Missouri Attorney General's Opinions - 1935

Opinion	Date	Topic	Summary
1-35	July 31	NEWSPAPERS.	Newspaper of “free circulation” not eligible to receive notices of publication.
3-35	Apr 9	MISSOURI ATHLETIC COMMISSION.	Sec. 12999, R.S. 1929 in using words “gross receipts” means receipts from all sources in connection with any boxing, sparring or wrestling exhibition.
3-35	Apr 25	ELECTIONS.	Duty of County Treasurer in connection with payment of expenses incurred by Board of Election Commissioners in administering Senate Bill No. 22 of the 58th General Assembly.
3-35	May 24	CRIMINAL LAW.	Unnecessary noise of motorboats.
3-35	Aug 19	QUO WARRANTO.	Whether Attorney General or prosecuting attorney should file action, and when, and under what condition.
3-35	Sept 17	BOARD OF ELECTION COMMISSIONERS ST. LOUIS COUNTY. BOND OF ELECTION COMMISSIONERS.	Act. Of 1935; Bond of $5000.00 required.
4-35	May 31	SCHOOL DISTRICTS CONSOLIDATED. SCHOOL FUND. FUND ACCOUNTING. ANNUAL FINANCIAL STATEMENT.	Certain requisites in form and substance on annual financial statement and certain requisites in fund accounting.
4-35	June 6	CORPORATIONS.	Entitled to certificate to commence business after obtaining corporate charter and recording same.
4-35	June 24	COSTS.	Supplemental costs bill in a criminal case.
4-35	Nov 19	TAXATION.	Various questions concerning certificate of purchase under Jones-Munger Act.
4-35	Nov 30	TAXATION.	Taxpayer liable for valid court costs when paying taxes in suits regardless of Senate Bill 143.
4-35	Dec 6	TAXATION.	Certificate holder not entitled to reimbursements for improvements made during redemption period.
4-35	Dec 14	TAXATION.	Collector may receive taxes on part of a tract. Division of taxes based

			on area.
5-35	Jan 8	TAXATION AND REVENUE.	Drainage taxes not cut out by sale under Senate Bill 94 for state and county taxes.
5-35	Jan 16	TAXATION AND REVENUE.	Section 55, Title 23; Federal aid will not be extended to states who change the registration fees, licenses, gasoline taxes, etc., after June 18, 1934. If state does make changes in license fees, etc. will receive only one-third of the amount that state would be entitled to.
5-35	Apr 22	MUNICIPAL CORPORATION.	Motor vehicle tax cannot be imposed on a resident who resides in the corporate limits but who stores his car outside of the corporate limits.
5-35	May 23	POLL TAX.	Governed by domicile of person.
5-35	July 22	BARBER AND BEAUTY SHOPS. CITIES, TOWNS AND VILLAGES.	Incorporated cities, towns and villages may enact ordinances regulating closing hours, by virtue of House Bill 32.
5-35	Aug 28	COUNTY BUDGET ACT.	Liabilities imposed by Sec. 20 do not apply to officials in counties of less than 50,000 inhabitants.
5-35	Nov 13	EVIDENCE.	Evidence of incorporation may be proved by parole evidence where original records are destroyed.
6-35	Feb 18	CIRCUIT CLERK AND EX-OFFICIO RECORDER OF DEEDS.	Not entitled to salary during time of suspension.
6-35	Mar 11	CITIES, TOWNS & VILLAGES. BOARD OF PUBLIC WORKS, CITY OF LOUISIANA.	Authority of Board of Public Works. Board of limited powers.
6-35	Apr 18	INTOXICATING LIQUORS.	Change of corporate name does not require new license.
6-35	May 8	NON-INTOXICATING BEER.	New permit necessary under law as amended, by 58th General Assembly of the State of Missouri.
6-35	May 15	INTOXICATING LIQUOR.	Corporation operating two wholesale liquor businesses in this State required to take out a wholesale liquor dealer's license for each place of business.
6-35	May 24	INTOXICATING LIQUORS.	Answering five questions regarding Senate Bill No. 30.
6-35	June 20	BONDS.	Counties may vote bonds under Sec. 2922, R. S. 1929, to relieve warrants, when reduced to judgments. Warrant holders paying

			expenses of election does not invalidate bonds. County Court may authorize election without petition.
6-35	July 26	INTOXICATING LIQUOR.	License for the sale of intoxicating liquor cannot be issued for any place or premise within one hundred feet of a church or school building, measured from the nearest point or place described in license to nearest point of church or school building.
6-35	Aug 19	CITIES TOWNS AND VILLAGES. BOARD OF PUBLIC WORKS CITY OF LOUISIANA. (SUPPLEMENTAL OPINION)	Authority of Board of Public Works. Board of limited powers.
6-35	Sept 9	TAXATION.	Procedure for sale of mineral rights for delinquent taxes.
6-35	Nov 25	COUNTY HOSPITAL.	Trustees not liable for tort.
7-35	June 27	SHERIFFS' FEES.	Howard County controversy.
8-35	Apr 4	TAXATION AND REVENUE. CITIES OF THE THIRD CLASS.	Procedure for collection of delinquent city real estate taxes in cities of the third class.
8-35	June 26	COUNTY BUDGET ACT.	Conditions under which County Court may reallocate funds.
8-35	Nov 13	ASSESSORS.	Laws of Missouri 1931, page 376, did not increase compensation of assessors then in office.
9-35	Mar 26	RECORDER OF DEEDS. MARRIAGE LICENSE.	Fee that recorder of deeds may charge for marriage license - $1.00, and if he takes an affidavit from a person he may only charge 25 cents for taking of such.
9-35	Apr 30	PROSECUTING ATTORNEY.	Duty to bring quo warranto proceedings against persons not qualified to hold public office.
9-35	May 22	PUBLIC OFFICERS.	Same person cannot hold office of Assistant Postmaster and Public Administrator at same time.
9-35	June 8	SHERIFFS FEES.	County Court, Duty of county court to audit and correct before paying.
9-35	June 25	COUNTY COLLECTOR.	Is required to give bond to drainage district which has property situated in his county.
9-35	June 26	SCHOOL DISTRICT.	Not liable for maintenance and construction of division fence.

9-35	Sept 11	MOTOR VEHICLES.	A City owned truck operated on City business side of the municipality does not have to be registered and the employees driving the trucks are not violating any criminal law.
9-35	Nov 14	FARM. DELINQUENT TAXES.	Under the provisions of Section 75 of the Bankruptcy Act, a farmer who files a petition in the court immediately subjects all of his property to the exclusive and sole jurisdiction of the court. Sales of property for delinquent taxes cannot be had except from the petition made to the Judge of the Court and order granted permitting the sale of the same.
9-35	Dec 2	INTOXICATING LIQUOR.	Non-resident dealer must have non-resident license regardless of fact he has a wholesale license.
10-35	Jan 23	COUNTY CLERKS. COUNTY DEPUTIES.	Salary of County Clerk and his Deputy in Counties having more than eleven thousand five hundred (11,500) persons and less than twelve thousand five hundred (12,500) persons. Salary not to be fixed by County Court.
10-35	Feb 1	CIRCUIT CLERK.	Compensation of a deputy clerk is to be fixed by the County Court. In counties having a population of 12,500 persons and less, compensation shall not exceed the amount allowed a deputy county clerk.
10-35	Feb 4	PROSECUTING ATTORNEY.	Duty to pay over fees.
10-35	Feb 7	BONDS. SURETIES.	Where statute requires a surety bond to be given a department cannot compel the giving of a corporation surety thereon.
10-35	Feb 13	COUNTY COLLECTORS.	County Collector relieved of liability in event of bank failure where he has deposited his funds in county depository as required by county court under Section 9885, Laws of 1933, pp. 464-465.
10-35	Mar 19	JUSTICE OF THE PEACE JURISDICTION. SHERIFFS POWERS TO RELEASE.	(1) Have no right to fine or imprison for misdemeanors where no information by Prosecuting Attorney be filed. (2) Have no right to accept cash bonds or any bonds but a surety bond. (3) Has no right to remit the whole of fine and costs assessed, but can commute to jail sentence at one day for every $10.00 for fine and costs. (4) Has no right to order release except as allowed by Statute.
10-35	Mar 23	CONSOLIDATED SCHOOL DISTRICTS.	Transportation of pupils.
10-35	May 10	COUNTY COLLECTOR. CIRCUIT CLERKS.	County Collector to make daily deposits in such depository as county court may select. (1) Deputy to be paid from general revenue of county. (2) Ex-officio recorder of deeds not to charge a fee for recording conveyances made to county.

10-35	May 10	COUNTY COLLECTOR. SALARIES AND FEES.	Selection of depositary for funds. Source and method of compensation of deputy circuit clerk.
10-35	May 13	SPECIAL ROAD DISTRICT.	Entitled to all road and tax money collected in such district.
10-35	June 7	TAXATION.	Senate Bill 143 of the 58th General Assembly does not apply to drainage district assessments but only applies to penalty on taxes.
10-35	June 12	LICENSES.	Where statute or ordinance fails to provide for collection of license tax, proper method of collection is by an action at law as for debt.
10-35	June 27	JUSTICES OF THE PEACE. CRIMINAL LAW.	A Justice of the Peace in a misdemeanor has no jurisdiction to impose a fine without any information on file. Fine imposed by a Justice of the Peace beyond his jurisdiction does not place the defendant in jeopardy.
10-35	July 22	TAXATION.	City cannot “farm out” collection of taxes. State laws prevail over city ordinances.
10-35	July 25	TAXATION.	Owner entitled to redeem within two years after tax sale. Mortgagee, although purchasing at tax sale, cannot prevent same.
10-35	July 26	MISSOURI RELIEF AND RECONSTRUCTION COMMISSION.	Exempt from payment of tonnage inspection fee for drought feeds.
10-35	July 26	LIQUOR LICENSE.	Immaterial whether state, county or city license is procured first. The main thing is that each must be procured.
10-35	Aug 20	TAXATION.	Board of Supervisors of Drainage District cannot delegate County Collector to remit penalties.
10-35	Sept 4	PUBLIC SERVICE COMMISSION. FUNDS. APPROPRIATION ACT.	The 1933 Laws remove all doubt but that fees received by any Commission from any source must be placed in the State Treasury; and can only be withdrawn from the State Treasury by an Appropriation Act.
10-35	Oct 2	ICE CREAM.	Proof necessary to require manufacturer for sale at retail to take out supplementary permit.
10-35	Nov 18	UNIFORM SEED LAW.	Various questions relating to enforcement.
11-35	Jan 25	ROADS AND BRIDGES.	Qualifications necessary for men employed by commissioners of special road districts incorporated under Article 9, Chapter 42, R. S. Mo. 1929.
11-35	Feb 2	PENAL INSTITUTIONS.	Mandamus imposing sentence in criminal cause. Sentence to run concurrently since the Supreme Court did not direct otherwise.
11-35	Feb 13	SECRETARY OF STATE.	Depositories of motor vehicles required to give bond; not entitled to deduct amount of F. D. I. in fixing amount of bond.

11-35	Mar 12	FUNERAL CONTRACT.	Issuance and performance of death benefit contract as violation of R. S. Missouri, 1929, Articles 9 and 10.
11-35	Mar 19	BLIND PENSIONS. PAUPERS.	Blind Pension discussed; duty of husband to use pension in support of his wife and family.
11-35	Apr 24	INHERITANCE TAX.	Method of paying the tax.
11-35	Apr 26	RECONSTRUCTION FINANCE CORPORATION.	Said Corporation and its subsidiaries are instrumentalities of U.S. government and State of Mo. Has no power to impose taxes thereon.
11-35	Apr 30	FEES. CORONER'S INQUEST.	Fees claimed in Coroner's Statutory Statement of costs of inquest as costs against the County must be audited by the County Court and the Auditors should disallow inquest fees claimed but not provided for by Statute.
11-35	June 21	INHERITANCE TAX.	When there is insufficient property in estate, only proceedings necessary is for Probate Court to make order that estate is not subject to tax, unless existence of other property or erroneous appraisement be shown.
11-35	June 28	NAMES. EMBLEMS.	Colorable imitation of the name "Better Business Bureau" cannot be registered under Article II, of Chapter 136, R. S. Mo. 1929.
11-35	July 11	PRINTING.	State Contract – Eleemosynary Printing of Old Age Pension under State Printing contract.
11-35	July 22	PENITENTIARY.	Inmates confined in Boonville Reformatory cannot be transferred out of said Institution to Algoa upon reaching seventeen years of age.
11-35	Aug 29	TRADE-MARKS.	Protection afforded trade-marks registered under state registration act.
11-35	Sept 19	SOLDIERS' BONUS.	Widow of soldier is entitled to Soldiers' Bonus on presumption of soldier's death, and presumption of death is not available until after seven years has elapsed from the date that soldier was last heard of.
11-35	Sept 27	SALES TAX.	Job printing, lithographing, etc., done by printers and newspapers subject to the sales tax.
11-35	Oct 5	CORPORATIONS. BRIDGE INCORPORATION.	Unconstitutionality of Act, pages 337-343 Laws of Missouri, 1935; Senate Bill No. 119.
11-35	Oct 26	MOTOR VEHICLES.	Passenger cars manufactured, assembled and sold after January 1, 1936, must be equipped with "safety glass". Trucks need not be equipped with "safety glass" if passengers are not carried for hire.
11-35	Nov 5	Messrs. Bryan, Williams, Cave & McPheeters	WITHDRAWN

11-35	Nov 6	TRADE-MARKS.	Must be affixed to a vendible commodity and does not apply to services.
11-35	Nov 6	PENAL BOARD. CRIMINAL COURTS. JUDGMENT.	Penal Board has no authority to accept prisoners committed to Industrial Home for Negro Girls at Tipton, Missouri, contrary to law.
11-35	Dec 9	ELECTION CONTESTS.	Judgment of Circuit Court constitutes certificate of election, and if deposited with bond, regular in every way, with Secretary of State, the Governor may issue the Commission.
12-35	Mar 6	PUBLIC OFFICERS.	Ex County Clerk is responsible to State of Mo. for loss of funds derived by sale of fishing and hunting licenses held by drug store proprietor when store was burglarized.
12-35	Mar 21	TAXATION AND REVENUE.	Certificates must be sold at public sale under Senate Bill 94 and not a private sale.
12-35	May 17	SCHOOLS.	Sending school must pay entire tuition of pupil, receiving credit up to $50.00 if the State has the money.
12-35	July 11	COMMON SCHOOL DISTRICTS.	Authority to erect additional school building out of building fund.
12-35	Aug 23	OLD AGE ASSISTANCE.	No person shall receive relief from any public fund and at the same time receive relief under the Old Age Assistance Act.
12-35	Aug 29	SALES TAX.	City of St. Louis is liable for tax for supplies used by contractors in fulfilling contracts for improvements of which the city is the ultimate user.
12-35	Sept 19	COUNTY DEPOSITORY. BOND-COUNTY DEPOSITORY.	Selection not in accordance with Section 12184 et seq., R. S. 1929.
12-35	Nov 20	STATE BOARD OF HEALTH. BURIAL AND BIRTH CERTIFICATES.	(1) City of St. Louis may provide a reasonable fee by ordinance for transcripts, certified copies and correction of records; (2) The City of St. Louis cannot by ordinance provide a fee for issuing burial, removal or cremation permits.
12-35	Dec 19	NEPOTISM.	Judges of the county court who vote for the appointment or connive to bring about the appointment of any relative, within the prohibited degree, on the County Old Age Assistance Board is subject to ouster.
13-35	Mar 20	SUPREME COURT. BOARD OF LAW EXAMINERS.	Examination fees paid by applicants for admission to bar are entirely under the jurisdiction of the Supreme Court and do not come within Section 1 of Laws of Missouri, 1933, (page 415).
13-35	May 16	TAXATION.	Tax rate of city of under one thousand population right to levy in

		MUNICIPAL CORPORATIONS.	excess of twenty-five cents for street lighting purposes.
13-35	May 28	SOLDIERS BONUS.	Administrator or Executor of deceased soldier's Will has no constitutional claim to any soldier's bonus money in Missouri, even when soldier applied for same during his lifetime.
13-35	Sept 19	COUNTY DEPOSITORY. BOND-COUNTY DEPOSITORY.	Selection not in accordance with Section 12184 et seq., R. S. 1929.
14-35	Feb 8	CIRCUIT CLERK.	County is not liable to the Circuit Clerk for payment of the fees chargeable to the County.
14-35	Mar 30	COUNTY CLERK.	(1) County Clerk not entitled to any fee for issuing county warrants or canceling same but is entitled to a fee of five cents for filing each cancelled warrant. (2) Not entitled to any fee for cancelling and filing school warrants.
14-35	May 28	HIGHWAY PATROL. CONSTABLES. JUSTICES OF THE PEACE.	Constables and their deputies have police jurisdiction over the whole county. Highway Patrolmen are not vested with exclusive jurisdiction of policing State Highways to the exclusion of other peace officers.
14-35	June 21	Colonel B. M. Casteel	WITHDRAWN
14-35	Aug 13	MOTOR VEHICLES.	If a person in good faith leases motor vehicle to transport property belonging to him over the highways, then neither lessor or lessee are subject to regulation of Public Service Commission.
14-35	Aug 24	MOTOR VEHICLES.	Tractors used in construction work need not have license.
14-35	Nov 5	INHERITANCE TAX.	Joint bank accounts not subject to tax. Irrevocable trust with reservation of life income to grantor subject to tax.
14-35	Nov 15	SHERIFFS.	Duties to attend court – compensation.
15-35	Mar 26	PENAL INSTITUTIONS. STATE PRISON BOARD.	Right to manufacture and sell certain articles to State and political subdivisions thereof.
15-35	Apr 4	COUNTY TREASURERS.	Meaning of "just and reasonable" compensation.
15-35	May 26	JUSTICES OF THE PEACE.	Fees – Transcript fees in criminal cases.
15-35	May 28	PROBATE JUDGE.	Method of accounting by probate judge for fees collected during his term which had accrued to his predecessor.

15-35	June 19	COUNTY COURT.	Warrants – right of county court to reduce rate of interest on.
15-35	June 21	SPECIAL JUDGE.	Compensation of under R.S. Mo. 1929, Section 1944.
15-35	Aug 1	MISSOURI STATE PENITENTIARY.	Prison-made Merchandise – Interpretation of Sumner-Ashurst Bill, H.R. #7940 as it relates to: (1) Shipping prison-made merchandise into any state or territory; (2) Marking of such shipments; (3) Seizure of prison-made goods; (4) Parties against whom action shall be brought; (5) Parties liable in case of reshipment of merchandise; (6) Party liable through numerous transactions; (7) Status of drop shipments; (8) Interstate commerce feature.
15-35	Aug 5	RECORDER OF DEEDS.	It is legal for the Recorder of Deeds to appoint the Circuit Clerk Deputy Recorder at Moberly.
15-35	Aug 9	DEPARTMENT OF HEALTH. BEAUTY.	Qualifications of persons applying for registration to conduct beauty school, and procedure to be followed to revoke a license for reasons enumerated in Section 9102, R. S. Mo. 1929.
15-35	Oct 8	BARBERING.	It is the duty of the State Board of Barber's Examiners to proceed against all persons violating provisions of Chapter 103, R. S. Mo. 1929.
15-35	Nov 1	SALARIES AND FEES.	Circuit Clerk is entitled to salary beyond December 31 and until first Monday in the following January, at which time his term expires.
15-35	Nov 5	OIL INSPECTION DEPARTMENT. BONDS.	Appropriation Act insufficient to authorize payment of premium on official bonds.
15-35	Nov 12	OLD AGE PENSION.	1. Only persons receiving assistance at time of death entitled to funeral expenses. 2. No accrued or unpaid assistance due until application has been finally approved.
15-35	Nov 29	OLD AGE ASSISTANCE ACT.	County judge may not appoint relative to county old age assistance board.
15-35	Dec 3	OLD AGE ASSISTANCE.	Benefits from war risk insurance not public funds, but may be taken into consideration under Secs. 4 and 6 of the Act and deducted from maximum amount of $30.00 per month.
15-35	Dec 11	OLD AGE PENSIONS.	Applications for assistance should be dated on the day actually received by the county board, and compensation, if any, should commence on the first day of the month following that on which the application was

			actually received.
16-35	Feb 18	TAXATION.	Legislature may provide maximum municipal tax for liquor license.
16-35	Mar 1	OFFICERS. NOTARY PUBLIC.	A stenographer in the employ of Home Owners' Loan Corporation may be a Notary Public.
16-35	Mar 8	COUNTY TREASURER.	Compensation for disbursing school moneys.
16-35	Mar 26	TAXATION AND REVENUE.	Delinquent taxes to be paid with interest at legal rate of six per cent rather than ten per cent if taxpayer in bankruptcy.
16-35	Oct 14	REWARDS. SHERIFF.	Officers without this State entitled to a reward offered by officials of Missouri for fugitives from this State.
17-35	July 30	CIRCUIT CLERK.	Entitled to fee of 75 cents for summoning petit jury for regular term of Circuit Court.
17-35	Nov 30	COSTS.	State Highway Condemnation Cases.
18-35	Feb 28	TAXATION AND REVENUE. OCCUPATION TAX LAW.	Applicability to boarding house keepers.
18-35	May 9	SCHOOLS.	A school director who has paid a State and county within one year preceding his election, although he owes other State and county taxes, is qualified under the terms of the statute. A school director who owns property, although taxes are assessed against and paid by her mother out of the assets of her undivided interest in said property is qualified.
18-35	June 14	RECORDER.	Cannot make abstract books with intention of engaging in abstract business after expiration of his term of office.
18-35	Dec 6	Hon. Wallace Cooper	WITHDRAWN
18-35	Dec 9	APPROPRIATIONS.	State University cannot spend appropriation in assisting another institution in caring for crippled children, but may care for them outside of Columbia.
19-35	Jan 3	LABOR DEPARTMENT.	Department of Labor has no right to inspect hotels.
19-35	Jan 4	LABOR & INDUSTRIAL INSPECTION DEPARTMENT.	Printing of report under Sec. 13182, R.S. Mo. 1929, to be paid for out of appropriation made to State Labor Department.
19-35	Jan 21	LABOR DEPARTMENT EMPLOYMENT AGENCIES.	Charging a fee not required to file reports.
19-35	Jan 25	ROADS AND BRIDGES.	Right of county court to change boundaries of road districts and to appoint no road overseers.

19-35	Feb 4	COMMON CARRIER.	If widow of former employee who died in service of common carrier be officer of state, county or municipal government, the common carrier is prohibited from issuing passes, either gratis or at a discount.
19-35	Feb 25	LABOR.	What constitutes “conducting an employment agency” – Deception in advertising a misdemeanor.
19-35	Mar 8	Mrs. Mary Edna Cruzen, Commissioner	WITHDRAWN
19-35	Mar 23	COUNTY SUP’T OF SCHOOLS.	It is not duty of candidates to furnish the ballots; it is optional with the county court to furnish the ballots and any form that is acceptable to board of directors and chairman and secretary of annual school meeting may be used; would be proper for county court to supply ballots providing same has been anticipated in estimate under County Budget Act; if county court should furnish ballots, members would not be personally liable.
19-35	June 20	LABOR.	Acceptance of Wagner-Peyser Law by Missouri does not require all of the Labor Department to come under federal supervision.
19-35	Aug 15		Wagner-Peyser Bill does not require civil service for the Missouri State Employment Service.
19-35	Aug 29	NOTARIES PUBLIC.	Notaries public are not precluded from taking acknowledgments for applicants to the Old Age Assistance Board, even though such Notary may be a member of the Board.
19-35	Aug 29	MO. STATE EMPLOYMENT SERVICE.	No prohibition against using state money for legitimate expense without reference to whether such expended sums are on concurrent basis with Federal mandate expenditures for given period.
19-35	Oct 10	HOTELS. STATE BOARD OF HEALTH.	An apartment hotel, having 10 or more rooms held out to the public to be a place where sleeping accommodations are furnished for pay comes within meaning of Sec. 13091, R.S. 1929, and is liable for inspection fee.
19-35	Oct 28	TAXATION.	Real estate not exempt from taxation, although income used for purely charitable purposes.
19-35	Oct 30	INCOME TAXES.	Laws of Missouri 1935, page 408 does not apply.
19-35	Nov 13		Construction of Section 13214.
19-35	Dec 20	COUNTY FARM BUREAU.	County Court cannot make appropriation for Agricultural Extension Service for two years instead of three as set forth in statutes.
20-35	Jan 26	ROADS AND BRIDGES.	Right of commissioners of special road districts incorporated under Article 10, Chapter 42, R. S. Missouri, 1929, to receive compensation as

			road overseers.
20-35	Feb 6	TAXATION AND REVENUE.	Income Taxes: (1) Exemption of county employee or elective officer; (2) deductibility of campaign expenses.
20-35	Feb 6	ROAD DISTRICTS. TAXATION.	Where land is removed from one district and attached to another the question as to which district taxes are payable for any year is determined by the fact as to which district the land was a part of at the time the levy was made.
20-35	Mar 20	OATH. AFFIDAVIT.	Not necessary to uplift hand to swear or to make an affidavit. Essential requirement of oath.
20-35	Mar 22	CITIES OF THE THIRD CLASS.	Chief of Police may attain authority of Constable to serve State process and collect constable fees in a particular case, but not generally so.
20-35	Apr 2	LOTTERY.	Giving away house and lot by chance to purchasers of other vacant lots is a lottery.
20-35	Apr 9	COUNTY BOARD OF EQUALIZATION.	Can only assess omitted property for the current year.
20-35	Apr 24	COUNTY BUDGET LAW.	(1) An officer may not exceed amount estimated for office supplies; (2) Auditing of an account and allowing of same by county court does not constitute a judgment and does not entitle clerk to a fee of 30 cents for entering same.
20-35	June 27	COUNTY FUNDS.	Transferring of county funds from one fund to another.
20-35	July 16	INTOXICATING LIQUOR.	The Liquor Control Act does not prohibit the sale of set-ups.
20-35	July 25	Hon. J. E. Davis	WITHDRAWN
20-35	Aug 12	SHERIFFS. PROBATE COURTS. JURORS.	Duty of Sheriff to attend Probate Court and certain fees payable to the Sheriff and Jurors for services rendered.
20-35	Aug 22	BOARD OF BARBER EXAMINERS.	May employ ministerial assistants.
20-35	Sept 11	SALES TAX.	When country clubs serve rooms, meals and drinks strictly to their members and not to the general public, such sales are not taxable if the club itself conducts the selling of the rooms, meals and drinks; if same are sold in the name of the club by private individuals for profit, such sales are taxable.
20-35	Sept 30	DEEDS. COLE COUNTY COURT HOUSE – JAIL.	Condition of deed not broken by building jail.

20-35	Oct 17	TAXATION.	Delinquent taxes of cities of the fourth class.
20-35	Nov 12	TAXATION.	Property of Hannibal-LaGrange College not exempt.
20-35	Dec 6	TAXATION.	Certificate Holder not entitled to possession until expiration of one year or longer from date of sale.
20-35	Dec 10	TAXATION.	Authority of Collector to employ attorney to assist in collection of delinquent personal property taxes.
21-35	Jan 17	NEWSPAPERS.	Newspaper must be published in county for one year, regularly and consecutively, before it can accept legal publications.
21-35	Aug 27	SALES TAX.	Tangible personal property used in connection with dental work where labor is principal charge not subject to tax; dental supplies sold in original form, not for resale, are taxable.
22-35	Mar 7	COUNTY BUDGET ACT.	Budget for County Extension Agent's office refused in final make up by county court and later desired to be allowed may be taken care of by transferring surplus in any class to succeeding class until it eventually get to Class 5 and paid therefrom.
22-35	May 13	CIRCUIT CLERK.	(1) An action to recover shortage of circuit clerk which occurred more than three years prior to date Statute of Limitations began to run is barred by Statute of Limitations. (2) Circuit clerk who has failed to pay all money for which he is accountable is ineligible to hold any office of trust or profit in this state.
22-35	May 17	COUNTY TREASURER.	1. Sections 12130, 12133, 12134, 12137 and 12138 R. S. Mo. 1929 are not repealed until December 31, 1936. 2. County Treasurer's salary cannot be increased to a greater amount than as made under the estimate in the County Budget Act, but may be fixed at a lesser amount.
23-35	Aug 21	COUNTY COLLECTORS.	Franchise taxes and railroad taxes not included in amount of taxes assessed and levied for purpose of determining commission of collector. Merchant's ad valorem tax is included.
23-35	Sept 9	CONSTABLE.	Subject to Ouster on changing residence from Township.
23-35	Oct 1	SCHOOLS. COUNTY SUPERINTENDENT.	County Superintendent of Schools must serve as truant officer or school attendance officer without compensation.
23-35	Oct 2	SCHOOLS.	$400.00 appropriation made by State to counties to be placed into county revenue fund as special fund and same applied on payment of county superintendent's salary.
23-35	Oct 29	SALARIES AND FEES.	Court Reporter's salary is payable on the certificate of the circuit judge

			alone being presented to the county treasurer. No approval of the county court is required.
23-35	Dec 10	ELECTIONS. BONDS.	Form of ballot for bond election, substantial compliance with Section 7219, R. S. Mo. 1929.
25-35	Jan 4	COUNTY CLERKS. SALARIES AND FEES.	Entitled to fees for certificates for States; must account for notarial fees.
25-35	Mar 26	Hon. Melvin Englehart	WITHDRAWN
25-35	May 15	SHERIFF FEES. COSTS.	County not liable for defense costs in subpoenaing witness or serving writ of habeas corpus ad testificandum when defendant is convicted.
25-35	July 3	CITY OF ST. LOUIS.	City of St. Louis cannot reduce number of employees of elective office by appropriating less than amount as fixed for number of employees by ordinance.
25-35	Aug 10	APPROPRIATIONS.	Cannot expend for purposes not reasonably definitely designated.
25-35	Nov 13	SCHOOLS.	Construction of Laws of Missouri 1933, page 415 with reference to funds from cafeterias.
25-35	Nov 30	Hon. Melvin Englehart	WITHDRAWN
25-35	Dec 12	MOTOR VEHICLES.	Procedure to be followed in removing a motor or engine from a motor vehicle and replacing same by a new motor or reconditioned engine.
25-35	Dec 17	GAMBLING.	Weekly drawings.
26-35	May 7	COUNTY COURT. INTOXICATING LIQUOR.	All persons engaged in retail business of intoxicating liquor required to take out a county license. County may enforce collection of license fee by an action at law.
26-35	June 22	LIQUOR CONTROL ACT.	County may exact a license from a wholesale beer dealer in the county where the premises are located.
27-35	Feb 5	SCHOOLS. COUNTY SUPERINTENDENT OF SCHOOLS.	Person must possess certain qualifications at the time of his election, and if acquires them after his election but before he qualifies, such does not avail him of anything.
28-35	Jan 2	STATE BOARD OF HEALTH. CHIROPODY.	Qualifications to practice Chiropody.
28-35	Dec 20	TAXATION.	Property of local council of Girl Scouts of America exempt.
29-35	Jan 9	TAXATION AND REVENUE.	House Bill 124, page 166 Laws of Missouri Extra Session, 1933-34, applicable to general personal real estate of cities of fourth class, but

			not to special benefits.
29-35	Jan 17	SHERIFF.	Sheriff not required to pay for lights, fuel, soap, etc., furnished prisoners out of the fees allowed him for boarding said prisoners. County Court is liable for purchases of necessary supplies to keep the jail in good and sufficient condition.
29-35	Mar 11	COUNTY SUPERINTENDENT OF SCHOOLS.	County Superintendent of Schools must be twenty-four years old at the time of his election.
29-35	Mar 12	CHIROPRACTIC.	Only one way provided now in the statute for obtaining license to practice chiropractic, and that is by examination. The provision relative to licensing those engaged in practice before act passed has expired.
29-35	May 7	CIRCUIT CLERKS.	Retain only fees taxed as circuit clerk costs; to retain fees earned after January 1, 1935; liability of county for circuit clerk fees; county treasurer shall report to circuit clerk only such fees as are for services of circuit clerk.
29-35	May 14	COUNTY COURTS.	County Courts shall return to county school funds, incomes and rents from properties foreclosed; insurance premiums and incidental expenses to owning said properties to be paid from county school fund.
29-35	Sept 5	CHIROPRACTIC.	Board may only revoke licenses for reasons set forth in Statute.
29-35	Oct 22	CHIROPRACTIC.	(1) Reciprocity requirements; (2) Actual term necessary for applicant to attend recognized college or school for chiropractic.
31-35	Jan 4	SHERIFF.	Sheriff has authority to buy necessary supplies for jail but not for court house unless ordered to do so by county court.
31-35	Feb 4	SHERIFFS.	Fees for notifying petit jury; fees for notifying judges of election; officer has no jurisdiction outside of Missouri; fees for delivering ballots.
31-35	Mar 26	BOARD OF PHARMACY.	Drugs, medicines, chemicals and poisons must be sold by a licensed pharmacist or assistant pharmacist—with certain exceptions.
31-35	May 13	TAXATION.	Institution of suit contemplated by Section 9962b is satisfied by filing of petition.
31-35	Aug 28	SALES TAX.	House Bill 198 – Sales made by merchants to persons on relief by orders obtained by the persons on relief, are not subject to the tax. Check or cash given to persons on relief, when purchases are made with the check or cash, such sales are subject to the tax.
32-35	Feb 12	DEPUTY HEALTH COMMISSIONERS.	The County Court has discretion in appointment of Deputy Health Commissioners. State Board of Health has no power to make such

			appointment.
32-35	Feb 16	INSANE PAUPERS. SHERIFFS.	Liability of county for transportation to and from hospitals. Fees for transporting insane patients.
32-35	Aug 30	SCHOOLS.	School District having received previous aid in erecting a school building will be denied subsequent aid, under Section 9357, R.S. 1929, when in need of a new school building.
32-35	Nov 4	INTOXICATING LIQUOR.	Licensee employing persons under the age of 21 years to sell or assist in the sale or dispensing of intoxicating liquors are guilty of violating Section 9 of the Liquor Control Act.
33-35	June 21	STATE BOARD OF HEALTH.	Oath of office for Local Registrar of Vital Statistics.
33-35	June 29	RECORDS.	Records of local registrars of births and deaths are open to inspection to a person having a proper interest therein.
34-35	Jan 21	APPROPRIATIONS.	An appropriation act cannot legislate – "Revolving Fund" of State Fair cannot be appropriated until statute is amended.
34-35	Jan 22	INHERITANCE TAX.	A step-child is considered as a stranger in blood under Mo. inheritance tax laws and the inheritance tax must be paid upon succession provided by statute for a stranger in blood.
34-35	Feb 19	PROSECUTING ATTORNEY.	Entitled to no fee from County for examination of abstracts for School Fund Loans.
34-35	Feb 21	SCHOOLS.	Rules and regulations if reasonable may be promulgated by School District.
34-35	Mar 25	MEDICINE. STATE BOARD OF HEALTH.	Persons practicing the profession of Naturopathy are subject to the regulations of State Board of Health and require a license under Section 9118 R. S. Mo. 1929.
34-35	Apr 9	Mr. E. O. Gray	WITHDRAWN
34-35	Sept 10	SCHOOLS.	Any person between the age of 6 and 20 years, unless defective, has a right to attend public schools.
34-35	Oct 17	COSTS IN CRIMINAL CASES.	County Treasurer cannot withhold fees payable to county judges and county clerk, indebted to county on school fund mortgages, because school fund mortgages are not included in provisions of Sec. 3854, R.S. 1929.
34-35	Oct 26	SALES TAX. HOTELS.	Rooms occupied by the same guest for thirty days or more, the receipts exempt from the tax.
34-35	Oct 28	Hon. W. W. Graves	WITHDRAWN
35-35	Feb 4	OPTOMETRY.	Proposed law Re: House Bill No. 247, Paragraph "(d)".

35-35	Feb 19	COUNTY CLERK.	Compensation of deputies.
35-35	May 9	SUPPLEMENTAL COST BILLS.	Cannot include claims for Sheriffs fees where the sheriff failed to claim same during the term of the trial.
35-35	Aug 13	INTOXICATING LIQUORS.	Permittee or Licensee cannot change location of their business and operate under a license issued for a former place of business.
35-35	Nov 18	CIRCUIT CLERKS.	Back salaries under Section 11786, R. S. Mo. 1929 can only be paid from back taxes.
36-35	Mar 18	COUNTY CLERK.	Sections 12165 and 12166 Laws of Mo. 1933 became effective 90 days after approval by Governor and compensation of County Clerk since that time, if appointed to prepare a financial statement of the county, is not to exceed 10 cents per 100 words and figures.
37-35	Mar 1	ELECTIONS.	Under section 10481 R. S. Mo. 1929, the amounts as set forth may be expended by all candidates in the primary and a successful candidate may then expend the same amount in the general election.
38-35	Jan 15	PUBLIC OFFICERS.	Office of Probate Judge and member of Board of Education not incompatible or in conflict and same party may hold both offices.
38-35	Jan 24	SCHOOL BOARDS.	May not employ counsel by the year.
38-35	Mar 15	BAIL BOND.	Sheriff to take and approve when amount is fixed by Justice; otherwise, a court of record fixes amount and approves bond.
38-35	Apr 4	TAXATION AND REVENUE.	House Bill 124, page 166, Laws of Missouri, 1933-34, Extra Session, does not remit Court costs accrued on taxes and suit.
38-35	May 6	COUNTY COURTS.	Acting as road overseers in certain counties.
38-35	May 20	TAXATION.	Senate Bill 143 of the 58th General Assembly does not remit Court costs accrued on tax in suit.
38-35	June 27	OLD AGE PENSIONS.	County Old Age Assistance Board may not employ clerks, investigators or deputies and pay them out of State funds.
38-35	June 28	TAXATION AND REVENUE. COUNTY COLLECTORS. COUNTY CLERKS.	Fees of county clerks and county collectors Re: Delinquent land lists, back tax books; and fee of county collector for delinquent taxes.
38-35	Sept 18	SCHOOLS AND SCHOOL DISTRICTS.	Money derived from sale of school or easement goes into “building fund”, and can be used for “building fund” purposes only.
38-35	Sept 20	COUNTY BUDGET ACT.	County court incurs no liability if warrants are issued in excess of estimate as contained in the budget.
39-35	June	SCHOOLS.	County Superintendents – Traveling expenses and clerical hire. $3 per

	28		teacher limit repealed. 25% maximum applies only to travel expenses, Sec. 167.150; 167.190; 167.230; and 167.270 after July 1, 1965 see 179.190.
39-35	Oct 10	CONTRACTS. COUNTY COURT.	County Court cannot legally contract with a corporation in which members of a county court are corporation officers.
40-35	Mar 21	COUNTY CLERK. COUNTY HEALTH OFFICER. COUNTY COURT.	County is not legally liable for salary of county health officer not legally appointed and County Clerk is personally liable for certification of illegal expenditure to health officer.
40-35	June 14	COUNTY BUDGET ACT.	Rock crusher and tractor not included in proposed expenditures for year cannot be purchased from funds in Class 6.
40-35	June 27	CHILDREN.	A child committed to the Missouri Training School for Boys is subject to any order or further orders made by Court making commitment.
40-35	Aug 28	RECORDER.	Under laws of 1935 Recorder is to charge no fee for discharging a chattel mortgage from the record.
41-35	Jan 8	OFFICER. OFFICES.	One person may hold both the office of Public Administrator and Justice of the Peace.
41-35	Feb 6	TAXATION AND REVENUE.	If county court levies the maximum of 40 cents and then attempts to proceed under Sec. 9868 R.S. 1929 to levy an additional 10 cents, same would be in violation of Sec. 11, Art. X of Constitution.
41-35	May 18	INSANE PERSONS. PAUPERS.	Proper county to assume charge of county patient – Residence.
41-35	June 26	ROADS AND BRIDGES.	Construction of Section 44a, Missouri Constitution as it relates to traffic relief roads chargeable against State Road Fund.
43-35	Feb 2	COUNTY CLERKS. COUNTY DEPUTIES.	Salaries of County Clerks and his deputy in Counties having a population of 7,500 and less than 10,000 persons.
43-35	Feb 6	Hon. Glen W. Huddleston	WITHDRAWN
43-35	Apr 1	CIRCUIT CLERK.	Circuit Clerk not entitled to retain change of venue fees prior to first Monday in January, 1935. Circuit Clerk is allowed to retain change of venue fees, in addition to other fees allowed him under Section 11786 Laws of 1933.
43-35	May 6	PENITENTIARY. CONVICTS' FUND.	Money deposited in fund for convicts cannot be diverted to any other use without consent of convict or by court action.
43-35	May 10	JUSTICE OF PEACE.	The election and number of Justices of the Peace should be governed by Sections 12268 and 12269, and Section 2136 R. S. Mo. 1929 does not apply to the election of Justices of the Peace in counties having

			township organization.
43-35	May 11	RECORDER OF DEEDS.	Not entitled to any fee for recording figures in a deed; entitled to ten cents for every hundred words for recording acknowledgments.
43-35	May 21	Hon. M. J. Huffman	WITHDRAWN
43-35	June 11	ASSESSORS.	Compensation for attending meetings called by State Tax Commission.
43-35	July 6	Hon. Glen W. Huddleston	WITHDRAWN
43-35	Aug 7	TAXATION OF MERCHANTS.	Poultry company buying from farmers, fattening them and shipping in car lots is a merchant within the meaning of Sec. 10099 R.S. 1929; likewise grain elevators operating in same manner.
43-35	Oct 8	FEES.	Circuit clerk entitled to charge for certified copies of naturalization papers and marriage licenses.
43-35	Oct 9	ALIENS.	Right to hold and dispose of real estate in Missouri. Alien Siamese subjects may own real estate in Missouri.
43-35	Nov 1	SCHOOLS.	County Superintendent must pay for clerical hire under Sec. 9467 from his own funds. County Court pays for necessary printing.
43-35	Nov 9	TAXATION.	Assessor only entitled to change his assessment list of ownership to the extent that the "land list" kept by the recorder shows the change. He may not substitute other names, although they be owners, if the same are not shown on the recorder's "land list".
44-35	Feb 8	OFFICERS.	Right to be both Judge of Probate and Justice of the Peace.
44-35	Feb 28	TAXATION AND REVENUE. BANK STOCK.	Right to deduct interest from tax free bonds in computing value of shares under R. S. Missouri, 1929, Section 9765.
44-35	Mar 19	DELINQUENT AND BACK TAXES.	Section 9952, Laws of Mo. 1933, p. 429 repeals by implication Sec. 9948, R. S. Mo. 1929.
44-35	Apr 22	TAXES—STATE LIABILITY.	Legislature has no constitutional power to authorize State debts in form of special municipal assessments on real estate of the State.
44-35	May 14	SCHOOL FOR DEAF.	Board of Managers can lease real estate for C. C. C. location.
44-35	June 17	SCHOOLS.	A grade school pupil must attend district in which he lives with certain exceptions.
44-35	Aug 17	OLD AGE PENSIONS.	(1) Inmate of county infirmary may make application for pension before being discharged from institution, but immediately upon receipt of pension must be discharged. (2) Inmate of county infirmary cannot use old age pension to support

			himself in the infirmary and occupy quarters as a paying patient.
45-35	Jan 29	ELEEMOSYNARY INSTITUTIONS. COUNTY COURTS. INSANE PERSONS.	The law is not mandatory that the state eleemosynary institutions return county patients to sending county where keep and expenses are not paid by the county, but the Board of Managers of the Eleemosynary Institutions have the right to so return such patients.
45-35	Feb 2	CIRCUIT CLERKS.	Circuit Clerks hold office from the first Monday in January of the year following election until the first Monday in January four years later.
45-35	Feb 23	COUNTY DEPOSITARY. COUNTY COURTS.	1. County court should advertise for bids at May Term, in odd years, under Sec. 12184 R.S. 1929. 2. Question discussed in event no selection made by County Court under Sec. 12184 & 12189. R.S. 29.
45-35	Mar 28	ELEEMOSYNARY BOARD. SUPERINTENDENT, STATE HOSPITAL.	Power of said board to appoint acting superintendent, one who does not possess the statutory qualifications of superintendent.
45-35	Apr 30	TAXATION.	Back tax collections apportioned to respective funds for which originally assessed and levied, and unpaid warrants drawn against same, have priority of payment.
45-35	June 10	HIGHWAY PATROL.	Purchases for State Highway Patrol under jurisdiction of Highway Commission.
45-35	June 20	OLD AGE ASSISTANCE.	Inmates of county infirmaries not barred from benefits if otherwise qualified.
45-35	June 20	Mr. George C. Johnson	WITHDRAWN
45-35	July 5	CITY TAX BOOK.	In cities of fourth class county clerk should make the city tax book.
45-35	July 6	OLD AGE ASSISTANCE BOARD.	Members of county court disqualified from appointing themselves to county old age assistance board.
45-35	July 8	OLD AGE ASSISTANCE.	Senator or Representative prohibited from being appointed to position of State Old Age Assistance Commissioner or to position on county old age assistance boards.
45-35	July 12	OLD AGE PENSIONS.	State Board has right to appoint clerical help for respective county boards.
45-35	July 18	STATE ELEEMOSYNARY INSTITUTIONS.	The board has implied power to accept a discount on bonds accepted in lieu of a judgment and sell the same.
45-35	Aug 20	SUPPLEMENTAL FEE BILLS.	When witness must make application for fees.

45-35	Aug 21	PENSIONS. OLD AGE ASSISTANCE.	Costs of investigations payable out of appropriation to State Board; not payable by county.
45-35	Aug 23	OLD AGE PENSION.	Payments due from date of filing application.
45-35	Aug 28	Hon. George C. Johnson	WITHDRAWN
45-35	Aug 29	FEES. COUNTY CLERK.	Not entitled to any fee for signing school bonds.
45-35	Sept 4	PRINTING.	Multilith work, offsetting and duplicating is printing.
45-35	Sept 30	ELEEMOSYNARY BOARD. INDIGENT SANE PERSONS. COUNTY.	Authority to fix charges for six weeks' treatment of indigent sane persons; To be given six weeks' treatment in state hospitals; Liable for six weeks' treatment of indigent sane under Laws Mo. 1935, p. 389.
45-35	Oct 7	OLD AGE ASSISTANCE BOARDS.	Qualifications of County Boards.
45-35	Oct 29	INSANE POOR.	County and State may accept from relative or other person, by way of re-imbursement, money expended by them on insane poor patients.
45-35	Nov 5	ELEEMOSYNARY INSTITUTIONS. APPROPRIATIONS. EXECUTIVE BUDGET SYSTEM.	Classification of appropriations. Cannot transfer from one classification to another.
45-35	Nov 22	ELEEMOSYNARY BOARD. APPROPRIATIONS.	Board has no authority to transfer funds from one classification of appropriation to another.
45-35	Dec 2	ELEEMOSYNARY BOARD.	No appropriation to pay for real estate.
46-35	Jan 3	TAXATION & REVENUE.	Authority of Collector to employ attorney to assist in collection of delinquent personal property taxes.
46-35	Jan 11	COUNTY BUDGET LAW.	Obligations of Class 5 may be carried over to following year and paid out of revenue from delinquent taxes if there are no funds in Class 6 and the funds in class 5 have been exhausted.
46-35	Feb 21	LABOR AND INDUSTRIAL INSPECTION.	Commissioner has authority to inspect all restaurants and charge a fee for such inspection.
46-35	Apr 17	SCHOOLS.	Mandamus will lie to compel a superintendent of schools to release for

			credit at another high school the credits of a pupil who has met every lawful requirement therefor.
46-35	May 29	SCHOOLS.	County Superintendent's salary, clerk hire and traveling expenses.
46-35	June 13	COUNTY BUDGET ACT.	Circuit Judge may purchase books for office from Class 5 providing he does not jeopardize listed and estimated expenditures in Class 5, or same may be paid out of any available funds in Class 6.
46-35	June 14	LIQUOR CONTROL ACT.	A person cannot obtain license to sell intoxicating liquor and 3.2 beer license on the same premises.
46-35	June 25	Hon. Alvin H. Juergensmeyer	WITHDRAWN
46-35	July 12	SCHOOLS. BONDS.	Interest after default in payment of principal.
46-35	Aug 30	TRUCKS. COUNTIES.	No liability on counties for injuries caused by negligence.
46-35	Nov 21	SCHOOL DISTRICTS.	When entitled to credit due resident under Section 9207, R. S. Mo. 1929.
46-35	Dec 19	COUNTY BUDGET ACT.	Appropriation made to County Farm Bureau organizations should be placed in Class 6; County Health Officer in Class 4; Government Relief Officer in Class 6; Probation Officer in Class 4; County Highway Engineer in Class 4.
47-35	Feb 4	IN RE: HOUSE BILL NO. 74.	Relating to placing of employees under the provisions of the Workmen's Compensation Act, in conflict with Section 44a of Article IV. Missouri Constitution.
47-35	Feb 7	ROADS AND BRIDGES.	Limitation on special road district incorporated under Article 9, Chapter 42, R. S. Missouri, 1929, in incurring indebtedness.
47-35	May 3	LICENSES.	Justices of the Peace and Police Judges have no jurisdiction to revoke or cancel State automobile licenses or to stay execution of punishment conditioned on good behavior.
47-35	June 25	INTOXICATING LIQUOR.	Corporations shall employ resident managers for their various places of business with the proper qualifications as provided in Section 27 of the Liquor Control Act.
47-35	July 22	INTOXICATING LIQUORS.	Licensees under a Liquor Control Act cannot form a co-partnership with others and operate under a license issued to one of partners.
47-35	Oct 9	PUBLICATION TAX.	Interpretation of the Law of 1935, page 403, Section 9952b, relating to publication of delinquent tax list.
47-35	Oct 16	OLD AGE	Interpretation of appropriation Act.

		ASSISTANCE.	
47-35	Nov 4	TAXATION.	Property of Woods Brothers located in Moniteau County on June 1st, subject to Missouri taxes.
48-35	Dec 17	SCHOOLS.	A flag of the United States shall be flown during school hours, except during rainy or stormy weather.
49-35	Jan 10	MOTOR VEHICLES. TRUCKS.	A person engaged in transporting property over the highways of this State must have license to do so as contract hauler.
49-35	Mar 15	COUNTY CLERK. DEPUTY.	(1) Deputy county clerk must be approved by the county court; (2) County court may refuse to approve, for what reasons.
49-35	May 4	SCHOOLS.	Judgment for damages for breach of contract for teaching school must be paid out of the teachers' fund.
49-35	May 6	SCHOOLS.	State Superintendent of Schools has power to deny state aid to district when he requires transportation of pupils under Section 20, Laws of Mo., 1931.
49-35	July 19	SCHOOLS. TRANSPORTATION.	Approval of various statements concerning transportation problem.
49-35	July 20	OFFICERS.	Salary does not attach until legal office created.
49-35	Oct 8	SCHOOLS.	The 1931 Act provides the only basis for apportioning State school moneys.
49-35	Dec 7	MUNICIPAL OFFICERS. MARSHALS.	Have no official power to apprehend offenders beyond the boundaries of their municipalities.
51-35	Apr 3	SCHOOLS. ELECTIONS.	Five questions in regard to school elections answered.
51-35	Apr 9	SCHOOLS. SCHOOL DIRECTORS.	The paying of automobile license tax will not qualify a party as director of a school district.
51-35	Apr 18	Dr. Leon B. Lake, Secretary	WITHDRAWN
51-35	May 15	CITIES.	Cities shall not pass ordinances regulating control, manufacture or sale of intoxicating liquor inconsistent with provisions of Liquor Control Act. Cities may fix any reasonable qualifications not inconsistent with provisions of the Liquor Control Act.
51-35	Aug 23	INTOXICATING LIQUORS. CITIES.	Cities do not have the right to require places of business handling intoxicating liquors to close on Sundays and between the hours of 1:30 o'clock, a.m. and 6:00 o'clock, a.m.
51-35	Nov 15	OLD AGE PENSIONS.	All property, real and personal, must be taken into consideration in

			determining qualifications for assistance.
52-35	Jan 11	SCHOOL DISTRICTS. SCHOOL FUNDS. SCHOOL FUND ACCOUNTED. SCHOOL WARRANTS. TAXATION.	Treasurer required to set up different funds and only those named in statute. Warrants must provide specific fund. Warrant payable only out of fund drawn on. Treasurer liable on bond for violation. School funds payable only on school warrant. Delinquent taxes to be credited to the particular fund for the particular year for which levied. School board required to issue warrants when delinquent taxes collected. Delinquent taxes to be used only for purposes for which levied. Section 9555. Delinquent taxes not all to be credited to teachers' fund. School board cannot authorize the setting up of any fund except those named in statutes.
52-35	Mar 11	CIRCUIT CLERK AND EX OFFICIO RECORDER OF DEEDS.	Circuit Clerk who is ex officio recorder of deeds should use the seal of the Circuit Court in all cases in which a seal is required.
53-35	Dec 11	Mr. Henry G. LePage	WITHDRAWN
54-35	Feb 14	GARNISHMENT.	Officers of the United States having money in their hands to which certain individuals are entitled are not liable to the creditors of those individuals in the process of garnishment.
54-35	Nov 15	RECORDER OF DEEDS AND CIRCUIT CLERKS.	Recorder of deeds shall receive the sum of 50 cents for affixing seal and certificate in every instance. Copies of petitions furnished by the Circuit Clerk shall entitle said Circuit Clerk to his fees despite the fact copies are furnished by plaintiff.
56-35	June 24	OLD AGE PENSIONS.	There is no legal duty on child to support parents under clause in Section 6 of Act "has no child or other person responsible under the law of this state and found by the state board or by the county board able to support him".
56-35	Aug 12	CORPORATIONS.	Stockholders may, by proxy, waive notice of meeting.
56-35	Oct 28	NON-PROFIT ASSOCIATION.	Entitled to purchase or manufacture and furnish electric current on non-profit cooperative plan.
56-35	Nov 26	STATE UNIVERSITY.	Professor may not enter into contract in violation of Section 9654, R. S. 1929.
57-35	Feb 21	Hon. G. Logan Marr	WITHDRAWN
57-35	Feb 26	COUNTY DEPOSITORY.	(1) Amount of bond to be fixed by County Court by method set out in statute – Section 12187, R. S. 1929. (2) Depository agreement submitted, not approved.
57-35	Apr 6	TAXATION.	Owner of land sold for taxes entitled to exercise privilege of ownership until deed issues—Senate Bill 94.

57-35	Apr 24	Hon. G. Logan Marr	WITHDRAWN
57-35	June 11	SCHOOL DIRECTORS.	Quo Warranto is proper proceeding to oust a school director who does not have the necessary qualifications.
57-35	June 18	ROADS AND BRIDGES.	Commissioners of special road districts cannot act as road overseers and draw pay for the same in a special road district.
57-35	June 27	TAXATION. COUNTY WARRANTS.	Protested county warrants not exempt from taxation.
57-35	July 6	COUNTY DEPOSITORY.	Deposits made by a county in non-compliance of County Depository Law, Section 1218-85-86-87, creates preferred claim in favor of county in case of failure of bank.
57-35	July 19	INTOXICATION LIQUORS.	County Courts and Cities may charge lesser fees for licenses than is required to be paid under the Liquor Control Act. Cities cannot pass ordinances lessening the inhibited distance as provided in the Liquor Control Act.
57-35	Aug 20	SLOT MACHINES. SEARCH AND SEIZURE.	Proper method of procedure; of gambling devices.
57-35	Aug 26	CONCEALED WEAPONS.	Carrying weapon exposed to bank.
57-35	Aug 28	INTOXICATING LIQUORS.	Licensees, under the provisions of the Liquor Control Act, may be prosecuted for failure to pay into the county treasury the fee as provided under Section 25 of the Act.
57-35	Sept 20	EVIDENCE-WITNESS-CRIMINAL PROCEDURE.	Evidence of former testimony of a witness given at a prior trial and preserved in Bill of Exceptions is admissible against a defendant at a subsequent trial where the presence of the witness cannot be obtained for statutory reasons.
57-35	Nov 20	PENAL INSTITUTIONS. CONVICTIONS. JUDGMENTS.	An ante-dated mittimus in the hands of the Warden is interpreted that sentence is to commence from date of judgment, unless sentence is stayed to a future date in some way provided by law. Allowing jail time by ante-dating sentence is illegal.
58-35	Feb 7	SCHOOLS. INCIDENTAL EXPENSE.	Repairs and replacements to building should be paid out of building fund, and if there is not enough money in the building fund the same may be transferred out of the incidental fund. However, in arriving at the rate of tuition moneys transferred or that will be transferred out of the incidental fund to the building fund should not be included.
58-35	Feb 12	SCHOOLS.	Board of directors have no power to repair roads in front of school buildings, out of incidental fund.

58-35	Mar 25	CORONER.	(1) Shall use reason in determining his statutory jurisdiction to hold an inquest. (2) Who shall pay inquest fees.
58-35	July 5	INTOXICATING LIQUOR.	Information for sale without license.
59-35	Jan 10	TAXATION AND REVENUE. BILLS.	Tax law can provide receipts to go to exclusive fund for specific purpose.
59-35	Feb 14	COUNTY CLERKS.	1. The amount of compensation of county clerk and deputy hire; 2. Compensation of county clerk and pay of deputies must be derived annually from fees earned; 3. Settlements with county courts; when made etc.; 4. Duty of the county clerk to appoint deputy or assistant; duty of county court to approve or disapprove such appointment.
59-35	Mar 21	BUILDING AND LOAN ASSOCIATION.	Building and loan corporation dissolved the same as any other corporation. However, first must comply with Section 5626, Laws of Mo. 1930.
59-35	Mar 23	FEES. DRAINAGE DISTRICTS. TOWNSHIP ORGANIZATIONS.	Fees for collecting and disbursing drainage funds are independent allowances and should be paid as such even under township organization.
59-35	Mar 27	GAMBLING.	“Bank Night”
59-35	Apr 3	TAXATION.	Supplemental opinion to opinion written November 24, 1934. County Court may change valuation after tax is delinquent.
59-35	Apr 18	BUILDING AND LOAN.	Voting by proxy.
59-35	June 25	BUILDING AND LOAN.	Building and Loan Associations are not permitted to conduct a safety deposit box business as such is not conferred by their charter.
59-35	Sept 10	BUILDING AND LOAN.	Interpretation of the word “salesman”; who deemed to be “salesmen”.
59-35	Sept 13	BUILDING AND LOAN.	Salesmen of “securities” for (1) state chartered B. & L. Associations; (2) B. & L. Associations or Savings & Loan Associations, incorporated under laws of United States; (3) B. & L. Associations or Federal Savings & Loan Associations incorporated under laws of other states, operating in Missouri, must be licensed; and (4) penalty for violation.
59-35	Nov 15	SALES TAX.	Municipally owned plants selling light and water to users and consumers are subject to the tax.
59-35	Dec 16	BUILDING AND LOAN ASSOCIATION.	If the by-laws of the Building Loan do not prohibit a director from selling his own commodity to said association, of which he is a director,

			then there is no statute that prohibits him from doing so.
60-35	Jan 11	PUBLIC HEALTH.	Registration of births under Section 9054a.
60-35	Feb 6	BOARD OF HEALTH. APPROPRIATIONS.	Fund for water analysis after being placed in treasury may not be withdrawn unless appropriated by the Legislature.
60-35	Feb 14	BOARD OF HEALTH. COSMETOLOGY.	Reinstatement of expired certificate discussed.
60-35	Feb 21	COUNTY COLLECTOR.	A vacancy does not exist by collector-elect's failure to give bond and he may qualify by meeting the legal requirements any time he is able to do so.
60-35	Mar 21	STATE BOARD OF HEALTH.	May Establish designation for registration districts.
60-35	Mar 23	State Board of Health. E.T. McGaugh	WITHDRAWN
60-35	Mar 25	MOTOR VEHICLES.	Lights—White lights to be used in front of an automobile and red lights to the rear; other lights prohibited.
60-35	May 2	STATE BOARD OF HEALTH. VITAL STATISTICS.	Fees earned in the division of vital statistics to be turned over to the State Treasurer.
60-35	May 8	CITIES OF THE THIRD CLASS.	Mayor not disqualified from election or holding said office.
60-35	May 14	STATE BOARD OF HEALTH. COUNTY COURT.	County Court required to appoint County Health Nurse upon filing of sufficient petition, Section 9039 R. S. Mo. 1929.
60-35	May 15	PHYSICIANS AND SURGEONS. PUBLIC RECORDS.	Records obtained by laboratory tests from samples submitted by physicians are privileged and not open for inspection to the public.
60-35	June 21	CITIES. INTOXICATING LIQUORS.	Cities of fourth class or other cities may limit the number of places where intoxicating liquors may be sold.
60-35	Nov 15	MEDICINE. STATE BOARD OF HEALTH.	Applicant not entitled to privilege of taking medical examination unless he is able to qualify under law as it presently exists.
60-35	Nov 15	INQUESTS. CORONERS.	Cases in which to be held – Necessity of reference by physician.
61-35	May 13	VACANCY.	Members of Board of Aldermen in cities of Fourth Class.
61-35	July 18	STATE BOARD OF	Board must elect a president in July in each year, and failure thereof

		OPTOMETRY.	means that the president and secretary hold at the pleasure of the board, and may be removed at any time.
61-35	July 26	RECORDER OF DEEDS.	Under Sec. 11543 it is the duty of the Recorder of Deeds to record deeds which shall be proved or acknowledged according to law.
63-35	Jan 2	INSURANCE.	Amount of reserve of mutual fire insurance companies required.
63-35	Jan 18	TAXATION & REVENUE.	Senate Bill 94 exclusive law for enforcing delinquent state and county taxes and taxes of cities of third and fourth class.
63-35	June 26	LICENSES.	When county courts may impose a license tax on roller rinks or skating rinks.
64-35	Jan 14	BANKS & BANKING. COUNTY COURTS.	Power and authority of County Courts to compromise with bondsmen on depository bond.
64-35	Jan 16	BANKS & BANKING.	Restricted banks may reorganize under House Bill 91, Laws 1933, pages 404, 405, and 406.
64-35	Feb 6	BANKS & BANKING.	Assignment executed by depositors of the Bank of Clark, legal and binding on them.
64-35	Feb 19	BANKS & BANKING. CORPORATIONS.	1. Corporation automatically dissolved by expiration of charter. 2. President and directors of dissolved corporation under Sec. 4561, R. S. 1929, became trustees for winding up affairs.
64-35	Apr 22	CLERK OF HANNIBAL COURT OF COMMON PLEAS.	Section 11812, Laws 1933, providing for appointment of deputies is applicable to Hannibal Court of Common Pleas.
64-35	May 3	STATE BOARD OF HEALTH. FOOD AND DRUG.	Every building or structure held out to public where sleeping accommodations are furnished for pay in which ten or more rooms are furnished shall pay hotel license inspection fees.
64-35	May 27	CHARITABLE TRUSTS. TAXATION.	Property located in a city used exclusively for charitable purposes, to the extent of one acre, is exempt from taxation for State, County or local purposes.
64-35	June 28	MISSOURI OCCUPATION TAX.	Water sold by City of Excelsior Springs subject to tax; mineral baths not subject to tax; receipts from operation of swimming pool not subject to tax.
64-35	Aug 26	SMALL LOAN LAW.	Licenses under Small Loan Law permitted to accept real estate as security. Sections 5544 to 5564, R. S. 1929.
64-35	Dec 3	BANKS & BANKING. COMMISSIONER OF FINANCE.	Publication of unclaimed deposits, dividends and interest every five years by Commissioner of Finance, under Section 5304 R.S. Mo. 1929.
64-35	Dec 21	TAXATION.	Refund to purchaser at void sale payable from County Treasury.

65-35	Mar 25	COUNTY SUPERINTENDENT OF SCHOOLS.	A person who has not taught or supervised schools as his chief work at least two of the eight years next preceding his election, or has not spent the two years next preceding his election as a regular student in a state teachers' college or university cannot qualify as County Superintendent of Schools.
65-35	May 3	STATE TAX COMMISSION.	Commission to assess busses of electric light and power company, operated in lieu of street cars as distributable property; also franchise of said electric light and power company.
65-35	May 20	FRANCHISE TAX.	Capital stock notes not exempted.
65-35	June 6	JUSTICE OF THE PEACE.	Transcript in criminal case may be filed with Circuit Clerk as in civil cases.
65-35	June 10	COUNTY BOUNDARIES.	Not changed by avulsion.
65-35	June 21	PROBATE COURT.	Probate judge may sit in case in which he is witness to will unless there be objection in writing, verified by affidavit filed on behalf of any party in interest.
65-35	Oct 10	OLD AGE COMMISSION.	County Old Age Assistance Board entitled to necessary expenses for meals not to exceed the amount fixed by Old Age Assistance Division.
65-35	Oct 29	BOARD OF HEALTH. SCHOOLS.	Power of Board of Education to require vaccination of pupils.
65-35	Nov 7	SALARIES AND FEES.	Circuit clerk and ex officio recorder is not entitled to retain fees for issuance of marriage licenses if by so doing he receives in compensation more than the annual salary as defined in Sec. 11786, R. S. Mo. 1929.
65-35	Nov 22	FERTILIZER.	State Fertilizer Law does not apply; fertilizer used in Missouri by U. S. Dept. of Agriculture not offered for sale.
65-35	Nov 22	TAXATION.	Leasehold interests, if of any value, assessable.
66-35	Jan 8	STATE TREASURER. ESCHEATS.	State Treasurer has no authority to receive intangible personal property which has escheated to the State.
66-35	Jan 14	INHERITANCE TAX.	Failure to make application for refund within two years from date of accrual of right to such refund bars claimant from making such application.
66-35	Mar 27	LIQUOR CONTROL ACT.	Moneys received by reason of county liquor license fees should be placed in county treasury and disbursed according to classification of expenditures as provided by county court under County Budget Act.
66-35	June 18	STATE TREASURER.	Federal Housing Administration first deed of trust notes do not of themselves become legal collateral for state moneys deposited.

66-35	Sept 25	EMINENT DOMAIN. CAPITOL GROUNDS. CONDEMNATION.	Board of Permanent Seat of Government does not have power to condemn under Laws of 1935, pages 53-54, nor under general law, without special statutory authority.
66-35	Oct 22	INHERITANCE TAX.	Exemptions of a widow or widower under the Inheritance Tax Laws of the State of Missouri are $20,000.00 plus the value of a child's share in the entire net estate.
67-35	June 24	OFFICIAL BONDS.	No county officer should become a surety on the official bond of another county officer.
68-35	Mar 18		Opinion Letter to Mr. R.E. O'Malley
68-35	Mar 22	INSANE POOR PATIENTS. SHERIFF'S FEES.	For transporting insane poor patients.
68-35	Mar 29		Opinion Letter to Mr. R.E. O'Malley
68-35	June 11	Hon. M. M. Ohlhausen	WITHDRAWN
68-35	Oct 2		Opinion Letter to Mr. R.E. O'Malley
68-35	Oct 3	PENAL BOARD. CONVICTS.	Certificate of Penal Board issuable in compliance with Section 8442 R. S. 1929, upon demand of former convict.
68-35	Oct 24	CRIMINAL LAW. HABITUAL CRIMINAL ACT.	Death sentence may be imposed on charge under habitual criminal act.
68-35	Nov 7		Opinion Letter to Mr. R.E. O'Malley
69-35	Jan 2	TAXATION AND REVENUE.	Penalties, interest, commissions and attorneys' fees as allowable on delinquent taxes against railroad undergoing re-organization under Section 77 of Bankruptcy Act.
69-35	Mar 25	CITY ORDINANCES.	Validity of same based on necessary statutory vote on final passage.
69-35	Apr 15	INSURANCE.	Re Approval of decreased value of Trans-Mississippi Life Insurance Company stock.
69-35	Apr 23	DEAD BODIES.	Consent of the Secretary of the State Anatomical Board must first be obtained before an autopsy may be performed on unclaimed dead bodies.
69-35	Sept 12		Opinion Letter to Mr. R.E. O'Malley
69-35	Sept 13	COUNTY COURTS. SCHOOL FUNDS.	Expense of managing and maintaining property acquired under a mortgage given to secure a loan of school money should be paid out of the income of said property.

69-35	Nov 23	SCHOOLS. TAXATION.	Distributable property of railroads and similar utilities is ascertained by the average rate levied for taxation.
70-35	Jan 18	ELECTIONS.	Death of contestee in election contest abates the action; if vacancy in office exists, the governor must issue writ of election to fill such vacancy.
70-35	Apr 25		Are Police Officers entitled to reward for the capture of criminals.
70-35	Aug 6	NOTARIES PUBLIC.	(1) One may hold the office of Notary Public and County Superintendent of Schools. (2) Notary Public is entitled to charge statutory fees for services rendered.
70-35	Sept 30	SALES TAX.	Sales of milk and farm products subject to tax.
71-35	Apr 2	TOWNSHIP ELECTIONS.	Names of candidates may be printed on ballot or ballot left blank and same written in, but voters cannot write candidates name on blank ticket, separate from regular ticket.
71-35	June 24	TAXATION.	Tender of tax, and no interest or penalty, etc., is all that is required if before June 30, 1933.
71-35	June 25	COUNTY TREASURER'S BOND.	County Court may not "reduce" bond by court order.
71-35	July 30	COUNTY SURVEYOR.	County Surveyor when ex-officio county highway engineer has only the powers that the county court confers upon him by direction.
71-35	Sept 26	TAXES.	Payment of taxes on part of one tract of land.
71-35	Nov 26	APPROPRIATIONS.	Money cannot lawfully be transferred from a general fund to a specific fund unless authorized by statute.
72-35	Jan 2	TOWNSHIP CLERK'S FEES.	Township clerk under Section 12310 R. S. Mo. 1929, as amended Laws of 1931, page 377, is not entitled to any fee for issuing warrants.
72-35	May 13	HEALTH COMMISSIONER – COUNTY COURT.	County Court can require duties of County Health Commissioner not inconsistent with rules of Board of Health.
72-35	Dec 19	COLLECTION OF TAXES.	1927 warrants cannot be used by taxpayer in payment of 1932 taxes.
73-35	Feb 6	SPECIAL ROAD DISTRICTS.	Road Districts composed in part of two special road districts would not be liable for the bonded indebtedness of said road districts.
73-35	Feb 20	Hon. C. W. Piper	WITHDRAWN
73-35	Mar 21	COUNTY BUDGET ACT.	Claims against the county not included in the estimate made at the February 1935 term may be paid out of (1) classes 5 or 6; (2) out of an ascertainable surplus in any of the other classes; (3) out of delinquent

			taxes.
73-35	Apr 15	INSANE PAUPERS. SHERIFF.	Not mandatory upon County Court to designate Sheriff to transport patient to State Hospital.
73-35	May 13	LICENSE – COUNTY COURTS.	Pool tables operated in a County may be licensed when?
73-35	June 26	INTOXICATING LIQUORS.	Wholesale Liquor Dealers subject to assessment and payment of an ad valorem tax.
73-35	Aug 21	CITY MANAGER GOVERNMENT.	Ordinance permitting marble and slot machines to operate and pay occupation tax illegal.
73-35	Sept 26	TAXES.	Payment of taxes on part of one tract of land.
73-35	Oct 16	COUNTY COURT. SHERIFFS.	In Counties of less than 75,000 inhabitants, County Judges are entitled to $5.00 per day when necessarily engaged in holding Court. There is no statutory or common law duty in Missouri for a sheriff to open Court, but his duty is to attend Court.
73-35	Nov 27	SCHOOLS.	Money found in the teachers' fund may not be transferred to either incidental fund or building fund, directly or by subterfuge.
73-35	Nov 29	COUNTY CLERKS.	Construction of Section 12183, R. S. Mo. 1929.
74-35	Feb 11	NEPOTISM.	It is not a violation of the nepotism section of the Constitution for a county court to appoint as janitor a first cousin of one of the judges' deceased wife, providing there are no living children of the marriage aforesaid.
74-35	May 15	SCHOOLS.	School district organized as a town district under the provisions of Section 9325, prior to the enactment of Section 9194, may levy a maximum tax of $1.00 on the $100.00 valuation. School district classified as a town district, under Section 9194 may levy a tax of $1.00 on the $100.00 valuation. District not so organized or classified is limited to a levy of 65 cents on the $100.00 valuation.
74-35	July 15	SCHOOLS.	Supplement to opinion No. 74, May 15, 1935, to J.E. Pummill.
75-35	Feb 6	INTOXICATING LIQUOR.	A city ordinance requiring a person to take out a license for operating each bar in the same place of business is in conflict with Section 20 of the Liquor Control Act, and therefore void.
75-35	Apr 4	TAXATION AND REVENUE.	Manner of redeeming sold property.
75-35	May 10	CONVICTS. PARDON.	Where one previously convicted of a crime is not suffering from civil disability, a pardon to remove civil disability is not necessary.

75-35	May 24	SCHOOLS.	Sending school must pay entire tuition of pupil, receiving credit up to $50.00 if the State has the money.
75-35	Oct 3	SALES TAX.	Farmer must be engaged in the "business" of selling apples to be subject to tax.
76-35	May 3	LICENSE FEES.	Bond and stock brokers required to pay license fee under Section 14044, R.S. Mo. 1929.
76-35	July 20	BROKERS.	Persons who do not deal as money brokers or exchange dealers are not subject to the provisions of Section 14044 R. S. Missouri 1929.
77-35	Jan 24	COUNTY BUDGET LAW.	Expenses of Class 1 incurred by county court in excess of fund set aside may be paid out of Class 1 regardless of fact that they are in excess of estimate as contemplated by the Budget Act.
77-35	June 7	COUNTY COLLECTOR.	County collector must pay direct to treasurer of City, Town or Consolidated District, moneys collected by him to which said district is entitled.
77-35	Dec 14	TAXATION. CITIES OF THE THIRD CLASS.	Duty of City Collector to make up delinquent lists of lands and lots.
78-35	Jan 9	COUNTY COLLECTORS, EX OFFICIO TREASURER.	Entitled to no expenses in addition to maximum allowance under first 13 subdivisions of Sec. 9935 Laws of Missouri 1933.
78-35	Jan 9	OFFICERS.	Probation officer is a county officer, and as such is entitled to receive a copy of the Revised Statutes under the provisions of Section 693, R. S. Mo. 1929.
78-35	Jan 17	SHERIFF.	County Court cannot change sheriff's fees for boarding prisoners after January 1, especially after the expiration of the November team.
78-35	Mar 21	PENAL INSTITUTION. MISSOURI REFORMATORY.	Superintendent may not receive a contagious person.
78-35	Mar 26	COUNTY BOUNDARIES.	Jurisdiction of Clay Co. extends to middle of main channel of Mo. River and Prosecuting Attorney of Clay Co. may prosecute for crimes committed on the Clay Co. side of main channel.
78-35	Apr 16	COUNTY BUDGET ACT.	Salary of Secretary of Farm Bureau Agent should be placed in Class 6.
78-35	May 8	SHERIFFS FEES.	Allowable only where he serves papers officially and not recoverably where he attempts and fails to serve.
78-35	May 23	PROBATION OFFICER.	County Court has authority to pay salary of Probation Officer by virtue of Class 4, Section 2, Budget Law 1933, maximum salary allowable.

78-35	June 26	INITIATIVE AND REFERENDUM.	Legislature may determine the percent, not in excess of eight per cent of petitioners, required to initiate measures.
78-35	July 9		Statute of limitations on delinquent taxes.
78-35	Aug 13	SPECIAL ROAD DISTRICTS.	Refund by State Highway Commission.
78-35	Aug 24	INSURANCE DEPARTMENT.	Rate filing held in violation of Article VIII, Chapter 37, Revised Statutes Missouri 1929.
78-35	Oct 7	SALES TAX.	Sales made by post exchanges to members of the camp are not subject to the tax. The original purchase made by the post exchange from the merchant or wholesaler is subject to the tax.
78-35	Oct 10	SPECIAL ROAD DISTRICTS.	Oral agreements with municipal corporations and executed on both sides cannot be repudiated.
78-35	Oct 15	TAXATION.	Right of Redemption from tax sale.
78-35	Oct 29	CIRCUIT CLERK. DRAINAGE DISTRICT.	Fees allowable to Circuit Clerk in drainage cases under special Act of the Legislature.
79-35	Jan 18		Opinion Letter to Hon. V. C. Rose, Jr.
79-35	Jan 23	CONVICTS.	Status of a person with legal residence in Missouri who has been convicted and sentenced in a United States District Court for a felony.
79-35	Mar 16	COUNTY BUDGET ACT.	Cost of administering Federal relief on part of county may be classified as Contingent and Incidental expenses or expense of paupers not otherwise classified and paid out of Class 5.
79-35	July 11	BLIND PERSONS.	It is a misdemeanor to cause a blind pensioner to unwillingly part with pension funds.
79-35	Oct 10	SHERIFFS.	Sheriff must feed prisoners and County must reimburse him for necessary feed up to 75 cents per prisoner in Putnam County.
80-35	Feb 14	CONVICTS.	Sentence to Boonville is not a bar to commitment to intermediate reformatory.
80-35	Feb 20	CONVICTS. WARDEN.	Imprisonment shall never be computed from a date in the judgment which is prior to the date of sentence.
80-35	Apr 16	PUBLIC OFFICERS.	Same person cannot hold position of road overseer and committeeman under corn-hog program.
80-35	May 7	DEAD BODIES. WARDEN.	Prisoners who die in the Penitentiary should be turned over to Anatomical Board when they are to be buried at public expense.
80-35	May 20	PENITENTIARY. CIRCUIT CLERK.	(1) Penitentiary liable for fees of Circuit Clerk for furnishing certified copies of Information and Judgment, requested by it.

			(2) Fees of Circuit Clerk for furnishing certified copies of Record to Penitentiary necessary to return a fugitive from justice, should be paid out of fund provided for apprehension of criminals.
80-35	July 15	HABEAS CORPUS AD TESTIFICANDUM.	A circuit court has power to issue and may only keep said prisoner as long as necessary for such to testify.
80-35	July 19	TAXATION.	(1) Amount of taxes if sold under Jones-Munger Law. (2) Amount of taxes if judgment taken. (3) Operation of 1935 act.
81-35	Feb 26	COUNTY TREASURER.	Entitled to such compensation as county court deems advisable not exceeding ½ of 1% on all school moneys disbursed by him.
81-35	Mar 8	COUNTY COURT.	Legal procedure for the removal of the judges of the county court from office.
82-35	Jan 21	COUNTY CLERKS. COUNTY DEPUTIES.	Salary of County Clerk and his deputy in counties having a population of 10,000 and less than 11,500 persons. Salary not to be fixed by county court.
82-35	Jan 30	Hon. T. M. Scott	WITHDRAWN
82-35	Mar 29	TAXPAYER.	Definition of, for voting purposes.
83-35	Apr 18	BEES.	Power of City of fourth class to prohibit possession of, within city limits.
83-35	June 12	PROBATE COURT.	Demands must be allowed by court in order for executor to receive credit therefor.
83-35	Nov 1	RECORDER.	Agreements must be acknowledged by both parties before same can be recorded.
83-35	Nov 5		Appropriation to Kansas City Court of Appeals not sufficient to cover payment of insurance.
83-35	Nov 14	SALARIES AND FEES.	Constable entitled to commitment fees only when person committed is a criminal. Sheriff entitled to commitment fees regardless of whether person committed is adjudged a criminal.
84-35	Jan 2	COUNTY SEAT, REMOVAL OF.	Petition to move County Seat and petition to increase tax to build new court house must be separate petitions.
84-35	Jan 3	COUNTY BUDGET LAW.	Road District Fund and County Purpose Fund may be used for Class 5 and need not be kept separate from other funds and if anticipated funds in Class 5 exceed 1/5 of anticipated revenue, the excess may be placed in Class 6.
84-35	Jan 26	DEPUTY CIRCUIT CLERK.	Statutes do not require a deputy to give bond; however, circuit clerk may, if he desires, exact a reasonable bond.

84-35	Apr 18	COUNTY COURT.	Sec. 11812, R.S. Mo. 1929 confers on County Court complete control of appointment, compensation, and tenure of office of deputies and assistants to clerks of the circuit court.
85-35	Sept 26	BARBER SHOPS AND BEAUTY SHOPS.	Under the provisions of House Bill No. 32, cities may regulate the hours of closing of barber shops alone or vice versa.
85-35	Nov 22	COUNTY BUDGET ACT. COUNTY COURT. CIRCUIT CLERK.	County Court may transfer surplus in any one of the five classes to some other class in need of same at the close of fiscal year. It is duty of county court under Sec. 12162, R.S. 1929 to take whatever action it deems proper in regard to audit made by State Auditor of county offices. Additional salary due Circuit Clerk, as shown by audit, for 1932-33-34 can only be paid from income of those years, from back taxes collected for those years, or from surplus remaining at close of fiscal year.
86-35	Jan 3	PRISONERS BOARD IN COUNTY JAIL.	County Court cannot order different amounts to be spent for board of misdemeanor and felony prisoners.
86-35	Jan 8	SHERIFFS.	Fees for attending court.
86-35	Jan 15	OFFICIAL BONDS.	Attorneys at Law accepted as sureties on official bond does not invalidate, yet such should not be accepted as the statute is purely directory.
86-35	Jan 29	COUNTY BUDGET LAW.	Revenue of 1934 cannot be used for payment of interest on warrants issued prior thereto; if surplus remains after all obligations have been taken care of, or if revenue is derived from delinquent taxes, the same may be applied on interest of protected warrants.
86-35	Feb 4	GAMBLING.	“Ball Machines”
86-35	Feb 12	INHERITANCE TAX.	Taxation of remainder interest should be at the highest possible rate.
86-35	Feb 12	TAXATION AND REVENUE. COUNTY COLLECTORS.	Collectors can only retain a commission on the amount of money actually collected regardless of the face value of the tax bill.
86-35	Mar 7	INCOME TAX.	Compensation paid officers and employees under the Federal Emergency relief Act of 1933 subject to taxation in Missouri.
86-35	Mar 21	SHERIFFS.	State not liable for commitment fees and mileage.
86-35	Mar 23	COSTS.	Information charges crime under Section 4151 R. S. Mo. 1929, ** State not liable for costs in the case charged under Section 4151, R. S. Mo. 1929.
86-35	Mar 29	COUNTY COLLECTOR.	Terms of collector’s bond is guide as to whether collector, who remains in office due to successor’s failure to qualify as to giving of bond, shall

			be required to give a new bond.
86-35	Apr 5	TAXATION. COUNTY COLLECTOR.	Commission of County Collector cannot under any circumstances exceed percentage of taxes actually paid.
86-35	Apr 8	PROBATE JUDGE.	Probate Judge is entitled to deduct amount of salary he has paid a probate clerk who holds over after the expiration of the term for which he was appointed.
86-35	Apr 9	MISSOURI ATHLETIC COMMISSION.	Sec. 12999, R. S. 1929 in using words "gross receipts" means receipts from all sources in connection with any boxing, sparring or wrestling exhibition.
86-35	Apr 20	MUNICIPAL LIGHT BONDS.	Laclede Electric Light Bonds.
86-35	May 2	INCOME TAX.	Compensation of counsel for Trustee in Bankruptcy not exempt.
86-35	May 6	APPROPRIATIONS.	Director of Medical Licensure—No appropriation having been made, cannot be ascertained at this time out of which of the two funds his salary may be paid.
86-35	May 8	COUNTY COLLECTORS. STATE AUDITOR.	The State Auditor's power to audit, adjust and settle with County Collectors carries with it the right to discreetly credit County Collectors with outlawed taxes where his refusal to so credit would be arbitrary under all the facts.
86-35	May 10	COLLECTOR. BONDSMEN.	1. Sureties on a Collector's bond are not liable beyond the liability of their principal. 2. Collectors and sureties are relieved if funds are lost by failure of a legal depository even though the bond contains the phrase "collect and pay over."
86-35	May 27	SHERIFF. COSTS. TRAVELING EXPENSES.	State is liable to Sheriff and guard for traveling expenses of themselves and prisoners when delivering boys convicted of a felony and committed to the Missouri Training School for Boys.
86-35	May 31	MISSOURI OCCUPATION TAX.	Deductibility of (1) sales of electric energy to municipally owned power and water plants; (2) sales of electrical energy to building owners to be remetered to tenants; (3) sales of electrical energy to companies for propelling street cars; (4) sales of electrical energy from transmission lines; (5) sales of electrical energy in other states by a Mo. company; (6) Rental receipts from property used in operations; (7) Sales of material and supplies to Employees Mutual Benefit Associations.
86-35	June 10	STATE ATHLETIC COMMISSION.	It is unlawful to pay members of Commission personally $25.00 per month as office expense, but the Commission with consent of Governor may appoint assistants whose salary shall not exceed $5.00

			per day.
86-35	June 14	STATE AUDITOR. CRIMINAL COSTS. COURT REPORTERS' FEES.	On Statutory certificate from the Prosecuting Attorney and Trial Judge the State Auditor may pay criminal costs in criminal cases charged against the State.
86-35	June 18	OFFICIAL BONDS.	Payment of premium may only be made where authorized by statute and by appropriation act.
86-35	June 27	FEES.	Change of venue deposits to circuit judge in district are considered in fixing probate judge fees.
86-35	July 10	BOARD OF HEALTH. APPROPRIATIONS.	Director of medical licensure to be paid out of Department of Health fund. Who to sign requisitions for disbursements from funds discussed.
86-35	Aug 2	Hon. W. Randall Smart	WITHDRAWN
86-35	Aug 16	INCOME TAX.	Royalties received for use of patents issued by U.S. Government during years 1929, 30, 31 and up to and including May 16, 1932 are subject to income tax laws of the State of Missouri.
86-35	Aug 22	RECORDER OF DEEDS.	Statute requiring Recorder to hold deeds for one year applies only to those both signed and acknowledged more than one year prior to filing.
86-35	Aug 30	AUTOMOBILE LICENSE.	License required when Oklahoma automobile enters Missouri, absent reciprocity.
86-35	Sept 5	MISSOURI DENTAL BOARD.	Authorized to employ counsel.
86-35	Sept 10	SCHOOL FUND MONEYS.	A loan good when made remains a valid loan although borrower thereafter is elected to county office, except county judge.
86-35	Sept 16	SALES TAX.	Grain shipped to mill between two intra-state points, transportation charges are subject to 1% tax regardless of whether or not same is to be rebilled and sold in interstate commerce.
86-35	Sept 18	APPROPRIATION.	In view of the effect of the decision in the case of State v. Thompson, printing and clerical help may be charged against the teacher-training appropriation for 1935.
86-35	Sept 27	CRIMINAL COSTS.	Liability of State for defendant's costs where case is nolle prosequi.
86-35	Oct 2	SHERIFFS.	Sheriff's fees for custody of prisoner when transferring him within Randolph County from one Circuit Court to another.
86-35	Oct 25	INCOME TAXES.	Net income received by non-resident as salary from resident corporation is taxable.

86-35	Oct 30	TAXATION.	Fees, commissions and costs for services actually performed allowed in bankruptcy.
86-35	Nov 1	CIRCUIT CLERK.	Must account for certain fees; fees for jury script and for opening and closing court.
86-35	Nov 4	SHERIFFS. COUNTIES.	State not liable for mileage for transporting prisoners for safekeeping; Liable for sheriffs' fees in transporting prisoners for safekeeping.
86-35	Nov 6	INCOME TAX.	Stockholders of Kansas City Life Insurance Company subject to tax.
86-35	Nov 19	SALES TAX.	A contract of sale made by parties within the State of Missouri of merchandise to be shipped from outside the State involves interstate commerce and is exempt from the tax.
87-35	Feb 13	WARRANTS.	The warrants in question cannot be paid out of the revenue of 1935.
87-35	Mar 29	GAMBLING.	Lottery, gift enterprises.
87-35	Apr 18	GRAIN INSPECTION AND WEIGHING DEP'T.	Suggestions for group insurance.
87-35	May 15	MISSOURI OCCUPATION TAX ACT.	Dairymen who engage in the business as their principal work are subject to pay the tax on their gross receipts if they sell their products to the ultimate consumer direct.
87-35	June 22	CITIES.	City of the third class may require all persons handling food to take a physical examination.
87-35	July 22	Hon. C. Spannagel	WITHDRAWN
87-35	Aug 27	NON-INTOXICATING BEER.	"Set ups" are not prohibited under the provisions of Non-Intoxicating Beer Act.
87-35	Sept 13	CIRCUIT CLERKS FEES.	For order opening or closing court.
88-35	Jan 16	COUNTY HIGHWAY COMMISSION.	May not appoint more than two commissioners from same county court district; quo warranto is proper remedy to try title to office.
88-35	Jan 31	CLERK OF THE HANNIBAL COURT OF COMMON PLEAS.	Compensation to be received after the first Monday in January, 1935.
88-35	Mar 25	Hon. Walter G. Stillwell	WITHDRAWN
88-35	Mar 28	Hon. Louis V. Stigall	WITHDRAWN
88-35	May 4	SCHOOLS.	Parent residing on district school line to send children to school in district he deems himself a resident of.
88-35	June	STATE HIGHWAY	Legal – Limitation in Sec. 1 of H.B. 277 "not to exceed four attorneys"

	12	DEPARTMENT.	is unconstitutional and void.
88-35	June 20	MOTOR VEHICLES AND LICENSES.	Lessor owning and leasing truck to lessee for more than ten days must procure a license.
88-35	June 20	NEPOTISM. TAXATION AND REVENUE.	Employment by county collector of daughter. County collector, compensation of; rate of penalties on delinquent personal property taxes.
88-35	July 29	ROADS AND HIGHWAYS.	State Highway Commission may include minimum wage scale in contracts for construction of highway projects if necessary to get Government funds.
88-35	Sept 20	MOTOR VEHICLES.	Persons hauling property or passengers for hire must have a chauffeur's license; An individual under private contract to the government to haul its mail from one point to another must also have a chauffeur's license if said person is not a government employee.
88-35	Sept 25	TAXATION.	County Court cannot compromise delinquent taxes owed a City of the Fourth Class.
88-35	Sept 26	Hon. Louis V. Stigall	WITHDRAWN
88-35	Oct 9	INSTITUTIONS.	Writ of Habeas Corpus may issue to bring prisoner from penal institution to answer and defend a criminal charge alleged to have been committed prior to incarceration.
88-35	Nov 13	INTOXICATING LIQUOR.	Five per cent beer may be sold in a place of business which operates a pool table.
89-35	Jan 25	CLERK OF CAPE GIRARDEAU COURT OF COMMON PLEAS.	Compensation to be received after the first Monday in January, 1935.
89-35	June 28	COUNTY COURT. SCHOOL FUNDS.	Costs or expenses necessary to preserve county school fund to be borne from that fund.
89-35	Aug 20	INTOXICATING LIQUORS.	(1) Cities cannot pass ordinances respecting searches and seizures power reserved to State under Liquor Control Act. (2) Cities may pass ordinances similar to State Law where consistent.
89-35	Oct 2	TAXATION.	Fees and costs on delinquent taxes; contents of back tax book, seizures of personal property for taxes.
89-35	Nov 23	CITIES.	Assent of two-thirds of voters required to incur indebtedness in excess of annual income.
89-35	Nov 25	CITIES, TOWNS, VILLAGES.	Cities of 3rd Class may pass ordinances imposing license tax on wholesale merchants doing business within city limits under Section 6840.

90-35	Mar 22	TAXATION.	Senate Bill 94 not applicable to collection of levee district assessments.
90-35	Apr 5	TAXATION AND REVENUE.	Disposition of surplus proceeds of tax sale.
90-35	June 19	TAXATION.	The tax lien for State and County taxes, in Missouri, is fixed on June 1st on all land in the State not exempt on that date, and subsequent purchase in the name of the United States does not exempt the land from the lien, by reason of the Missouri Constitution exempting property of the United States from taxation.
90-35	June 19	INTOXICATING LIQUORS.	Sales of intoxicating liquor made before prohibited hour for delivery after prohibited hour would be unlawful.
90-35	Dec 17	COUNTY ASSESSOR. COUNTY CLERK.	Not required to designate school district on land tax book. Duty on County Clerk.
91-35	Jan 15	Hon. H. P. Thomas	WITHDRAWN
91-35	May 11		1. A newspaper, in order to publish the financial statement of a county, must be qualified under Section 13775 Laws 1931, page 103, and the question as to whether or not the newspaper possesses the qualifications, is one of fact. 2. County Budget Act. The county court may pay a sum in excess of the amount estimated in the budget out of the funds of Class 5, provided it does not jeopardize the priorities of the four prior classes, or the same may be paid from the funds of class 6.
91-35	June 18	COUNTY TREASURER.	County Treasurer must give bond under Section 10969 R.S. Mo. 1929 for funds of Drainage District when organized by county court and his compensation shall not exceed more than one-half of one per cent of the funds handled.
91-35	Sept 28	OLD AGE PENSION.	Qualifications as to “resident” under Old Age Assistance Act.
92-35	Nov 14	SHERIFF’S FEES.	Entitled to no fees for attempting to serve capias.
93-35	June 29	SHERIFF.	Fee for committing a person to jail.
94-35	Apr 18	LAW PRACTICE.	What constitutes practice of law without a license and for a valuable consideration under Sections 11692 and 11693 R. S. Mo. 1929?
95-35	May 16	CONSTABLE FEES.	Constable of Audrain County not entitled to fee for attending Justice Court.
97-35	Aug 27	SALES TAX ACT.	Sales of electricity, gas and water to cities for street lighting, white way system, traffic signal lights, etc., are not subject to the tax.
97-35	Sept 16	CITIES OF THIRD CLASS.	Power to contract for sewers outside of corporate limits.

98-35	Jan 21	TAXATION. BOARD OF EQUALIZATION. PENALTIES AND INTEREST. RAILROADS.	Taxes on account of 5% increase ordered by Board of Equalization December 17, 1934, not delinquent until levied by county courts and reasonable time given to pay.
98-35	Jan 28	HIGHWAYS.	Right of action against operators of trucks for heavy use of highways.
98-35	Feb 19	BANKS & BANKING. TAXATION.	(1) Taxation of Banks and Trust Companies; (2) Preferred Stock; (3) Capital Notes; (4) Stock owned by Reconstruction Finance Corporation not taxable.
98-35	Mar 8	COUNTY SUPERINTENDENT OF SCHOOLS.	Candidate is at liberty to announce himself on any platform he desires; tickets bearing words “Democratic ticket” would not invalidate the election providing no fraud existed and same were acceptable to persons in charge of the election.
98-35	Apr 17	PROBATE COURT.	Probate Judge is within his rights in purchasing filing cabinets, etc. provided same can be classified as “other necessaries”, but the expenditure must receive approval of county court as set forth in County Budget Act.
98-35	Apr 24	SCHOOLS.	School director may take his oath of office before a notary public. Failure of a director to meet with the other directors within four days after annual meeting for purpose of organization does not create a vacancy on said board.
98-35	May 3	STATE TAX COMMISSION.	Four questions in regard to whether or not State Tax Commission is compelled to grant hearings on complaints.
98-35	May 8	VILLAGES.	Can impose occupation tax on dealers for privilege of selling gasoline.
98-35	May 9	COUNTY BUDGET ACT.	County Court cannot transfer funds at the close of the fiscal year to any of the classes for use for the current year if valid and outstanding obligations in the nature of warrants exist.
98-35	May 22	MOTOR VEHICLE MUNICIPAL TAX.	Municipal tax for motor vehicles cannot exceed the amount authorized for 1933. Furthermore, the amount authorized for 1933 should not exceed 1/3 of the aggregate amount of state registration fees as prescribed in Sec. 7762, R. S. Mo. 1929.
98-35	May 28	BUS AND TRUCK LAW.	(1) A truck domiciled in a foreign State and operating as a contract hauler in interstate commerce over the highways of this State comes within the Act. (2) Contract hauler domiciled in foreign State and operating in interstate commerce through Missouri must obtain a contract hauler’s permit.

98-35	June 10	TAXATION.	Real Estate purchased from proceeds of World War compensation etc., is taxable. Money loses government identity on being paid to guardian.
98-35	June 14	COUNTY BUDGET ACT.	County Treasurer should apportion funds turned over to him monthly by the collector according to the six classes and in such a manner that the priority of payment of each class over each succeeding class may be sacredly preserved.
98-35	June 22	CITIES. INTOXICATING LIQUOR.	Municipalities shall not increase occupation tax of merchants and dealers engaged in the sale of non-intoxicating beer.
98-35	Aug 26	COUNTY BUDGET ACT.	County Court cannot permit Probate Judge to exceed amount provided in original budget estimate but if any funds are left in class 6, same may be used for purchasing additional books – clerical error may be corrected after estimate goes to State Auditor.
98-35	Sept 30	RECORDER OF DEEDS.	Is entitled to compensation as provided by statute. No compensation for a receipt that a certain chattel has been filed in his office.
98-35	Oct 3	TOWNSHIPS.	Townships may issue warrants, which warrants shall bear interest.
98-35	Oct 8	DRAINAGE DISTRICTS. COUNTY COURT. BONDS.	Treasurer of Drainage Districts should promptly disburse funds in retirement of outstanding bonds which are due and payable, in spite of the County Court's order to the contrary.
98-35	Oct 17	SCHOOL BUSES. SALES TAX.	School employed bus drivers do not have to pay a 1% sales tax if such are not licensed by the Public Service Commission.
98-35	Oct 29	ROAD DISTRICTS.	(1) May purchase right-of-way and deed to state. (2) Those organized under Article X of Chapter 42, R.S. Mo. 1929, may not borrow money for such purpose except after petition or election.
98-35	Nov 5	TAXATION.	Tangible personal property owned by building loan association is taxable to said association.
99-35	Jan 24	CIRCUIT CLERK.	Circuit Clerk is not entitled to retain fees earned under the provisions of Section 916, R.S. Mo. 1929, in addition to the maximum amount of fees allowed him under Section 11786, Laws of Mo. 1933.
99-35	Aug 15	LOTTERIES.	Specifically prohibited in the State of Missouri by Section 10, Article XIV of the Constitution.
99-35	Nov 8	CIRCUIT COURT REPORTERS.	Salary determined by population as ascertained by Sec. 11808, R. S. Mo. 1929 as amended.
99-35	Nov 21		All applicants for Old Age Assistance must have resided within this state for five years or more, within the nine years immediately preceding the filing of the application for assistance. Also must have been a resident of the State for one year next preceding the filing of

			said application for assistance.
99-35	Dec 23	COUNTY COURTS.	County Court cannot relieve itself of the duties imposed by statute, relative to the poor, by delegating its duties to a board established by it.
100-35	Feb 19	INTOXICATING LIQUOR. LEGAL ETHICS.	(1) Information. (2) Sell intoxicating liquor without a license. (3) Proof that a retailer has no license. (4) Principal's liability to act of agent.
100-35	May 21	TAXATION AND REVENUE. COUNTY COLLECTORS.	Collectors – commission of county and township collectors for collecting drainage taxes and media for payment thereof.
100-35	June 21	Mr. H. Parker York	WITHDRAWN

NEWSPAPERS - Newspaper of "free circulation" not eligible to receive notices of publication.

July 31, 1935

8-10

FILED

Honorable Jack R. Adams
Rolla Printing Company
Rolla, Missouri

Dear Sir:

We have your request of July 19, 1935, which is as follows:

> "We have been debating a question here for some time concerning the publication of legal notices, and we would like for you to give us your opinion on the matter.
>
> "We are publishing a free circulation newspaper, distributing it through the Rolla Post Office to the boxholders, 631 of them, on three Rural Routes out of Rolla, and by carrier to every home in Rolla, for a total of 1800 copies. The legal notice law reads that to accept legal publications, the paper must be in existence for one year, and be of 'general circulation.'
>
> "The Rolla School Board is seeking bids on the publication of their financial statement, and they would like for us to be able to publish it because of our much larger circulation.
>
> "How would our paper, free circulating, with only seventeen paid subscribers, seventeen people have paid fourth class

postage to get it, be considered regarding other legal notice publications.

"I would appreciate your, and your Department's opinions on this matter as soon as possible so that we may notify the School Board at once of our position."

The statute pertaining to public advertisements is Section 13775, Laws Mo. 1931, p. 303. It is as follows:

"All public advertisements and orders of publication required by law to be made, and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of one year; shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for a subscription for a definite period of time. Provided that when a public notice required by law to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this act. All laws or parts of laws in conflict with this section, except sections 13777,

#3 - Honorable Jack R. Adams

13778, 13779, 7631, 7632 and 7633, Revised Statutes of Missouri, 1929, are hereby repealed."

The underlined portions of the above statute were inserted by the 1931 Legislature. In order for a newspaper to qualify for public advertisements and orders of publication required by law, it must meet five conditions under the above statute, which briefly are:

(1) It must be published daily, tri-weekly, semi-weekly or weekly.

(2) Be of general circulation.

(3) Be admitted to the post office as second class matter.

(4) Shall have been published regularly and consecutively for one year.

(5) Shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for a subscription for a definite period of time.

From your request, it appears that you have only seventeen subscribers who have paid postage for receiving the paper as fourth class matter. The balance of the 1800 subscribers belong to what may be termed a "free list", wherein they receive the paper without having to pay for it.

Since the amendment of the above statute in 1931, it is necessary that all newspapers, to be eligible for legal notices of publication, must have been admitted to the post office as second class matter. The qualifications for admission of a newspaper as second class matter are set out in 39 U. S. C. A., Section 226, and are as follows:

#4 - Honorable Jack R. Adams

> "Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

It will be noted in the above section of the Federal Law that a newspaper "designed primarily for advertising purposes, or for free circulation" is not eligible to enter the post office as second class matter. The term "primarily for advertising purposes" means chiefly or principally. Lewis Publishing Co. v. Wyman, (Mo. 1910), 182 Fed. 13.

A newspaper otherwise entitled to be admitted as second class matter would violate the federal law by mailing under the second class matter a newspaper designed primarily for advertising purposes, or for free circulation. U. S. v. Atlanta Journal Co., 185 Fed. 656.

The phraseology "legitimate list of subscribers", as used in the Federal Code, means subscribers taken at more than a nominal price, wherein a price has been paid or agreed to be paid by the subscriber; in substance, it means a paid list of subscribers. Myrick v. U. S., 291 Fed. 1.

From the 1931 law, it is apparent that the term "bona fide subscribers" means a group of subscribers well distributed over the county of circulation, who have in good faith paid a valuable consideration to receive the newspaper over a fixed period of time. The term "bona fide subscription list of paying subscribers", as a requirement of a newspaper of general circulation for the publication of notices, means a real, actual, genuine subscription list containing only the names of those paying in good faith regularly for their subscription. Application of Herman, 191 Pac. 934, 939; 183 Cal. 153.

CONCLUSION.

It is, therefore, the opinion of this office that a newspaper whose circulation is primarily on the "free list" as distinguished from a newspaper which has a paid-up subscription list, is not eligible to receive public advertisements and orders of publication required by law to be published; is not eligible to be admitted to the post office as second class matter, and does not have a bona fide list of subscribers who have voluntarily paid or agreed to pay a stated price for a subscription for a definite period of time.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

Roy McKittrick
Attorney General

FER:PE

MISSOURI ATHLETIC COMMISSION: Sec. 12999, R.S. 1929 in using words "gross receipts" means receipts from all sources in connection with any boxing, sparring or wrestling exhibition.

April 9, 1935.

FILED
3

Athletic Commission of Missouri,
3132 Troost Avenue,
Kansas City, Missouri.

Attention: Mr. Garrett L. Smalley

Gentlemen:

This department is in receipt of your request for an opinion as to the following state of facts:

> "We are writing you for a written opinion in regard to the money we are collecting from concessions being operated in the majority of wrestling and boxing shows throughout the State of Missouri.
>
> We have successfully collected this fee ever since the Commission was organized in 1927, with one exception, and that is in one of the auditoriums in St. Louis. In Section 2 of the laws governing boxing and wrestling, it states that,
>
> > 'The Commission is to collect five per cent of the gross receipts of every boxing, sparring or wrestling exhibition held, such funds to be accounted for by the said Athletic Commission of the State of Missouri.'
>
> What we want to know is, whether the word 'gross' is to be construed to cover all moneys taken in from everything connected with the show or simply from the date. * * * * "

Section 12999, R.S. Mo. 1929 provides in part as follows:

> "* * * Third, to collect fees for such license of ten dollars ($10.00) for every license issued, and to collect five per cent. of the gross receipts of every boxing, sparring or wrestling exhibition held, such funds to be accounted for by the said athletic commission of the State of Missouri, and deposited monthly in the state treasury, and by the state treasurer set apart into a fund to be known as the athletic commission fund."

Statutes and ordinances imposing licenses and business taxes are generally to be construed liberally in favor of the citizens and strictly against the government. "The rule, however, does not compel an adherence to the mere letter of the law or to strict grammatical construction so as to defeat the plain legislative intent." Porter v. State, 58 Ala. 66.

Volume 37 Corpus Juris, page 249 states the general rule,

> "Liability for a license fee or tax, and the nature and extent of such liability, depend upon the terms of the statute or ordinance by which the fee or tax is imposed."

By the plain terms of the statute, the Commission is to collect 5% of the gross receipts of every boxing, sparring or wrestling exhibition. Nothing is said in the statute limiting the source from which said gross receipts should be estimated. The receipts obtained from concessions, etc. are collected by reason of their being connected with the boxing, sparring or wrestling exhibition in conjunction with which they are established.

CONCLUSION

In view of the foregoing, it is the opinion of this department that it was the intention of the Legislature that the

words "gross receipts", as used in Section 12999, R.S. Mo. 1929 should be taken to include the receipts from all sources obtained in connection or in conjunction with any boxing, sparring or wrestling exhibition.

Respectfully submitted,

JOHN W. HOFFMAN, JR.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

ELECTIONS * Duty of County Treasurer in connection with payment of expenses incurred by Board of Election Commissioners in administering Senate Bill No. 22 of the 58th General Assembly.

436

April 25, 1935.

FILED 3

Hon.C.Arthur Anderson,
Prosecuting Attorney St. Louis County,
Clayton, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of April 16, 1935, such request being in the following terms:

"I am requested by the Treasurer of St. Louis County, Hon. Maurice Dwyer, to inquire of you for an opinion concerning Senate Bill No. 22, which now has been enacted into a law. He wishes me to propound to you the following questions:

(1) Does this law make it compulsory that the Treasurer of the County honor any or all warrants drawn on him by the Election Commissioners?

(2) On what specific fund or funds shall these warrants be drawn?

(3) In event these warrants will be required to be protested for insufficient funds, as the warrants are in St. Louis County, will the same words be used, as in the case of the regular warrants, for the purpose of protesting?

(4) In what manner will the Board of Election Commissioners co-operate with the County Court to avoid the issuance of warrants in excess of the anticipated revenue.

(5) Will the County Court be compelled to give the Treasurer credit for the Election Board warrants honored by the Treasurer?

(6) Will the County Court or the Election Board audit the accounts of the Election Board war-

rants and cancel such warrants after honored by the Treasurer.

All of the above questions are predicated upon the assumption that the delegation of power to draw warrants is constitutional, of which I am in no way certain. Inasmuch as the Treasurer will perhaps be called upon shortly to honor warrants presented to him by the Election Board, I would appreciate hearing from you at your earliest possible convenience."

The above letter was supplemented by your letter of April 17, 1935, which reads as follows:

"Supplementing my letter to you of April 16th, 1935, relative to request from Maurice Dwyer, Treasurer of St. Louis County, for certain information relative to the warrants to be issued by the Election Board of St. Louis County. An additional question has come before Mr. Dwyer, it is this:

What is the legal wording and form to be used in the aforementioned Election Board Warrants?

It is the intention and wish of the Election Board to issue such warrants as are necessary to cover accumulated bills in the next few days, and for this reason an early reply will be greatly appreciated."

The Committee Substitute for Senate Bill No. 22 of the 58th General Assembly of the Legislature of this State, as truly agreed to and finally passed, provides a scheme for the registration of voters and for the holding of elections, including primary elections, in counties containing more than 200,000 inhabitants, within which category St. Louis County falls according to the last decennial census. This Act is lengthy and consists of 55 sections, but an examination of the entire Act in conjunction with the questions asked in your letter, discloses only two sections relating generally to the method in which the Board of Election Commissioners, created by the Act, incurs obligations and arranges for the payment thereof, these being Sections 47 and 48, which provide as follows:

Sec.47."Said board of election commissioners are hereby authorized to purchase and provide all necessary ballot boxes, registration books, verification lists, poll books, tally sheets, booths, printed ballots, blanks, stationery and all necessary supplies and equipment for the conduct and holding of registrations and elections,

including primary elections, and for every incidental purpose connected herewith. Such supplies and materials shall be purchased by said board upon public bids for the same from the lowest and best bidder, upon rules and regulations prescribed by said board. Said election commissioners shall also be authorized to require bonds sufficient in sum to insure prompt and faithful compliance with all such contracts and to contract for or rent the polling places and places of registration and outfit and equip the same and secure light, heat, and other conveniences for same. In all cases where the printing of official ballots is awarded to a bidder, the board of election commissioners may require the constant guarding of such ballots by a guard of their own selection, at the expense of the contractor, from the beginning of the printing of the same until their safe delivery at the office of said board of election commissioners. Said board of election commissioners shall audit all accounts and claims for salaries, per diem, supplies, printing, stationery, rent and all other costs of administration of this act, and shall be authorized to draw a warrant, signed by the chairman of said board, and attested by its secretary, upon the county treasurer in payment of the same, to be paid out of the county revenue.

Sec.48. In all counties of this state affected by this article the board of election commissioners, clerks of the board, judges and clerks of election and registration and all assistants employed by the board of election commissioners shall be paid as follows: In all general and primary elections embracing the whole county or any office not exclusively a city office, the expense specifically incurred for such election shall be paid by the county; in all city elections the expenses specifically incurred for such election shall be paid by the city; in all towns and villages, incorporated, the expenses specifically incurred for any election for offices solely within such towns or villages shall be paid by such towns and villages. The members of said board of election commissioners as such, and as members of the board of registry as herein provided, shall each receive a salary of two thousand dollars per year and the two bonded clerks of the board shall each receive a salary of $1,600.00 per year, all payable monthly by the county treasurer upon warrants issued by the board of election commissioners and payable out of the county revenue, or any revenue available for that purpose. Assistants and clerks employed by the election commissioners shall receive a salary of $5.00 per day

for the time actually employed and the same shall be paid monthly, upon a certificate of the board to the county treasurer that the services have been rendered."

These two sections of the 1935 Act are almost identical to two sections in the old Act, R. S. Mo. 1929, Sections 10698 and 10699, so that the previous practice in complying with such sections would create a presumption that as to the unchanged provisions no change was contemplated by the 1935 Act.

Another provision which is important in connection with your questions is that part of Section 46 of the new Act which provides as follows:

"All the powers and duties now vested in and required of county clerks and county courts and boards of canvassers pertaining to nominations, primary elections, and elections and election contests in such counties shall hereafter vest in and be required of and be performed by, the board of election commissioners herein provided for in accordance with the provisions hereof."

This provision is identical to a provision in the old law contained in R.S. Mo. 1929, Section 10697, and has been construed by the Supreme Court en banc in the case of State ex rel. Kirchner v. McElhinney, 302 Mo. 564, 258 S.W. 1020 (1924), as follows:

"In express terms it strips county clerks, county courts, and boards of canvassers of every vestige of authority 'pertaining to nominations, elections and election contests.' "

We are aware of no other decisions which might be of assistance, so in the light of the foregoing we shall proceed to rule upon the issues presented in your letter by number.

QUESTION 1. The 1935 Act imposes certain definite duties on the Board of Election Commissioners and directs such Board to perform these duties and to issue warrants for the payment of salaries and expenses in connection therewith, and in view of the language of Sections 47 and 48, and particularly Section 46 as construed by the Supreme Court of Missouri, the County Court and the County Clerk would have no voice in this matter. If the Board of Election Commissioners should act unreasonably or improperly, the bonds which the several commissioners must give for the faithful and honest performance of their duties seem to be the protection contemplated by the Act for the County. (Section 45).

QUESTION II. Section 47 of the 1938 Act authorizes the Board of Election Commissioners to draw a warrant on the County Treasurer in payment of the expenses of administration of the Act, the same "to be paid out of the county revenue". Section 48 authorizes the Board of Election Commissioners to draw warrants payable by the County Treasurer "out of the county revenue, or any revenue available for that purpose". We are unable to discover any provision in the County Budget Law (Laws of 1933, page 340, Sections 1-21-) or elsewhere, requiring the creation or setting apart of any separately named fund for the payment of expenses in connection with the administration of Senate Bill No. 22, and it is our opinion that since all warrants drawn by the Board of Election Commissioners would show on their face and by the signatures thereto that they were in payment of expenses of registration and elections in connection with Senate Bill No. 22, if legally issued, it would be unnecessary for such warrants to state any specific fund or funds against which they are drawn.

QUESTION III. The new Act does not prescribe any method of protesting warrants drawn by the Board of Election Commissioners and it is our opinion that where a protest may legally be made, the formula would be the same as that used for protesting any other warrant.

QUESTION IV. The reasoning in the introduction to this opinion and under Question I hereof provide the answer for your Question IV. A suggested method of co-operation, however, would be to have the Board of Election Commissioners submit to the Budget Officer an estimate of the funds necessary for administering Senate Bill No. 22 during the ensuing year.

QUESTION V. In view of our answer to Question I, Question V must be answered in the affirmative,because the law could hardly be intended to penalize the County Treasurer for doing something which the law requires him to do.

QUESTION VI. The last sentence of Section 47 imposes the duty of auditing accounts and claims in connection with the administration of the Act upon the Board of Election Commissioners. As to cancellation of warrants after they have been honored, the County Treasurer should cancel these warrants in the same manner as he cancels warrants drawn by order of the County Court under the provisions of R. S. Mo. 1929, Sections 12143-12145. It would seem to us that since the Board of Election Commissioners as to warrants drawn by it stands in approximately the same relation to the County Treasurer under the provisions of Senate Bill No. 22, as does the County Court to the County Treasurer under the provisions of Article 8, Chapter 85, of R.S. Mo. 1929, that the Board of Election Commissioners should cancel and preserve its warrants in the same manner as the County Court through the County Clerk cancels and preserves its warrants under

Sections 12146 and 12147.

QUESTION VII. No specific form is imposed by the new Act for warrants, but it is our opinion that it would be proper for warrants of the Board of Election Commissioners to be in substantially the form provided for county warrants by R. S. Mo. 1929, Section 12169, as has been referred to in our answer to Question II above. Of course, the signatories thereto would be the appropriate officials of the Board instead of the officials of the County Court. Even as to County warrants the provisions of Section 12169 would seem merely directory under the ruling in Young v. Camden County, 19 Mo. 309, in which the court at page 311 said:

> "The provisions of the act which have been relied upon by the counsel for the county, are directory to the county courts in issuing warrants, and the chief design of those enactments was, to prevent the making of paper by county courts which could be used as a circulating medium, having the appearance of ordinary bank paper."

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRIMINAL LAW - Unnecessary noise of motorboats.

5-28

May 24, 1935.

FILED
3

Hon. C.Arthur Anderson,
Prosecuting Attorney,
Clayton, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of May 7, 1935, such request being in the following terms:

> "I have had several complaints regarding the unnecessary noise created by motor boats on the Meramec River on Saturday and Sundays. A great many people have homes built on the river and this noise disturbs them greatly.
>
> Do you know of any Section of the Statutes under which we can proceed?"

The only criminal statute which we have been able to discover which might be applicable, and which might justify such a proceeding, is R.S.Missouri, 1929, Section 4247, which provides in part as follows:

> "If any person or persons shall willfully disturb the peace of any neighborhood, or of any family, or of any person, by loud and unusual noise * * every person so offending shall, upon conviction, be adjudged guilty of a misdemeanor."

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

QUO WARRANTO: Whether Attorney General or prosecuting attorney should file action, and when, and under what conditions.

8-22

August 19, 1935.

FILED
3

Hon. C. Arthur Anderson,
Prosecuting Attorney,
Clayton, Missouri.

Dear Sir:

We are in receipt of your letter of August 9, 1935, which is as follows:

> "There has been some dispute as to who can file ouster proceedings against some twenty two different Justices of the Peace appointed by the County Court of St. Louis County.
>
> "I know that it is set out very clearly in the Statutes that the Attorney General or Prosecuting Attorney has the right to file quo warranto proceedings, but as long as the County Court made these appointments, and the County Court is represented by a County Counsellor, I am of the opinion that it is the County Counsellor's duty to file the above named proceedings, and the same must be filed in my name or the Attorney General.
>
> "Kindly give me an opinion on the above as soon as possible.

Section 1618, R. S. Mo. 1929, in part reads as follows:

> "In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney-general of the state, or any circuit or prosecuting

> attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney."

In the case of State ex inf. v. Taylor, 208 Mo. 442, l. c. 451, the Supreme Court of Missouri, speaking with reference to questions raised by your inquiry, said:

> "Now, observe, our statute (R. S. 1899, sec. 4457) charges the Attorney-General of the State and the prosecuting attorneys of the respective counties with the duty of speaking in the name of this sovereign commonwealth, 'in case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise.' In such case, in matters of initiative, they wield the bolt forged by the law, no other hand may; they stand charged with the duty of exhibiting to the court an information in the nature of quo warranto, at the relation of any person desiring to prosecute the same. When such information has been once filed and proceedings commenced in a circuit court at the relation of such person, such prosecuting attorney or Attorney-General steps down from the exclusive stool of duty and responsibility, and, seating himself on a lower and more humble bench of power shared jointly with relator, he may not thereafter dismiss or discontinue such proceeding without his

consent. (Sec. 4457, supra). So much appears from that statute, and the case may proceed with the assumption that the power and duty of the prosecuting attorney to alone use the name of the State in quo warranto come down unimpaired, in full flower, until such time as the information is exhibited, filed and the proceeding commenced; and, with that point once reached, the relator thenceforward (but not before) shares with him the control and disposition of the litigation.

"The statute uses the phrase 'shall exhibit.' It was argued in this court in State ex inf. v. Talty, 166 Mo. 529, that the phrase 'shall exhibit' as therein used 'means that the act itself must be done;' and that the prosecuting attorney had no discretion with respect to the matter, but was bound, as of course, to exhibit the information when requested to do so by a given relator. In disposing of that argument, this court (p. 559, et seq.) said: 'That the word "shall," as generally used, is mandatory may be conceded, but it is a cardinal rule that "the intention of an act will prevail over the literal sense of its terms" (Sutherland on Statutory Construction, sec. 219), otherwise it might lead to absurd consequences, which could but be the result in this case if the statute be construed according to its strict letter. If the statute is to be interpreted in accordance with defendant's contention, the proceeding would be at the mere will or caprice of any person in position to prosecute it, and the Attorney-General, circuit or prosecuting attorney, as the case might be, a figurehead, a mere nonentity, and we are unable to believe

> that any such state of affairs was ever contemplated by the Legislature. The power of determining whether or not the action shall be commenced must exist somewhere, and from the very nature of the writ, its character and purpose, it should rest with the officer who represents the people of the State with respect to such matters."

In the case of State ex rel. v. Hyde, 2 S. W. (2d) 212, l. c. 214, the Supreme Court of Missouri said:

> "It has been held by our Supreme Court that a proceeding of this character is a statutory civil proceeding and that the statutes relative to amending pleadings applies to this character of case. State ex inf. v. Beechner, 160 Mo. 78, 86, 60 S. W. 1110. Also, that after the information is filed at the relation of a private citizen the relator is the real party in interest and the Attorney General or prosecuting attorney becomes a mere instrumentality. State ex rel. v. Long, 275 Mo. 169, 180, 204 S. W. 914.
>
> "The statute itself, section 2066, Stat. 1919, provides that when an information in the nature of a writ of quo warranto to test the right of a person alleged to have usurped an office or franchise has been filed and the proceedings commenced by the Attorney General or prosecuting attorney at the relation of a private citizen, 'the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney.' In State ex inf. v. Heffernan, 243 Mo. 442, at page 450, 148 S. W. 90, 92, it is said, after quoting the above statute:

> "'If the relator is successful, he recovers his costs against the defendant; if he is unsuccessful the defendant recovers his costs against him. From the time of the filing and exhibition of the information, it is a fight between the relator and defendant, in which the state and its officers are disinterested spectators.'
>
> "While the Attorney General or the prosecuting attorney can exercise a discretion when application is made to him by a private individual asking that an information of this character be filed and may refuse to file it, yet, when he has acceded to the request of the party and has filed the information and named the party therein as relator, the statute seems to place further prosecution of the case largely, if not entirely, in the hands of the relator and the officer becomes, as said, 'a disinterested spectator.'"

In the case of State ex rel. v. Long, 275 Mo. 169, l. c. 180, the Supreme Court said:

> "This proceeding was brought under Section 2631, Revised Statutes 1909. The prosecuting attorney, under this section, is clothed with the power to determine the propriety of bringing an action of this character, but after he has exercised his discretion and the suit has been brought, he is not permitted to dismiss or discontinue it without the consent of the individual at whose request it was brought. In short, where the action was instituted not ex officio but upon request, the individual is the real party in interest and the prosecuting attorney

> (State ex inf. v. Taylor, 208 Mo. l. c. 452) an instrumentality. The statute, otherwise construed, would present the anomaly of authorizing the assertion in the courts of a right, and while forbidding the official in whose name it was required to be brought to dismiss or discontinue same, upon his failure or refusal to prosecute it to a final determination, to preclude the real party in interest from so doing. Such a ruling would nullify the statute and limit its effective application to such cases only as are brought by an officer on his own initiative. A reasonable construction of the statute, and one which accords with justice and right, is that where a prosecuting attorney institutes an action of this character upon request, and the court in its discretion permits the same to be brought (State ex inf. v. McClain, 187 Mo. l. c. 412; State ex rel. v. Rose, 84 Mo. l. c. 202), regardless of the attitude thereafter of the prosecuting attorney, the real party in interest may prosecute it to a final determination. This is in accord with that well established rule, consistent with reason, that a statute should be so construed as to render it operative."

It will be noted that Section 1618, supra, provides that when the prohibited acts have occurred which have given rise to the existence of the right to oust, that the duty is placed on the officials to take court action, but such duty to act is by the statute cast on said officials "at the relation of any person desiring to prosecute the same." This implies that someone desires to prosecute such action. When they do so desire, it is the duty of said officials to use their discretion as to permitting the use of their names in the institution of quo warranto suits. If they decide that a particular set of facts justifies such a suit, they are authorized to lend their names to the suit that is instituted at the instance

of an interested party. However, when once instituted, such suit is under the control of the party at whose instance it was instituted.

The county counsellor, as such, does not have authority to file a quo warranto suit, but either he or some other appropriate person "desiring to prosecute the same" may request you, as prosecuting attorney, to institute such suit, and if and when you reasonably deem the suit to be appropriate, such suit may be instituted by you at that person's instance, and thereupon the suit proceeds under the control of such person.

The statute does not make it mandatory on the prosecuting official to file quo warranto proceedings. It makes it his duty to file suit if he is convinced that the facts justify it, and the suit may be either filed at his own relation or at the relation of "any interested person desiring to prosecute the same."

This does not mean that the prosecuting official has the right to arbitrarily refuse to file such suit. If the violation is adequately brought to his attention, it is his duty to act; otherwise, such official would have the right to thwart the enforcement of justice, and this would be a solecism in the law.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

BOARD OF ELECTION COMMISSIONERS ST. LOUIS COUNTY:

BOND OF ELECTION COMMISSIONERS:

Act. of 1935; Bond of $5000.00 required.

9-17

September 17, 1935.

FILED 3

Hon. C. Arthur Anderson
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Attention: John H. McNatt

Dear Sir:

This is to acknowledge receipt of your letter of September 10, 1935, in which you request the opinion of this Department, which letter is as follows:

> "We would like to know what bond is required of election commissioners in this County at this time. We note that in the Laws of Missouri, 1935, page 258 of Section 45, that the amount of bond is specified as $5,000, but under the old law, they were required to make $10,000 bond. We were wondering what bond should prevail for the commissioners in the future."

Laws of Missouri, Session Acts of 1935, at pages 229 to 262, inclusive, provide laws relating to the registration of voters and the holding of elections in all counties of 200,000 to 400,000 inhabitants.

Section 45 of said Act provides for the appointment, in such counties, of four members of a board of election commissioners by the Governor, and said act further provides that,

> "Each commissioner shall give bond to the state in the sum of $5,000.00,

> with security to be approved by the governor, conditioned for the faithful and honest performance of the duties of said office and the care and preservation of the property thereof. Said oaths of office and bonds to be filed at the office of the secretary of state."

This Act had a emergency clause attached thereto and became effective upon the approval by the Governor, namely, April 4, 1935. It is, therefore, our opinion that each commissioner at this time would only be required to execute a bond in the sum of $5000.00.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

CRH:EG

SCHOOL DISTRICTS CONSOLIDATED--SCHOOL FUND--FUND ACCOUNTING--
ANNUAL FINANCIAL STATEMENT: Certain requisites in form and substance on annual financial statement and certain requisites in fund accounting.

6-10

May 31, 1935.

FILED
4

Mr. Lindell F. Bagley
Parma, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated March 6, 1935, which reads as follows:

> "I would greatly appreciate from your office an opinion on the following questions:
>
> "(1). Is it necessary that each and every consolidated school district of this state, through its clerk, to report each year the amount of money in the teachers' fund or in any other fund, when making application for state aid for the ensuing year?
>
> "(2). What is the legal status of a practice of so 'juggling' figures as to not report such remaining monies in one or more of such definite funds?
>
> "(3). Is it a legal practice to build up a reserve in any fund, teachers', sinking, or incidental, and then fail to report in annual statement the fact? Does such practice in any manner affect the amount or conditions of the state aid of the ensuing year?
>
> "(4). Is it legal to use teachers' funds for any other purpose whatever?
>
> "(5). Is it legal to use text-book funds for any other purpose whatever, even for educational supplies in general?
>
> "(6). Is it a legal practice to include janitor work as a part of the regular teachers work, be made a part

of the contract, and then be paid out of the teachers' fund marked as such?

"(7). In case a teacher teaches an entire year without a contract, who is legally at fault, the teacher, the board, or both?

"(8). Do all of the above questions pertain to rural consolidations (wherein there are no high schools) and to high school consolidations in exactly the same manner?"

Section 9360 R.S. Mo. 1929, provides for publication and distribution of a financial statement by all school boards in this State. Said Section reads as follows:

"No member of any public school board of any city, town or village in this state having less than twenty-five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services: Provided, the compensation of the secretary shall not exceed one hundred and fifty dollars, and that the treasurer shall not exceed fifty dollars for any one year; and provided further, that it shall be the duty of each of said boards, and of the boards of directors in other school districts in this state having graded schools, to make and publish, annually, on or before the 15th day of July in each year, in some newspaper published in such school district, and if there be no newspaper published therein, then by written statements posted in five public places in such district, a detailed statement of all receipts of school moneys, when and from what source derived, and of all expendi-

> tures, and on what account; also, the present indebtedness of the district and its nature, and the rate of taxation for all school purposes for the year; which said statement, so required to be made and published, shall be duly attested by the president and secretary of the board, and the secretary shall forward a copy of said report to the state superintendent of public schools at Jefferson City. And any board of education or board of directors who shall fail, refuse or neglect to order such statement to be made, and any officer of said board who shall fail, refuse or neglect to prepare such statement and publish and forward the same, as required by the foregoing provisions of this section, when ordered by such board, shall be guilty of a misdemeanor and punished by a fine not to exceed one hundred dollars.

Section 9358 R. S. Mo. 1929, provides for State aid in consolidated school districts, and how it is to be computed for distribution. Said Section reads as follows:

> "Whenever any consolidated school district votes one hundred cents on the one hundred dollars assessed valuation for teachers' and incidental purposes and the proceeds of said tax together with the estimated amount from county, township, and state funds and cash on hand amount to less than fifty dollars per pupil in average daily attendance during the preceding year for teachers and incidental expenses, the state superintendent of schools shall each year before apportioning the public shhool fund set aside and apportion to each such district a sum sufficient to enable said district to expend fifty dollars per year per child in average daily attendance. Provided, that

when any consolidated school district votes sixty-five cents on the one hundred dollars assessed valuation for teachers and incidental purposes and the proceeds of said tax together with the estimated income from county, township and state fund and cash on hand amounts to less than forty dollars per pupil in average daily attendance during the precdding year for teachers and incidental expenses, the state superintendent of schools shall each year before apportioning the public school fund set aside and apportion to each such district a sum sufficient to enable said district to expend forty dollars per year per child in average daily attendance: Provided, the district maintains an approved high school of at least the third class and gives an approved course of at least one year in agriculture. The form of requisition for such state aid to be determined by the state superintendent of public schools. Said aid granted under this section shall be in lieu of all and any other form of state aid except aid for teachers-training and vocational education. The incidental expenses referred to in this section shall include only the general incidental expenses of the district. Aid will not be granted for extensive repair work or for the remodeling of buildings. State aid granted to consolidated districts during the year 1925 will be based upon the provisions of this section. The average daily attendance for the first apportionment of school funds to any consolidated district receiving state aid under the provisions of this section shall be computed in the following manner: As soon as said consolidated district is formed the enumeration shall be taken and the average daily attendance for the preceding year shall

be found by multiplying the enumeration of said district by the ratio obtained by dividing the average daily attendance for the entire average daily attendance for the entire state by the total enumeration of the state. Said ratio to be determined by the state superintendent of public schools."

Laws of 1931, page 340, Section 13, provides:

"The board of directors of each and every school district in this state is hereby empowered and required to maintain the public school or schools of such district for a period of at least eight months in each school year. In order that each and every district may have the funds necessary to enable the board of directors to maintain the school or schools thereof for such minimum term and to comply with the other requirements of this act, it is hereby provided that when any district has legally levied for school purposes (teachers' wages and incidental expenses) a tax of not less than twenty cents on each one hundred dollars of the assessed valuation of property therein, such district shall be allotted out of the public school fund of the state an equalization quota to be determined by adding seven hundred and fifty dollars for each elementary teaching unit to which the district is entitled according to the provisions of section 14 of this act, one thousand dollars for each high school teaching unit to which the district is entitled according to the provisions of section 14 of this act, and the amount approved for tuition and transportation according to the provisions of section 16 of this act, and then subtracting from the total, which total shall be known

as the minimum guarantee of such district, the sum of the following items: The computed yield of a tax of twenty cents on each one hundred dollars ($100) of the assessed valuation of the property of the district, the sum received the preceding year from the county and township school funds, and the sum estimated to be received for the current year from railroad, telegraph, utility and all other taxes based on assessments distributed by the state board of equalization, plus the county foreign insurance fund for the school year 1932-1933 only. The state superintendent of schools is hereby empowered, and it shall be his duty, on or before the 15th day of August, 1932, and on or before the 15th day of August of each year thereafter, to apportion the public school fund of the state as follows: He shall calculate an equalization quota, as hereinbefore defined, for each and every district entitled to such quota. For each and every district not entitled to an equalization quota he shall calculate a teacher quota in accordance with the basis provided in section 9257, Revised Statutes 1929, and an attendance quota in accordance with the basis provided in section 9257, Revised Statutes 1929, at the rate of one and three-tenths (1.3) cents a day. He shall apportion to each and every district for which an equalization quota was calculated the amount as hereinbefore provided; and he shall apportion to each and every district not receiving an equalization quota the teacher and attendance quotas as above provided. On or before the 15th day of March, 1933, and on or before the 15th day of March of each year thereafter, he shall determine the amount of the public school fund

in the state treasury as of the last day of the preceding February, and from this amount he shall apportion to each and every district for which an equalization quota was calculated at the time of the apportionment made on or before the 15th day of August last preceding the remainder of such quota, if any remainder there be. He shall also apportion to each and every district for which teacher and attendance quotas were calculated at the time of the apportionment made on or before the 15th day of August last precdeing the remainder of such quotas, if any remainder there be, or such part of such remainder as the funds available for apportionment will permit: Provided, that special state aid shall continue to be apportioned as now or hereafter provided by sections 9220, 9223 and/or 9431 Revised Statutes 1929: Provided further, that the state superintendent of schools shall at the time of making the annual apportionment, apportion to the various districts their allotments of building, transportation and/or tuition aid as provided in this act. Provided, however, in the event there should be insufficient funds to carry out the minimum guarantee of seven hundred fifty dollars ($750) for each elementary teaching unit and one thousand dollars ($1,000) for each high school teaching unit, and the teacher quota and the attendance quota of one and three-tenths cents (1.3) for such districts as do not participate in the minimum guarantee, all school funds to be apportioned by virtue of the provisions of this act shall be apportioned to all districts in pro rata proportions, paying such percentage of each and every one of these apportionments ss the money available in the public school fund will permit: Provided, further, that after all apportionments hereinbefore provided have

been paid in full, the state superintendent of schools shall make an additional apportionment of one hundred fifty dollars ($150) for each elementary teaching unit in which a teacher having a state certificate is employed, one hundred dollars ($100) for each such unit in which a teacher having a first grade certificate is employed; seventy-five dollars ($75) for each such unit in which a teacher having a second grade certificate is employed, fifty dollars ($50) for each such unit in which a teacher having a third grade certificate is employed and two hundred dollars ($200) per high school teaching unit to each and every district to which an equalization quota has been apportioned, and an additional attendance apportionment of one and six-tenths cents (1.6) per pupil day based on total days attendance of preceding year to each and every district to which teacher and attendance apportionments have been made. In the event the amount of money in the public school fund is not sufficient to pay these quotas in full the state superintendent of schools shall pay such percentage of both the equalization and attendance quotas as the amount in thepublic school fund will permit: Provided, that until such time as the above mentioned additional apportionments are paid in full, any consolidated district now in existence and operating under the provisions of section 9358 Revised Statutes 1929, may elect to receive state aid under the provisions of this act or under the provisions of said section 9358; but if said consolidated district elects to receive aid under the provisions of said section 9358, said district shall thereby waive all claim to priority of payment as provided in said section. "

These last two provisions of law give to consolidated districts the option of receiving State aid under Section 9358, supra, or receiving State aid under the equalization quota plan set out in Section 13. We are informed that the School District of Parma has not qualified itself to receive State aid by virtue of Section 13, supra.

The Parma School District is entitled to receive State aid only by virtue of the old consolidated aid plan set out in Section 9358, supra.

Since your first question is hypothetical we will broaden the scope of our conclusion so as to answer your question as to each and every consolidated school district in the State.

CONCLUSION TO QUESTION ONE.

We are of the opinion that for purposes of obtaining State aid, the detailed annual financial statement required by Section 9360, supra, must be a statement which sets out in detail all items of expense necessary to inform the State Superintendent of Schools of sufficient facts upon which to compute the State aid which the particular district is entitled, under one or the other methods of computation provided by law.

We are further of the opinion that since the consolidated district of Parma receives State aid under the method of computation set out in Section 9358, supra, said Section and Section 9360, supra, should be construed together and the school board must comply with the legislative intent of both Sections. One Section gives force to the other Section. The Legislature intended that the apportionment of State aid payable to consolidated school districts entitled to State aid by virtue of Section 9358 must be calculated by the State Superintendent of Schools upon the basis of how much money, as revealed in the annual statement, is on hand in the teachers' and incidental funds. Without knowledge of the amount on hand in these funds published in the annual statement, there is no way that the statutory method of calculation can be executed by the State Superintendent of Schools. Without this knowledge and the

calculation pursuant to this knowledge, there is no way that the consolidated school can get the State aid provided in the Statute.

By the process of computation set out in the Statute, the amount of money available in teacher and incidental funds is to be counted against the district as a deduction in calculating the State aid. In other words, the apportionment would be less to the extent of money on hand, as revealed in the statutory annual statement.

This brings us to our final conclusion. We are of the opinion that the annual statement of condolidated schools, who qualifying to receive State aid under Section 13, surpra, need not report to the State Superintendent of Schools, as a condition precedent to State aid, the amount of money in the teacher, incidental or other funds, as this knowledge is not necessary in computing State aid provided provided under Section 13, but the annual statement of consolidated schools who qualifying under Section 9258, supra, must necessarily report to the State Superintendent of Schools, as a condition precedent to State aid, the amount of money in the teacher and incidental funds as this knowledge is absolutely necessary in computing the State aid to which they be entitled.

* * * * * * * * * * * * * * * * *

QUESTION TWO.

Fund accounting by school boards is provided for in the Statutes.

Section 9233 R. S. Mo. 1929, provides:

> "All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected; but the income from state, county and township funds shall be applied only to the payment of teachers' warrants, issued by order of the board to legally qualified

teachers for services rendered according to law. No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to distribution of such funds in accordance with section 9257, and no school warrant shall bear interest."

Section 9312 R. S. Mo. 1929, provides:

"The warrants thus drawn shall be in the following form, and shall be signed by the president of the board and countersigned by the district clerk:

TEACHERS' FUND.

$_____ No._____

Treasurer of_____County, Missouri:

Pay to _____, or order, for services as teacher in district No. _____, _____ dollars, out of any funds in your hands for the payment of teachers' wages belonging to said district.

Done by order of the board, this _____day of _____, 19___.

_____,president. _____,clerk.

INCIDENTAL FUND.

$_____ No._____

Treasurer of_____county, Missouri:

Pay to_____, or order, the sum of _____, dollars, for_____furnished district No. _____, out of any funds in your hands for the payment of incidental expenses belonging to said district.

Done by order of the board, this _____day of_____, 19___.

_____,president _____,clerk.

BUILDING FUND.

$_____ No._____
Treasurer of_____county, Missouri:
Pay to_____, or order, the sum of_____dollars for_____furnished in the erection of a schoolhouse in district No._____, out of any money in your hands belonging to the building fund of said district, and not otherwise appropriated.
Done by order of the board, this _____day of_____, 19___.
_____,president. _____,clerk.

The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from the taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'teachers' fund;' the money derived from taxation for incidental expenses shall be credited to the 'incidental fund;' all money derived from taxation for building purposes, from the sale of school site, schoolhouse or school furniture, from insurance, from sale of bonds, from sinking fund and interest, shall be placed to the credit of the 'building fund;' and all moneys not herein specified that now belong to any school district, or that may hereafter be received by such school districts, shall be placed to the credit of the 'teachers' fund' of such school district. No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; and each and every warrant shall be paid from its appropriate fund, and no partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant; Provided, that the board of

> directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property: Provided further, that in the event of a balance remaining in the building fund after the purpose for which said fund was levied is accomplished, the said board shall have the power to transfer such unexpended balance to the incidental fund: Provided further, that by a majority vote of the school board tuition fees may be used to liquidate indebtedness accrued in the building fund."

In the case of Consolidated School District No. 6 v. Shawhan, 273 S. W. 182, the school district brought suit against the directors for diverting money in the teachers' fund to other purposes and the court held that the directors were personally liable. The Court construed the two statutes above set out and said at l. c. 184:

> "Section 11223 sets forth the form of warrant to be issued by school boards, a separate form for teachers' fund, for incidental fund, and for building fund, and provides that all money derived from the state, county, and township funds, and all money derived from taxation for teachers' salaries, and all tuition fees, shall be placed to the credit of the teachers' fund; that money for incidental purposes shall be kept in the incidental fund and all money for building purposes in the building fund. Further, this section prohibits the honoring of any warrant by any county treasurer unless such warrant be in proper form and drawn upon the proper fund; and the provision is made that, in case of emergency, transfers back and forth of the incidental and building fund may be made by the board."

CONCLUSION TO QUESTION TWO.

We are of the opinion that Section 9233 and 9312 specifically require fund accounting of money in hands of school boards and these sections provide the specific funds to which money should be credited. The law requiring fund accounting is mandatory, and any juggling of school funds or falsifying of reports is such conduct which makes the members of the school board personally liable for losses to any person resulting by reason of misapplication of funds.

* * * * * * * * * * * * * * * * *

QUESTION THREE.

This question is answered by the statutory citations and cases cited in questions one and two.

CONCLUSION TO QUESTION THREE.

We are of the opinion that the annual statement required in Section 9360, supra, requires that the board publish and submit to the State Superintendent of Schools a detailed financial statement of receipts and expenditures and a reserve in any statutory fund is that which is left when the expenditures be substracted from the receipts. The annual statement, to comply with the statutory form, is attested as a true statement by the president and secretary of the board.

It is elemental law that where the board makes a false annual statement for any purpose, such conduct is an illegal practice and a crime.

We are of the opinion that where a school board has been guilty of such practice, it is within the powers of the State Superintendent of Schools to deplete the State aid to such a district in the amount

of any fraud which was perpetrated by reason of the false statement.

* * * * * * * * * * * * * * * * *

QUESTION FOUR.

This question is answered by the statutory citations in question number two.

CONCLUSION TO QUESTION FOUR.

It is our opinion that it is illegal to use teachers' funds for any other purpose

* * * * * * * * * * * * * * * * *

QUESTION FIVE.

Laws 1931, page 345, Section 18a. provides for free text books and the concluding sentence is as follows:

> "Provided, that if free textbooks have not been authorized by a vote of the district or if there remain a balance in said fund after said free textbooks have been provided, the funds received from the county foreign insurance tax or the remainder thereof shall be transferred to the teachers fund."

CONCLUSION TO QUESTION FIVE.

It is our opinion that Section 18a., supra, permits the school board to transfer any balance in free textbook fund to the teachers' fund.

It is our opinion that it would be illegal to use textbook funds for other than textbooks, supplemental textbooks, library or reference books within the needs of the district. There is nothing in the free textbook law that would authorize this fund to be used for educational supplies in general.

* * * * * * * * * * * * * * * * * * *

QUESTION SIX.

It is a customary procedure with many rural boards in Missouri to require the teachers to do the janitorial work as a part of the consideration of their teachers' contract. Apparently rural boards desire, in many instances, to shift the janitorial responsibility to the teachers.

CONCLUSION TO QUESTION SIX.

There is nothing illegal in including the janitor's work as a part of the regular teacher's work in contracting with teachers, and when to pay the teacher out of the teachers' fund on such a contract.

* * * * * * * * * * * * * * * * * * *

QUESTION SEVEN.

Your question is as follows: "In case a teacher teaches an entire year without a contract, who is legally at fault, the teacher, the board, or both?" This question assumes a hypothetical state of facts and then assumes a conclusion that either the teacher, the board, or both are at legal fault.

In the case of Wilson v. Board of Education 63 Mo., 137, the plaintiff, a teacher, brought action against the School Board for salary, alleging a breach of contract.

The plaintiff had proposed to work for the Board for ten months at a stipulated salary. The Board made an order on their minutes that plaintiff was to be considered duly employed upon entering into a written contract which was never entered into, but the judgment of the Trial Court allowing plaintiff his proposed salary was affirmed and the Court said at l. c. 141:

> "But, under the law applicable to the defendant, the contract was valid and binding without being reduced to writing, and it does not appear to have been a part of the agreement between the plaintiff and the committee representing the board, that such agreement should not conclude the parties and become a binding contract until it was reduced to writing. The simple direction to the secretary on August 16th, to draw articles of agreement between the plaintiff and the board pre-supposes that an agreement had been entered into, the terms of which were known to the secretary, and the only agreement known to the secretary of the board, according to the plaintiff's testimony, was one for ten months. It seems to us fairly inferable from the whole testimony for the plaintiff, that he was employed for ten months, and that the board thought it formal and proper that the contract should be in writing, but did not intend its reduction to writing as a condition upon which only it was to take effect."

CONCLUSION TO QUESTION SEVEN.

Under the meager facts in your request, including conclusions, it does not follow that there is a legal fault in either teacher or the board.

Having none of the facts before us we are in no position to make an assumption that a teacher taught a year without teaching under contract. In the Wilson case, supra, such was the position taken by defendant Board, but the Supreme Court held otherwise. The fact that a teacher teaches a year pre-supposes a binding contract and we are

in no position to assume otherwise in this opinion. We are sorry, but since you have not presented the facts which lead up to the teacher teaching for one year, we are unable to say that there be a faulty contract of employment as suggested in your request.

* * * * * * * * * * * * * * * * * * *

QUESTION EIGHT.

CONCLUSION TO QUESTION EIGHT.

We find nothingin the answers to above questions that would apply differently to a consolidated district without a high school than to one w th a high school.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

CORPORATIONS - Entitled to certificate to commence business after obtaining corporate charter and recording same.

June 6, 1935

6-14

FILED
4

Honorable James A. Barks
Deputy Commissioner
Corporation Department
Secretary of State's Office
Jefferson City, Missouri

Dear Sir:

We have your request of May 15, 1935 requesting an opinion as to whether or not a certificate to do business should be issued to the "Blind Broom Exchange", a corporation.

Your request is as follows:

"On the 7th of January, 1935, Articles of Incorporation of the above named company were sent to this office and the same came under the attention of Mr. Wm. F. Goodman. He decided that they met the requirements of the statute and a charter was issued thereon.

"A short time later Mrs. Mary E. Ryder, Executive Director of the Missouri Commission for the Blind, wrote a letter to this department stating that she wanted to object to the incorporation of the above named company. A copy of that letter dated January 28th is attached herewith.

"The copies of the Articles of Association, together with certificate from the Secretary of State, were recorded in pursuance to statute and sent to this office with check for $1.50 to cover the fees. Mr. Goodman returned the same under date of February 4th.

Prior thereto he had advised Harzfeld, Beach, Steeper and Gordon of the protest on the part of the Missouri Commission for the blind and stated in his letter above referred to that 'the department will be glad to file the affidavit in question with the understanding that the said corporation will immediately file an affidavit for Change of Name'.

"On January 11th Mrs. Ryder addressed to this department in this connection a letter, copy of which is also attached. We are also attaching copy of another letter by Mrs. Ryder dated January 22nd.

"A number of letters were directed to Mr. Goodman by J. A. Harzfeld explaining the attitude of Mr. Catell and his new corporation. The business is carried on by means of solicitors and printed matter which is handed to prospective customers. It is headed 'BLIND PEOPLE NEED A Market For Their Products'. It lists the products to be sold in two groups. Group 1 names 11 different articles under the heading 'MADE BY THE BLIND'. Group 2 lists 36 articles under the heading 'NOT MADE BY THE BLIND'. It concludes in the following language: 'Our girls call regularly, once a month. Look over this list carefully. Will you give us an order when she calls you the next time? Read OUR TASK, the monthly bulletin of the Blind Broom Exchange. Sample copies free. Subscription 50¢ a year.'

"We are enclosing copies of the letters referred to herein and a copy of the Articles of Agreement for your consideration. There is no provision made under the purposes of the corporation for the publication or distribution of the printed matter referred to herein.

#3 - Honorable James A. Barks

> "The question is strictly a legal one -- whether or not, over the objections of Mrs. Hyder for the Missouri Commission for the Blind, the department having granted a charter of incorporation, whether it is now compelled to issue the certificate to commence business, due to the discovered name irregularity granted under said charter."

From your letter, it appears that the Articles of Association have been duly filed in your office, a corporation charter issued thereon, and the same filed in the recorder's office and the required affidavit of the incorporators has been filed with you, showing such filing in the recorder's office.

Section 4955, R. S. Mo. 1929, relating to manufacturing and business companies, provides as follows:

> "Every corporation formed under this article before it commences business shall file an affidavit with the secretary of state, made by its directors showing that a certified copy of its certificate and articles of association have been filed in the recorder's office as is required by section 4934, and showing that ten or more per cent of the authorized par value shares of stock has been subscribed and paid up in money, property or labor, and if any part of the capital stock is paid in property, the affidavit must give an itemized description of such property, setting out the cash value of each item thereof, and such itemization shall show:
>
> (a) If such property be real estate, the exact description by metes and bounds and location of such real estate, and the actual cash value of each tract;

> (b) If such property be personal property, such itemization shall give the location of each class of personal property and the actual cash value of each class of such personal property. Upon the filing of such affidavit the secretary of state shall issue a certificate to said corporation authorizing it to commence business: PROVIDED, nothing herein can be construed as to prevent the corporation from organizing and financing and getting ready to do business as contemplated in its articles of association; and provided, if in the articles of association it is shown what per cent of the authorized capital stock has been subscribed and paid up, then that part of the affidavit referring to the payment of the capital stock may be omitted."

Since corporate existence commences at the time of filing the Articles of Association in duplicate with the Secretary of State, and the issuance of a certificate of incorporation, Williams v. Everett (1917) 200 S. W. 1045, and if the Articles of Incorporation and the certificates have been recorded as provided in Section 4934, R.S. Mo. 1929, then under Section 4955, upon the filing of such affidavit, the Secretary of State shall issue a certificate to said corporation authorizing it to commence business.

It is, therefore, the opinion of this office that the "Blind Broom Exchange" is entitled to a certificate to commence business as a corporation.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

COSTS: Supplemental costs bill in a criminal case.

June 24, 1935.

Hon. Gilbert Barlow,
Prosecuting Attorney of
Harrison County,
Bethany, Missouri.

FILED
4

Dear Sir:

A request for an opinion has been received from you under date of June 12, 1935, such request being in the following terms:

"In May or June, 1933 the case of the State of Missouri vs. Daryll Billyard was prosecuted and tried in Harrison County, Missouri for murder and acquitted. On June 29, fee bill was sent to the State of Missouri in payment and the claim was paid August 11, 1933.

During the trial a writ of Habeas corpus ad testificandum by the Circuit Court and Sheriff W. H. Webb and one guard was sent to Jefferson City to bring back to testify in the case. They brought back Red Shepard, confined in the penitentiary for life in connection with this case, and George Cramer, confined in the penitentiary for life, convicted in another murder case. They were all confined in the County Jail at the same time. Mr. Webb and guard brought them up and took them back. Webb, the Sheriff's claim of $89.20 was afterwards paid through the County Court. Leland McCollum, the guard, one trip -- $44.60 has not been paid. The claim was filed in the County Court for the May term and I advised the County Court that this claim should have been paid as other costs in the case and that the claim of W. H. Webb, Sheriff, should have been paid as other costs in the case. I do not know why these items of costs were not entered in the fee bill theretofore sent in. I was not Prosecuting Attorney at that time.

I think that the Sheriff's bill of $89.20 was erroneously paid by the County and should have been taxed as cost in the case with the fee bill. Could the County be reimbursed for that erroneous payment and Leland McCollum, the guard, be paid by a supplement fee bill made out and

sent to the State? Please advise me and if necessary I will have the clerk make up an additional fee bill."

I

WRIT OF HABEAS CORPUS AD TESTIFICANDUM

R. S. Missouri, 1929, Section 1745, provides as follows:

"Courts of record, and any judge or justice thereof, shall have power, upon the application of any party to a suit or proceeding, civil or criminal, pending in any court of record, or public body authorized to examine witnesses, to issue a writ of habeas corpus, for the purpose of bringing before such court or public body any person who may be detained in jail or prison, within the state, for any cause, except a sentence for felony, to be examined as a witness in such suit or proceeding, on behalf of the applicant."

In the case of Ex Parte Marmaduke, 91 Mo. 228, 4 S.W. 91 (1886), the court held that a Circuit Court had no jurisdiction to issue a writ of habeas corpus ad testificandum for the purpose of securing the attendance of a witness in the State Penitentiary under a sentence for felony. The court said:

"The power of the legislature to provide that all persons convicted of felony shall forever be disqualified, is undisputed, and, inasmuch as the greater includes the less, their power to provide that such persons shall not, for the time they are undergoing sentence of imprisonment in the penitentiary, be taken therefrom into the various courts of the state, logically follows and is equally indisputable, and said section 4031 does nothing more than this." 91 Mo. 241.

However, in the case of State ex rel. Rudolph v. Ryan, 327 Mo. 728, 38 S.W. (2d) 717 (1931) that case was overruled, and the Supreme Court in referring to Section 1745 said:

"If by this section it was intended to limit the use of the writ, the section is, to that extent, unconstitutional. As stated, the Constitution authorizes circuit courts to issue the writ. It follows that the Legislature is without authority to limit its use." 327 Mo. 731.

Thus, under the present state of the law, a Circuit Court does have the power to issue such a writ for the purpose of compelling the attendance of a witness who is serving in the State Penitentiary under a felony sentence, and if such a writ is issued by the Circuit Court, the cost, legally computed, of securing the attendance of a witness under such a writ, would be as much a part of the costs of the case as any other fees.

II

LIABILITY FOR COSTS

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state;" **R. S. Missouri, 1929, Sec. 3828.**

III

SUPPLEMENTAL BILL OF COSTS PREVIOUSLY OMITTED

R. S. Missouri, 1929, Section 3844, provides as follows:

"When the clerk shall send a bill of costs to the state auditor or county court, as provided in the next preceding section, he shall expressly state in his certificate that he has not at any previous time certified or sent a copy of the same bill, or part thereof, for payment: Provided, that if the clerk shall, by oversight or mistake, fail to include any costs properly chargeable against the state or county in any fee bill, he may make out and present, as hereinbefore provided for making out bills of costs, a supplemental bill for the costs so omitted: Provided, that the clerk shall in no case charge or receive any fee or fees whatsoever for the issuance of such supplemental fee bill."

Thus, a supplemental costs bill certified to the State Auditor for payment by the Judge and Prosecuting Attorney, in compliance with Section 3844, can be used to secure payment from the State Auditor of costs omitted from the original bill of costs by oversight or mistake. Such a supplemental costs bill must be exhibited to the State Auditor within two years after the final determination of the prosecution, as they are claims against the State within the meaning of R. S. Missouri, 1929, Section 11416, and under the rul-

ing of the Supreme Court of Missouri in the case of State ex rel. Johnson v. Draper, 48 Mo.56 (1871), in which the court denied a writ of mandamus against the State Auditor to pay supplemental costs bills exhibited to him over two years after the close of the cases in which such costs were taxed. The court in the course of its opinion said:

> "It is admitted that these supplemental costs bills were not presented until after the expiration of two years from the final determination of the prosecutions, and I can see no reason for excluding this class of claims from the operation of the statute. The language is general, and if the statute should be held not to apply to the claims of those interested in costs bills, I know not whose should be included, or how to fix any rule for enabling the auditor to decide what must be presented within two years, or what may lie by for an indefinite period." 48 Mo. 58.

If the acquittal in your case was in May or June, 1933, it may be too late to secure payment from the State Auditor, as the two years may have elapsed since the case terminated. However, if the claim can be presented within two years, since the State is required by statute to pay the costs in a case of the kind under consideration, it would seem that the costs in the supplemental bill should include all legitimate costs which the State has not yet paid, and if the County has already advanced part of such costs to the Sheriff, the County will not be obliged to pay such Sheriff again such amount, but would be reimbursed for its advance.

In conclusion, it is our opinion that all costs authorized by statute which are incurred in a criminal capital prosecution in which there is an acquittal, are payable by the State, and where a part of such costs is omitted by oversight or mistake from the original bill of costs paid by the State Auditor, a supplemental bill of costs, if certified in the manner provided in R. S. Missouri, 1929, Section 3844, may be presented to the State Auditor for payment, but must be presented within two years after the final determination of the prosecution.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

TAXATION: Various questions concerning certificate of purchase under Jones-Munger Act.

November 19, 1935. 11-20

FILED
4

Honorable Sam A. Baker
Collector of Revenue
Bollinger County
Marble Hill, Missouri

Dear Mr. Baker:

We acknowledge receipt of your letter of November 8, 1935, wherein you request an opinion of this office on a number of problems. We shall deal with the problems in the order in which they are presented.

I.

> "Does the owner have any right to move either fences, timber standing on land, or buildings, from premises, after a certificate of redemption has been issued to another on the premises, or would he have to redeem the land first?"

In reply to the above inquiry we advise that on April 6, 1935, this office issued an opinion to Honorable G. Logan Marr, Prosecuting Attorney Morgan County, wherein the following conclusion was reached:

> "It is accordingly the opinion of this Department that the purchaser of a certificate of purchase at a tax sale held under Senate Bill 94, page 425, Laws of Missouri, 1933, receives no title to the land involved until the executionof the deed contemplated by that law, and that under the circumstances described in your request, to-wit, that the timber is being removed by the

> owner for the purpose of raising funds to redeem the land from the tax sale, the holder of the certificate of purchase is without remedy at law to prevent the owner from severing and removing the timber from the land involved."

We herewith enclose to you a copy of this opinion for your examination.

Accordingly, it would appear that a certificate holder would have no remedy at law to prevent the owner from removing timber, fences or buildings from the premises between the date of sale and the time in which the purchaser could obtain a deed. In the event the improvements constitute a very substantial part of the value of the premises it is entirely possible that the court of equity might afford the certificate owner some relief. This would depend upon the facts in the exact case involved.

II.

> "Who is entitled to collect rent off of premises which are rented by the month, the owner, or the purchaser at the sale? If the latter when does he have the right to begin collection of rent?"

Section 9954a, page 434, Laws of Missouri 1933, provides in part as follows:

> "The purchaser of any tract or lot of land at sale for delinquent taxes, homesteads excepted, shall at any time after one year from the date of sale be entitled to the immediate possession of the premises so purchased during the redemption period provided for in this act, unless sooner redeemed:* * * * *"

By this provision the purchaser of the certificate is entitled to possession of the premises after one year from the date of the sale, provided it is not the taxpayer's homestead. If a homestead, the purchaser is not entitled to possession until he has obtained title under other provisions of the act. In the event it is not a homestead, as the law allows him possession of the tract after one year, he would logically be entitled to receive the rent therefrom. In respect to this inquiry we direct you to a further provision of this section which reads as follows:

> "Provided further, * * *the rights of any occupant of any tract or lot of land not liable to pay taxes thereon nor such occupant's interest in any planted, growing or unharvested crop thereon* * **"

shall be prejudiced.

And also the provisions of Section 9954b, page 435, Laws of Missouri 1933, reading as follows:

> "Any purchaser at delinquent tax sale of any tract or lot of land, his heirs or assigns, who takes possession of any tract or lot of land within the redemption period shall be required to pay the taxes subsequently assessed on such tract or lot of land during the period of occupancy and within the redemption period, and upon failure so to do, ~~of he~~ he commit waste thereon, such purchaser, his heirs or assigns, shall forfeit all rights acquired by his certificate of purchase, so far as the tract or lot of land taken possession of is concerned."

III.

> "Has the holder of a certificate of purchase the right to take out insurance in his favor on the buildings on premises on which his certificate attaches, up to the amount of his interests therein?"

The foregoing problem is one which is not free from doubt and cannot be determined until the courts have actually passed upon it. There is considerable doubt as to the existence of an insurable interest. However, if at the time the insurance is applied for a full revelation of the situation of the parties is made to the insurance company the Courts would undoubtedly hold that the company was estopped to deny an insurable interest. We have not gone into this matter in detail for the reason that it has no bearing upon the duties of your office and we are not authorized under the law to advise you except as to the matters which have a direct bearing upon your own duties.

IV.

"Who is entitled to the rent corn from land occupied by tenant, the owner or the holder of the certificate of purchase? How as to this years' crop now standing in the field? How as to next years' crop?"

This question is in general terms answered in our answer to your question number two. The holder of the certificate is not entitled to possession of the land until one year from the date of sale, therefore, he has no interest whatsoever in the rent accruing to the owner during that first year. Unless the certificate holder elects to take possession of the property under Section 9954a, he has no interest in the crop standing on the field or to be planted, or if it is a cash rental in the cash rental therefrom. His only rights are as set up by Section 9954a, which reads in part as follows:

"* * *any owner or occupant of any tract or lot of land purchased may retain possession of said premises by making a written assignment of, or agreement to pay, rent certain or estimated to accrue during such redemption period or so much thereof as shall be sufficient to discharge the bid of the purchaser with interest thereon as provided in the certificate of purchase* * * * * * * * * * Any rent collected by the purchaser, his heirs or assigns, shall operate as a payment upon the amount due the holder of such certificate of purchase, and such amount or amounts, together with the date paid and by whom shall be endorsed as a credit upon said certificate, and which said sums shall be taken into consideration in the redemption of such land, as provided for in this act.* * **

In the event the certificate holder elects to demand possession of a premises and the owner elects to assign to the certificate holder the rent which may become due, such certificate holder must credit the rent received upon the certificate of purchase. It should be remembered that this has no application in the event the premises is a homestead, and in no event applies during the first year after date of sale.

V.

"Who would have the right to rent premises not now occupied but to be rented for next year, the owner or the certificate holder?"

The question is answered by what has been said under questions two and four of this communication. During the first year after the date of sale the certificate holder has no right whatsoever in the possession or rental of the premises whether occupied or unoccupied. During the second year, in the event the premises is not a homestead, the certificate holder has the right to possession unless the owner enters into the agreement in writing hereinbefore referred to. The right of possession contemplates also the right of renting the premises and receiving the proceeds therefrom, which of course must be credited as hereinbefore stated.

VI.

"Has the county court the right to compromise taxes on land after it has been offered for sale the first time, where there was no sale?"

The power of the County Court in the compromise of taxes is set forth in Section 9950, page 427, Laws of Missouri 1933. This section reads as follows:

"Whenever it shall apparr to any county court, of if in such cities the register, city clerk or other proper officer, that any tract of land or town lot contained in said 'back tax book' or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon, as charged in said 'back tax book' or recorded list of delinquent land and lots in the collector's office, or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the said court, or if in such cities the register, city clerk or other proper officer, to compromise said taxes with the owner of said tract or lot, and upon payment to the collector

> of the amount agreed upon, a certificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state and all taxes due thereon, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office; and in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due, inproportion as to the amount received bears to the whole amount charged against such tract or lot."

By virtue of the foregoing statute it appears that the exercise by the County Court of their power of compromise of taxes depends upon a showing or at least a belief that the land will not sell for the amount of the taxes, interest and costs. The fact that the land had once been offered and had not brought the amount of taxes, penalties and costs could be considered by the Court in determining whether or not the land would at the next sale bring a sufficient amount to pay the taxes, penalties and costs which would then be due. There is nothing in this section restricting the power of the County Court to cases involving land not yet offered for sale. In the absence of such a limitation, we must construe this section to effect the purpose for which it was enacted, to-wit, the obtaining of the greatest amount of revenue possible at the least possible expense.

It is therefore our opinion that the County Court has the right to compromise taxes on land after the tract has once been offered for sale but no bid sufficient to pay the amount of taxes, penalties and costs received.

VII.

"If the owner of land wants to pay the taxes on land after it has once been offered for sale, does he pay the costs which would have attached in case of sale?"

Section 9952a, page 430, Laws of Missouri 1933, provides in part:

"* * *provided, however, delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor.* * * *"

This provision is specific authority for the County Collector to receipt for taxes, penalties and interest on any tract up until the certificate for the same is actually sold, so that in the event a tract is once offered for sale and not sold, the owner may pay the taxes by paying the amount due at the date of sale, which includes advertising fees and all other costs plus penalty interest of one per cent per month beginning in January of the following year.

VIII.

"We have issued our certificates to bear interest at 10% per year. In the event of redemption, as we have now some applicants to redeem, does the owner only pay 10% for the time only during which the certificate of purchase was outstanding, or would he have to pay the whole 10% for any part of a year?"

We refer you to Section 9953d, page 433, Laws of Missouri 1933, which provides in part as follows:

"* * *Such certificate of purchase shall also recite the name and address of the owner or reputed owner if known, and if unknown then the party or parties to whom each tract or lot of land was assessed, together with the address of such party, if known, and shall also have incorporated therein the name and address of the purchaser. Such certificate of purchase shall also contain the true date of

> the sale and the time when the purchaser will be entitled to a deed for said land, if not redeemed as in this act provided, and the rate of interest that such certificate of purchase shall bear, which rate of interest shall not exceed the sum of ten percent per annum.* * * *"

Also, Section 9956a, page 437, Laws of Missouri 1933, which provides in part as follows:

> "* * *By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption.* * * *"

By virtue of these sections it is apparent that the tax certificate issued shall bear "interest" which shall "not exceed the sum of ten percent per annum" and that the redeemor may pay the amount of the certificate with the interest it bears which shall be "not to exceed ten percent annually." There is no other provision indicating any intention to assess this penalty of ten per centum for any period of less than a full year. In the absence of any suchspecific provision the interest should be calculated as would any other obligation bearing "ten percentum per annum". It should be calculated exactly from the date of the sale to the date of redemption at the rate of "ten per cent per annum." Until the certificate is exactly one year old there would be no justification for charging the full ten percent.

IX.

"A question as to the merchants tax; if they don't pay their tax by November 1st, do they then have to pay one per cent per month or do I call on their bond? Am I personally liable for their tax if their bond proved to be insolvent?"

Taxation of merchants is provided for in Article XVII Chapter 59, Revised Statutes of Missouri 1929. Under the provisions of Section 10078 it is required that a bond be given conditioned upon the payment on or before November first, of the year following the amount of tax due. Section 10079 provides a penalty for any collector who shall fail to require such bond to be filed and assesses a fine of not less than one hundred nor more than five hundred dollars, or imprisonment of not less than six months in the county jail for each failure. Section 10080 provides the form of such bond. It is the duty of the County Collector under the provisions of Section 10078 to approve such bond. Section 10081, page 360, Laws of Missouri 1931, provides for the form of return upon which the amount of tax is based, and for the filing of such return. Section 10087 R. S. Missouri 1929, provides as follows:

"Every person, corporation or copartnership of persons, to whom a license shall have been granted to vend goods, wares and merchandise, who has filed a correct statement as herein required, and failed to pay the amount of revenue so owing to the collector of the proper county, shall be deemed to have forfeited the bond given by him or them in virtue hereof, and judgment shall be rendered for the plaintiff in damages, for double the amount of such revenue and costs."

No section in this Article provides for the assessment of any penalty other than that set out above. There is no provision attaching the one per cent per month penalty to delinquent merchants tax as penalties will only be assessed when plainly and certainly provided for. We must hold that the one per cent per month penalty interest provided for under the general statutes on delinquent taxes is not applicable to merchants taxes provided for in Article 17. The penalty there set out is a sum equal to the amount of taxes due.

Insofar as your personal liability is concerned it is our view that unless you are negligent in the approval of the bond you could not be liable because of the insolvency of the sureties. There are certain duties placed upon you, as for instance, the duty to promptly institute suit without delay upon the forfeited bond against the principal and the sureties. Section 10790. If you perform your duties conscientiously, honestly and with reasonable care and diligence you will not be personally liable because of your failure to collect merchants taxes.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

Enclosure.

TAXATION: Taxpayer liable for valid court costs when paying taxes in suits regardless of Senate Bill 143.

11-30

November 30, 1935.

FILED
4

Mr. Lee Barham
Clerk Circuit Court
Stoddard County
Bloomfield, Missouri

Dear Sir:

Acknowledgment is herewith made of your letter of November 23 requesting an opinion of this office on the following matter:

> "I would appreciate very much getting your opinion on the following matter, at your earliest convenience.
>
> 'A tax suit on General Delinquent Taxes, is filed in this office in February, 1933. Service is obtained on the defendant or defendants, forthwith, then the suit lays dormant, until October, 1935, and the defendant or defendants come along and pay the taxes, to the Collector, the costs accrued in this Court, being exempted or not collected, by the County Collector, for the reason that judgment had not been rendered on said tax suit.
>
> Whether or not the Court costs accrued on said tax suit or suits, when judgment has not been rendered against said defendant or defendants, is collectible, I would like to know."

On the 4th day of April 1935, this office rendered an opinion to the Honorable George Harrington, Collector of Revenue of Jackson County, Missouri, wherein the following conclusion was reached:

> "It is therefore the opinion of this office that suits instituted prior to the effective date of Senate Bill 94, Laws of Missouri 1933, page 425, may be prosecuted to final judgment and taxes collected by execution if necessary, and that the necessary court costs incident to such procedure, including statutory attorney fees, may be collected from the taxpayer."

From your communication it is evident that the tax suit filed in February of 1933, was instituted prior to the effective date of Senate Bill 94. Section 9962b, page 445, Laws of Missouri 1933, provides as follows:

> * * *as to suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

By virtue of this provision it is within the discretion of the County Collector as to which method he will pursue in the collection of the taxes. However, it is plainly stated that in the event the suit is dismissed such is subject to the preservation of rights to all valid costs and commissions. Your County Collector is probably proceeding upon the theory that Senate Bill 143, found at page 408, Laws of Missouri 1935, prevents his collection of the court costs which have accrued. This section reads as follows:

> "That all penalties and interest on personal and real estate taxes delinquent for the year 1934 and prior years shall be computed after December 31, 1934, on the same penalty and interest basis as the taxes delinquent for the year 1934 until paid."

In the opinion of April 4, 1935, heretofore referred to, we have held that the foregoing section does not prevent the collection of valid court costs which have accrued prior to the time the taxes are paid, as it is our view that the legislature did not contemplate the remission of these costs. Your particular question deals with the proposition of a person redeeming the property before sale, and in this connection I direct attention to Section 9952a, page 430, Laws of Missouri 1933, which provides in part as follows:

> "Delinquent taxes with penalty, interest and costs, may be paid to the County Collector at any time before the property is sold therefor."

It is clear from this provision that all valid penalties, interests and costs should be paid at the time the taxes are paid, and while Senate Bill 143 supra, remits a portion of the penalty interest due it is not to be construed as remitting valid court costs which have accrued on suits brought before the effective date of Senate Bill 94, Lawsof Missouri 1933, page 425.

CONCLUSION.

It is therefore the opinion of this office that in the event the taxes are paid to the Collector after a suit has been instituted therefor in February of 1933, that the taxpayer is liable for valid court costs which accrued on such tax suits although judgment has not been rendered thereon, and should be calculated as a part of the costs and collected from the defendant.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

TAXATION: Certificate holder not entitled to reimbursements for improvements made during redemption period.

December 6, 1935. 12-6

FILED 4

Honorable Gilbert Barlow
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Mr. Barlow:

We acknowledge receipt of your letter of November 29, 1935, requesting an opinion of this office on the following matter:

> "Question, Can a purchaser recover compensation for improvements at its value on property purchased Nov. 1935 if made immediately after purchase and before the two years after the date of sale, especially to protect the property from loss and destruction by repairing the roof of the property covering the large holes over a foot or two in diameter?"

Section 9964a, page 434, Laws of Missouri 1933, provides in part as follows:

> "The purchaser of any tract or lot of land at sale for delinquent taxes, homesteads excepted, shall at any time after one year from the date of sale be entitled to the immediate possession of the premises so purchased during the redemption period provided for in this act, unless sooner redeemed:* * * * *"

The purchaser therefore has no right whatsoever to possession of the premises for one or two years, depending upon whether or not the tract is a homestead. Being without right to the possession of the premises it is hard to conceive under what circumstances he could require the owner thereof to reimburse him for any improvements made thereon. It should be kept in mind that under the Missouri law the purchaser of a certificate for taxes is in a peculiar position. He obtains only such rights as the law specifically gives him and does not obtain any title of any kind until the giving of the Sheriff's deed at the expiration of the redemption period. Therefore, any improvements made would be at the certificate holders risk unless his rights are specifically provided for in the law. In this respect Section 9956c, page 437, Laws of Missouri 1933, provides:

> "In case any lasting and valuable improvements shall have been made by the purchaser at a sale for taxes, or by any person claiming under him, and the land on which the same shall have been made shall be redeemed as aforesaid, the premises shall not be restored to the person redeeming, until he shall have paid or tendered to the adverse party the value of such improvements; and, if the parties cannot agree on the value thereof the same proceedings shall be had in relation thereto as shall be prescribed in the law existing at the time of such proceedings for the relief of occupying claimants of lands in actions of ejectment. No compensation shall be allowed for improvements made before the expiration of two years from the date of sale for taxes."

While the first sentence of this section gives the general right to the purchaser for reimbursement for lasting and valuable improvements yet the entire first sentence is modified and qualified by the provisions of the last sentence which effectually denies any reimbursement to the certificate holder for improvements made before the expiration of two years from the date of the sale.

CONCLUSION.

In view of the foregoing it is the opinion of this office that the certificate holder cannot recover compensation for improvements made on the property covered by the certificate of purchase, which improvements are made immediately after the purchase and before two years from the date of sale.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

TAXATION: Collector may receive taxes on part of a tract. Division of taxes based on area.

December 14, 1935.

12-14

FILED 4

Honorable Sam A. Baker
Collector of Revenue
Bollinger County
Marble Hill, Missouri

Dear Mr. Baker:

We acknowledge receipt of your request for an opinion of this office on the following matter:

> "During the November tax sales I offered a number of tracts of land for sale and was unable to get a bid on part of them. Since that time there has been parts of some of the tracts sold and the purchaser wants to pay up the back taxes on the part that he bought and let the rest of the tract remain delinquent.
>
> 1. Does the purchaser have the right to buy a small parcel of a tract which will generally be the best part and pay the back taxes on that particular part?
>
> 2. If so, how would you arrive at the value of this parcel?"

The only authority that you as County Collector has to sell a portion of a tract of land for taxes is found in Section 9952d, page 432, Laws of Missouri 1933. This Section provides as follows:

> "When more than one tract or lot belonging to the same person shall be for sale at the same time, in the same municipal corporation or township, a part of one of said tracts or lots shall be offered, first for the payment of the whole sum due from such owner on all such delinquent lands or lots, or otherwise; and if no person shall bid off a part of such tract or lot the sum required, the said tract or lot shall then be offered to the highest bidder for cash, and if any amount shall remain due, or if no person bid for a part or all of one tract or lot, each of the other tracts or lots shall be offered in like manner until the required sum is realized; and if no one bids upon a part or all of said tracts or lots separately, enough to pay the amount due, then the whole of said tracts and lots shall be offered together and sold to pay the taxes, penalty, interest and costs thereon; provided, however, this section shall be construed directory in character and a failure to comply therewith shall not of itself invalidate any sale."

This Section authorizes the offering of a part of a tract of land for sale but before a part of the tract can be sold "the sum required" must be offered for the tract. In other words, in no case shall a sale of a part of a tract be made unless the bid received for that part is sufficient to pay for the taxes which are due or delinquent on the whole tract. In the event the bid for the tract is insufficient to pay the taxes against the whole tract there is no authority to sell the portion of the tract but the whole tract must be offered for sale and sold if possible for all the taxes that are against the property. There is no authority in the Jones-Munger Law for selling a tract for 1934 taxes and accept from the purchaser the amount of such taxes when taxes for prior years against the tract are delinquent and unpaid. If the tract is sold for 1934 taxes it must be sold for all taxes

that have accrued for the years prior thereto. Therefore, it is difficult to ascertain how an occasion would arise wherein a person would buy a parcel of a tract and offer to pay the back taxes on that particular tract. The amount of his purchase bid at the sale should be sufficient to cover all prior accrued taxes.

It is therefore the opinion of this office that a purchaser at a sale under the Jones-Munger Law has no right to buy at such sale a small parcel of a tract and pay the taxes on that particular part.

In the event your situation is not as above described, to-wit, that the sales of a part of a tract of land were not sales made under the Jones-Munger Act, but were sales subsequently made by the owners to purchasers who have taken title to a part of a tract of land, the situation is controlled by the provisions of Section 9913 R. S. Missouri 1929, which section reads as follows:

> "Whenever any person shall pay taxes charged on the tax book, the collector shall enter such payment in his list, and give the person paying the same a receipt, specifying the name of the person whom paid, the amount paid, what year paid for, and the property and value thereof on which the same was paid, according to its description on the collector's list, in whole or in part, as the case may be, and the collector shall enter 'paid' against each tract or lot of land when he collects the tax thereon. The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes: Provided, the persons paying such tax shall furnish a particular specification of the part, and if the tax on the remainder of such lot and parcel of land shall remain unpaid, the collector shall enter such specification in his return, to the end that the part on which the tax remains unpaid may be clearly known. If payment is made on an undivided share of real estate, the collector shall enter on his record the name of the owner of such share, so as to designate upon whose undivided share the tax has been paid."

By this section specific authority is given to pay the taxes which may be charged on the tax books against a part of a tract, but it is required that the party paying the taxes furnish a specific description in detail of the tract of land upon which he desires to pay taxes. This section does not provide the manner in which the County Collector shall determine what proportion of the taxes assessed against the whole tract shall be distributed to the portion of the tract which has come into the hands of a new owner and who desires to pay the taxes upon his portion of the tract. However, this issue has been before the Supreme Court of the State of Missouri in the case of State ex rel. Realty Company et al. vs. Koeln, 255 Missouri 301. In this instance the taxpayer proposed to pay the taxes on a portion of a tract which it had purchased and offered to pay that portion of the total tax bill as was represented by the area of the portion upon which the taxes were sought to be paid. The Court in this case stated, l. c. 303:

> "On April 28, 1910, the relators tendered to the defendant five hundred and ten dollars, the full amount of all taxes, interest, penalties and costs for the taxes for the year 1909 on that part of the land not condemned for the street, computing the amount due by taking such proportion of the whole tax, interest, penalties and costs as the uncondemned land bore to the whole tract prior to such condemnation, according to area.* * * * * * * * **
>
> It is contended that the various parts of such tract may not have a value in proportion to the area, and that the collector has no such powers as the assessor, and cannot apportion the value of the different parts of a tract which has been assessed in solido. There is no showing in this case that a payment in proportion to the area is not equitable and fair. Whether such proportion should be used in all cases we will not now decide."

From the foregoing ruling of the Supreme Court it is apparent a division of the tax based upon area will be approved if such division operates fairly and equitably. On the other hand the words of the Court throw a doubt upon a division based upon area if such division would be unfair and inequitable and therefore

it would appear that in the event a person sought to pay taxes on the basis of area when such basis did not afford a fair and equitable proportion of the taxes, such a division might not be upheld by the Courts. It should be kept in mind that we are referring to those cases which properly fall within the provisions of Section 9913 and not those cases which fall within the provisions of Section 9955d, page 436, Laws of Missouri 1933.

It would therefore be the opinion of this office that the County Collector is required to use judgment and discretion in proportioning the amount of taxes due against a part of a tract, that such division should be upon the basis of area, unless such a division would result in an unfair and inequitable division of taxes, in which latter event, the collector should make the division on some equitable and fair basis.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, JR.,
(Acting) Attorney General

HGW:MM

TAXATION AND REVENUE: Drainage taxes not cut out by sale under Senate Bill 94 for state and county taxes.

1-14

January 8, 1935.

FILED 5

Mr. R. F. Baynes
Tax Attorney
New Madrid County
New Madrid, Missouri

Dear Mr. Baynes:

In accordance with your request we render you an opinion on the following questions:

> "(1) What will be the status of delinquent drainage taxes after sales had for State and County taxes for the County Collector in November under the so-called Jones Tax Law?
>
> (2) In the event judgment is obtained prior to November for drainage taxes, what effect will the sale for State and County taxes have on the judgment for drainage taxes?"

From other portions of your communication you state that you are interested in County Court Drainage Districts and we shall therefore discuss the law as applied to such districts, although from our cursory examination of Circuit Court Drainage District laws there does not appear to be any distinction between County Court Districts and Circuit Court Districts insofar as your inquiry is concerned.

I.

SALE FOR STATE AND COUNTY TAXES UNDER JONES MUNGER ACT DOES NOT ENTIRELY ELIMINATE DRAINAGE DISTRICT TAXES.

County Court Drainage Districts are provided for in Article II, Chapter 64, R. S. Mo. 1929. The entire procedure for the establishment of such districts is set out in said article. In respectto the drainage district assessments levied to provide for the improvements Section 10828 provides in part:

> "All drainage taxes provided for in this article, including maintenance taxes, together with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee to be fixed by the court and taxed as costs in the action brought to enforce payment shall from date of the levying of the same by the county court as provided herein, until paid, constitute a lien, to which only the lien of the state for state, county, school and road taxes shall be paramount, upon all of the lands assessed, and shall be collected in the same manner as state, county and school taxes upon real estate are collected." * * *"

By specific provision it is therefore declared that drainage taxes provided for in the article concerning county court drainage districts are to be inferior to state taxes for state, county and school and road purposes. Therefore, it appears that the purchaser of the tax certificate under the Jones Munger Act, otherwise known as Senate Bill 94, becomes possessed of an interest which shall be equal to a first line on the property involved. What effect if any this is to have upon the drainage district taxes is to be determined by the nature of this interest and what rights, if any, the drainage district has after such sale.

We must remember that the lien for taxes is not changed by the Jones Munger Act, and that after all that act is but a procedural statute for the enforcement of liens which are of the same nature after the passage of this act as they were before. We therefore look to the statutes establishing these liens and decisions concerning them. Decisions determining the nature of state and county liens and drainage tax liens, and the extent and priority would still be applicable under the Jones Munger Act insofar as the sale proceeding itself is concerned. One of the most recent cases determining the respective priority of drainage district assessments and state and county taxes is that of Little River Drainage District vs. Sheppard, a decision of the Supreme Court in Banc, reported at 7 S.W.(2d) 1013. In this case the plaintiff brought suit to collect delinquent drainage taxes assessed for the years 1921 to 1927. The answer alleged as a complete defense that the land was sold under judgment of the circuit court for general state and county taxes due for the years 1921 to 1924, and defendant claimed under that tax title. The question of the priority of these taxes and respective rights of the parties after the sale for state and county taxes were the problems determined bearing upon the issues here considered. The Court held in effect that

as the drainage district was not a party to the suit it was not bound by the decision and that its lien for drainage district taxes was not cut out by such sale but that it could redeem the property from the purchasers at such sale, or could proceed to enforce its lien for drainage taxes and the purchaser at such sale could them redeem the property by paying the state and county taxes for which the property had been sold. In the course of the opinion the Court stated, l. c. 1014:

> "The lien for state and county tax shall be paramount. The statute does not say that it shall necessarily destroy the district lien for special taxes. The plaintiff district, according to the stipulation and the finding of the trial court, was not made a party to this proceeding. No person or corporation can be affected by a proceeding to which he or it is not made a party, and that applies to tax suits. For instance, the state's lien for taxes is superior to a prior mortgage lien, and a sale under such tax lien conveys title to the purchaser but does not affect the mortgagee's right to redeem.* * *"

The foregoing decision is in respect to taxes levied by a drainage district organized by the Circuit Court, However, a comparison of Section 10764 R. S. Mo. 1929 with Section 10828 hereinbefore quoted in part, shows that there is no material distinction between the lien for drainage taxes levied by a circuit court district and the lien for drainage taxes levied by county court districts. We therefore consider this case directly in point.

We shall now turn to the Jones Munger Act to determine what provision is there made for the redemption of property after the sale of the tax certificate. Section 9956A, page 437, Laws of Missouri 1933, provides in part as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by

> the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption.* * * *"

By the foregoing provisions any person having an interest in the land is privileged to redeem within two years after the sale by complying with the provisions therein set out. This section should be construed liberally so as to encompass within its terms all persons or parties having an interest in the land. It must be construed as permitting the redemption from such sale by the drainage district or by the purchaser under the drainage district sale.

While the foregoing covers the matter of your inquiry we direct further attention to Section 9957, page 438, Laws of Missouri, 1933. This section provides:

> "If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase,* * * * *the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold. * * * *"

The purchaser of a tax certificate at a sale held pursuant to the Jones Munger Act is authorized to obtain a clear title to the land described in the certificate at the expiration of two years of the date of sale if by that date the land has not been redeemed by the provisions of this section. The title which he obtains is to be free and clear of all encumbrances, charges or taxes except a lien which was superior to the lien of the taxes for which the land was sold. Therefore, in the event that redemption is to be made under the provisions of this act, it should be made within two years of the date of sale, for if the purchaser of the certificate obtains a deed therefore it appears that he takes the property free and clear

of all encumbrances and taxes existing at the time, and which were inferior to the taxes for which the land was sold.

CONCLUSION.

It is therefore the opinion of this office that a sale for state and county taxes under the Jones Munger Act does not in itself cut out the lien of drainage districts for drainage taxes.

II.

THE LIEN OF DRAINAGE TAXES IS NOT EFFECTED BY THE ENTRY OF A JUDGMENT THEREFORE, NOR IS THEIR RELATION TO STATE AND COUNTY TAXES EFFECTED THEREBY.

It is recognized that the lien of a judgment for taxes is but an extension of the tax lien. The lien therefor dating from the assessment or levy of the tax as the case may be. Under the provisions of Section 10828 hereinbefore quoted, it is provided that the lien of drainage taxes shall date from the levy of the same by the county court until paid. It then provides that such lien shall be paramount except for the lien of the state for state, county, road and school taxes. Therefore, the lien obtained by the entry of judgment is no better or worse than the lien given the drainage district taxes. It therefore appears that the obtaining of the judgment prior to the date of sale does not affect one way or the other the substantive rights or priorities. The purchaser at the sale for drainage taxes would be entitled to the rights of redemption provided for in the sections of the Jones Munger Act hereinbefore referred to.

In a most recent case decided by Division No. 2 of the Supreme Court styled Dyer et al vs. Harper et al. the Court considered interest and rights of a purchaser at a sale for state and county taxes and the purchaser at the sale for drainage district taxes. The sales were held on the same date. The Sheriff fixed a sale for state and county taxes and sale for drainage district taxes, and on the same date the sheriff executed deeds to both purchasers. The drainage district was not made a party to the suit for state and county taxes. The Court in holding that the purchaser at the sale for drainage district taxes had the right to redeem the property from the sale for state and county taxes stated:

"The lien created by the judgment for state, county and school taxes was superior to the lien for drainage taxes. In the suit to enforce the collection of state, county and school taxes the Big Creek Drainage District No. 2 was not made party and, therefore, its lien was not destroyed by a sale under such a judgment. At a sale under a judgment for drainage taxes, the purchaser would acquire the right to redeem in an action against the holder of the tax title, by making a proper tender of thhe amount due the holder of the tax title."

The foregoing case has not yet been reported.

CONCLUSION.

It is therefore the opinion of this office that the obtaining of a judgment for drainage taxes would not effect favorably or unfavorably the priority of state and county taxes and drainage district taxes or the rights of the purchasers at sales of the land upon which the taxes were levied.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

TAXATION AND REVENUE: Section 55, Title 23; Federal aid will not be extended to states who change the registration fees, licenses, gasoline taxes, etc., after June 18, 1934. If state does make changes in license fees, etc. will receive only one-third of the amount that state would be entitled to.

January 16, 1935.

FILED 5

Hon. William Barton,
Representative - Montgomery Co.,
House of Representatives,
Jefferson City, Missouri.

Dear Sir:

On this day you have in person submitted the following question to this department and requested our opinion on same:

> "Under the Hayden-Cartwright Act a Federal Act, relating to roads and highways, will a reduction in automobile license fees by an Act of the General Assembly give the Federal Government the right to reduce the Federal appropriations to Missouri for highway purposes to one-third of the amount the Federal Government might give, or will the reduction of fees cut the amount of Federal grant to the amount of reduction of license fees?"

In 1921 the Congress of the United States passed Section 12 of Title 23 pertaining to the submission of project statements, approval, and setting aside share of Federal aid. In 1928 under Title 23, Highways, Section 12, the following amendment was made:

> "***And provided further, that in the case of any State containing unappropriated public lands and nontaxable Indian lands, individual and tribal, exceeding 5 per centum of the total area of all lands in the State in which the population, as shown by the latest available Federal census, does not exceed ten per square mile of area, the Secretary of Agriculture, upon request from the State highway department of

such State, may increase the share payable by the United States to any percentage up to and including the whole cost on projects on the primary system of Federal-aid highways and on projects on the secondary system when the latter is a continuation of a route on the primary system or directly connects with a route on the primary system of an adjoining State, but such State shall allocate and expend during the same fiscal year upon some other project or projects on the Federal-aid system, under the direction of the Secretary of Agriculture, the amount it would have been required to expend upon such project."

In 1930, Section 12a was enacted, said section being as follows:

"The limitation of payments which the Secretary of Agriculture may make is increased to $25,000 per mile, exclusive of the cost of bridges of more than twenty feet clear span: Provided, That the Federal participation shall be limited to $15,000 per mile until the original certified seven per cent system of such State shall have been surfaced: Provided further, That any such increase above $15,000 per mile shall be certified by the Director of the Bureau of Public Roads and the Secretary of Agriculture as securing actual extension of the highway system or economy in its construction: Provided further, That the limitation of payments herein provided shall apply to the public-land States, except that the same is hereby increased in proportion to the increased percentage of Federal aid authorized by section 12 of this title. The provisions of this section relating to the limitation of payments per mile which the Secretary of Agriculture may make shall apply to all funds heretofore appropriated and available for payment to the States on April 4, 1930, and to all sums hereafter appropriated for carrying out the provisions of section 12 of this title. (July 11, 1916, c. 241, sec. 6, 39 Stat. 355, as amended Nov. 9, 1921, c. 119, sec. 6, 42 Stat. 213; Apr. 4, 1930, c. 105, Sec. 3, 46 Stat. 141)."

Section 55, Title 23, Highways, was enacted June 18, 1934 and is as follows:

> "Since it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways, after June 30, 1935, Federal aid for highway construction shall be extended only to those States that use at least the amounts now provided by law for such purposes in each State from State Motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes, under such regulations as the Secretary of Agriculture shall promulgate from time to time: Provided, That in no case shall the provisions of this section operate to deprive any State of more than one-third of the amount to which that State would be entitled under any apportionment hereafter made, for the fiscal year for which the apportionment is made."

The Extra Session of the 57th General Assembly of Missouri in 1933-34 (Sec. 7761, p. 99) enacted a law reducing the license fees on motor vehicles, same being approved by the Governor on January 6, 1934.

CONCLUSION

Referring to Section 55, Title 23, supra, we find the clause "After June 30, 1935, Federal aid for highway construction shall be extended only to those states that use at least the amounts now provided by law for such purposes in each state from state motor vehicle registration fees, licenses, gasoline taxes, etc." We interpret that section of the Federal statute to mean that Federal aid will not be extended to those states who change the registration fees, licenses, gasoline taxes, etc. after the effective date of the Act, to-wit, June 18, 1934, and if the language of the statute is to be read literally, any state which

does decrease the license fees, gasoline taxes, etc. would only receive such aid as contained in the proviso therein, to-wit, one-third of the amount which that state would be entitled to under any apportionment hereafter made for the fiscal year for which the apportionment is made.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

MUNICIPAL CORPORATION: Motor vehicle tax cannot be imposed on a resident who resides in the corporate limits but who stores his car outside of the corporate limits.

4-26

April 22, 1935

FILED 5

Honorable William Barton
Representative
58th General Assembly
Jefferson City, Missouri

Dear Sir:

This Department wishes to acknowledge your letter of April 16, wherein you state as follows:

> "Has village with population between 400 and 500, by ordinance, power and authority to place motor vehicle tax on resident of such village who resides in corporation limits but who stores car in garage outside of corporation limits?"

Section 7780c R.S.Mo,1929, provides in part, that:

> "No such municipal license tax shall be collected from a resident of such municipalities of motor vehicles used exclusively outside of such municipalities * * * * * * * * * * * * * * * * * *".

Dillon on Municipal Corporations, Volume 4, Section 1388, page 2407, provides, in part, that,

> "Among the most usual of the express limitations upon the power of municipal taxation is the one confining its property within the corporation."

Cooley on Taxation, Volume 1, Section 95, page 223, provides, in part, that,

> "A municipality cannot tax property situated outside its territorial limits."

In the case of City of Plattsburg v. Clay 67 Mo. App. 497, l. c. 500, the court said:

> "Under the agreed case the situs of these cattle of the defendant was not within the city of Plattsburg but in Clinton County, and without such city limits. The authorities then are uniform and overwhelming that such personal property is not to be taxed for municipal purposes."

Cooley on Taxation, Volume 1, Section 93, page 221, in setting out reasons for such a rule, states as follows:

> "Those cases in which it has been held incompetent for a * * * * * municipality to levy taxes on persons or property not within its limits have generally indicated the want of jurisdiction over the subject of tax as the ground of invalidity, but such a burden would be inadmissible, also, for the reason that as to any property or person outside the district in which the tax was levied the want of legal interest in the tax would preclude its being subjected to the burden."

From the foregoing, we are of the opinion that a village, town or city cannot enact an ordinance placing

a tax on motor vehicles stored or used exclusively outside of its territorial limits.

A motor vehicle tax is generally regarded not as a tax on property nor on the person for the ownership of the vehicle, but on the privilege of using the vehicle on the streets. In other words, a motor vehicle tax is generally regarded as a privilege tax. Certainly it cannot be said that a resident who has his vehicle stored or uses it exclusively outside of the city limits exercises such a privilege. As stated in Berry on Automobiles, Section 106, page 88, thus,

> "This law does not impose a tax on motor vehicles and motorcycles as property, nor is it a tax on the person for the ownership of the vehicle. It is a tax for using the vehicle upon public roads. It is in the nature of a toll for the use of the highway; not the vehicle but the privilege of using the vehicle, is taxed."

Again, in the case of Ex parte Andrews 23 S. W. (2nd) 95, l. c. 96, the court said;

> "The statute in making this requirement may be in part a police regulation, but it is also a revenue measure. And there is no doubt as to the particular privilege taxed; it is the privilege of operating and driving a motor vehicle 'upon the highways of this state.' * * *
>
> *
>
> It seems entirely clear that the privilege so authorized to be taxed is one in all respects like the one taxed by the state itself - the privilege of operating and driving motor vehicles upon the streets and thoroughfares of the municipality."

If it can be shown, of course, that a resident uses the streets but merely stores his car outside of the corporate limits as a subertfuge to avoid payment of the tax, then he is clearly liable for the payment of such tax. But, as previously stated, if he does not use the streets and has his motor vehicle stored outside the corporate limits, such a tax cannot be imposed on him by ordinance.

Respectfully submitted,

Wm. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:
MW:LC

POLL TAX: Governed by domicile of person.

6-10

FILED
5

May 23, 1935.

Hon. William Barton,
House of Representatives,
58th General Assembly,
Jefferson City, Missouri.

Dear Sir:

We wish to acknowledge your letter of May 20th, wherein you state as follows:

> "Does a person over twenty-one years and under sixty years who works in a county where a poll tax is demanded and who votes out of the county and has his laundry done outside of that county, have to pay a poll tax in the county in which he works when demanded?
>
> "Section 7879, R. S. Mo. 1929, seems to be the section dealing with this question."

Section 7879, R. S. Mo. 1929, provides as follows:

> "In all counties in this state in which the county court shall levy a poll tax it shall be the duty of each road overseer during the month of February each year to prepare a list, alphabetically arranged, of all able-bodied male inhabitants in his district over the age of twenty-one and under the age of sixty years, also a list of all other able-bodied male citizens over the age of twenty-one residing in his district, and he shall file said lists with the county clerk of his

> county on or before the first day of March following. On or before the 15th day of April of each year the clerk of the county court shall copy the list of names furnished him by the road overseer of the several road districts, alphabetically arranged, on a separate tax book, to be known as the poll tax book, and shall extend opposite each name the poll tax as levied by the county court, and he shall furnish each overseer with a copy of the poll tax book for his district. All persons, corporations and copartners are hereby required, on application of the road overseer, of his, her, its or their district to furnish to said overseer the names of all persons in his, her, its or their employ who are liable to the payment of all poll tax under the provisions of this article, and for a willful refusal, failure or neglect to do so within ten days after such demand, in writing, they shall forfeit and pay to the county, for the benefit of the county school fund, the sum of one hundred dollars, to be recovered by suit brought by the overseer in the name of the road district, as in other civil actions."

Cooley on Taxation, Vol. 4, page 3505, provides as follows:

> "The domicile of the person taxed governs the place where poll taxes may be imposed."

In the case of In re Ozias' Estate, 29 S. W. (2d) 240, l. c. 245, our court said:

> "The ruling herein depends upon the proper construction of the word domicile. Our Supreme Court held in Re Estate of Lankford, 272 Mo. 1, 197 S. W. 147, that residence is largely a matter of intention, to be deduced from the acts of a person. Residence and domicile are used inter-

changeably, and, in so far as they apply to the situation here presented are synonymous.

"'Domicil. That place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.'

"Bouv. Law Dict., Vol. 1, page 915. Proof of domicile, or legal residence, does not depend upon any particular fact, but upon whether all the facts and circumstances taken together tend to establish the fact. Engaging in business and voting at a particular place are evidence of domicile there, though not conclusive. Hayes v. Hayes, 74 Ill. 312; Inhabitants of East Livermore v. Inhabitants of Farmington, 74 Me. 154. To constitute a change of domicile three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicile, and (3) an intention of acquiring a new one. Berry v. Wilcox, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706. It has been held a wife's removal into another state for the benefit of her husband's health and a residence there for twelve years will not change the original domicile. In re Reed's Will, 48 Or. 500, 87 P. 763; Ensor v. Graff, 45 Md. 291.

"A person can have but one domicile, which, when once established, continues until he renounces it and takes up another in its stead. It is not lost by temporary absence. The question is one of fact which is often difficult to determine. Words and Phrases, Second Series, Vol. 2, page 133; City of Lebanon v. Biggers, 117 Ky. 430, 78 S. W. 213, 214."

A person's domicile is largely a matter of intention, to be deduced from the acts of the person. In the instant case we are presented with the following facts that might indicate that his domicile is not in the county where he works: (1) He votes outside of the county, and (2) he has his laundry done outside of the county. Our courts have held that voting at a particular place is evidence of a domicile there, though not conclusive, and we are of the opinion that the same reasoning would apply in the case of laundry done outside the county. If a person has a true, fixed and permanent home and principal establishment in one county, he does not lose it by engaging in business in another county. To constitute a change of domicile, there must be residence in another place, an intention to abandon the old domicile, and an intention of acquiring a new one. A person can have but one domicile, and it is not lost by temporary absence. Proof of domicile or legal residence is not dependent upon any particular fact, but upon whether all the facts and circumstances taken together tend to establish the fact. We have not been presented with enough facts to determine where this person has his domicile. Voting and having laundry done outside the county, as we have previously said, is evidence, but not conclusive.

A person's domicile may be determined by aid of the rules hereinabove set out, and if it is found that his domicile is outside the county in which he works, we are of the opinion that a poll tax can not be imposed on him by the county where he works.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney-General.

MW:HR

BARBER AND BEAUTY SHOPS:

CITIES, TOWNS AND VILLAGES: Incorporated cities, towns and villages may enact ordinances regulating closing hours, by virtue of House Bill 32.

July 22, 1935

FILED 5

Hon. William Barton
Representative of Montgomery County
Jonesburg, Missouri

Dear Sir:

This is to acknowledge your letter, as follows:

"Under House Bill Number 32 empowering municipalities to regulate the closing hours of barber and beauty shops, may a village provide by ordinance that barber shops and beauty shops shall be closed at 6:30 p. m. each day, except that on Saturdays they shall close at 9:30 p. m. and that on holidays they shall close at 11:00 a. m.?"

House Bill 32, passed by the Fifty-eighth General Assembly, and approved by the Governor April 16, 1935, without an emergency clause, becomes effective August 27, 1935. House Bill No. 32 was an Act "Authorizing all incorporated cities, towns and villages to pass, alter, amend and repeal ordinances regulating the closing hours of barber shops and beauty shops." Section 1 of said Act provides as follows:

"The legislative bodies of all incorporated cities, towns and villages are hereby empowered to pass, alter, amend and repeal ordinances to regulate the hours of closing of barber and beauty shops."

We assume the constitutionality of the above Act. The closing hours sought to be provided for by ordinance for barber and beauty shops, as stated in your letter, appear to be reasonable.

It is our opinion that an incorporated village may enact an ordinance placing the closing hour of barber and beauty shops at 6:30 P. M. each day except that on Saturdays the time shall be 9:30 P. M., and that on holidays the time shall be 11:00 A. M., under and by virtue of House Bill No. 32, supra.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JLH:LC

COUNTY BUDGET ACT: Liabilities imposed by Sec. 20 do not apply to officials in counties of less than 50,000 inhabitants.

8-29

August 28, 1935.

FILED
5

Mr. C.W. Bass,
Clerk of County Court,
Osceola, Missouri.

Dear Sir:

This department is in receipt of your letter of August 20 making the following inquiry regarding the County Budget Act:

> "Under the above law our county court approved the budget made up for this year by this office the 1st of February this year, same being made according to sections 4 and 5, S.B. 154 laws of 1933.
>
> "As suggested in Section 5 of the above named law, one-fifth of the estimated revenue was placed in Class 5 which in this instance amounted to $9,000.00. At the present time warrants have been allowed by the court and drawn against this fund to an amount slightly in excess of $9,000.00. In our opinion, in order to carry on the balance of the year, it will be necessary to use practically $9,000.00 more against Class 5.
>
> "It is noted in Section 20 of S.B. 154, Laws of 1933 that the accounting officer or in this county, the County Clerk, is held responsible on his bond for all warrants written against the funds of any class in excess of that estimated for that fund. Does this section apply to counties of this size?

> "Section 1 of this act stated that 'all counties now or hereafter having a population of 50,000 inhabitants or less according to the last federal census, shall be governed by Section 1 to 8 inclusive of this act.'
>
> "Will you please give us your opinion as to whether Section 20, S.B. 154, Laws of 1933, applies to counties of this size, population 13,289, and if so, what provision can be made to take care of Class 5 expenditures for the balance of this year?"

Your precise question is whether or not Section 20 of the County Budget Act (Laws of Mo. 1933, page 351) is applicable to counties of the population of St. Clair. Section 20 referred to provides:

> "The accounting officer shall be personally liable and liable on his bond for the amount of any obligation incurred by his erroneous certification as to the sufficiency of an appropriation or of a cash balance, or for any warrant drawn when there is not a sufficient amount unencumbered in the appropriation or a sufficient unencumbered cash balance in the fund to pay the same, or for the payment of any amount not legally owing by the county.
>
> "Any officer purchasing any supplies, materials or equipment shall be liable personally and on his bond for the amount of any obligation he may incur against the county without first securing the proper certificate from the accounting officer.
>
> "Such other officers as the county court may require shall each give surety bond in such amount as may be fixed by order of the county court for the faithful performance

> of his duties and for a correct accounting for all moneys and other property in his custody. The sufficiency of the sureties shall be approved by the county court. Any premium on such bonds shall be paid by the county."

Section 1 of the Budget Act (Laws of Mo. 1933, page 340) reads in part as follows:

> "This act may be cited and quoted as the county budget law. All counties now or hereafter having a population of 50,000 inhabitants or less, according to the last federal decennial census, shall be governed by Sections 1 to 8 inclusive of this act. * * * *"

Section 9 of the Act (page 346) provides:

> "In all counties in this state, now or hereafter having a population of more than 50,000 inhabitants, according to the last federal decennial census, the presiding judge of the county court shall be the budget officer of such county, or the county court in any such county may designate the county clerk as budget officer. The budget officer shall receive no extra compensation for his duties under this Act, and Sections 9 to 20 inclusive of this Act shall apply to such counties."

Inasmuch as the above quoted section states that counties of more than 50,000 inhabitants are to be governed by Sections 9 to 20 inclusive, we are of the opinion that any violation on the part of an officer insofar as it relates to the County Budget Act would not be amenable to Section 20. Such officer, if liable, would be subject to the provisions of Section 8, which provides as follows:

> " * * * *Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and

> of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

Section 1 of the Act directs the county court to divide or classify proposed expenditures into six classes and to sacredly preserve the priorities of the classes. Section 2 of the Act sets forth the six classes. There is no provision made in the event the estimates are less than the expenditures in any one class. If there are any funds in Class 6, the same may be used to take care of the additional expense which has arisen in Class 5.

As a further suggestion, at the close of the fiscal year, if there remain any excess funds in any of the classes after all the priorities have been sacredly preserved, such excess may be transferred to Class 5 and used for the deficiency.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH

EVIDENCE: Evidence of incorporation may be proved by parole evidence where original records are destroyed.

11-14

November 13, 1935.

FILED
5

Honorable William Barton
Jonesburg, Missouri

Dear Sir:

This Department is in receipt of your letter of November 1, requesting an opinion as to the following state of facts:

> "Where all records of incorporation of a town have been destroyed in the Recorder's office and County Clerk's office where they were recorded, is it necessary to reincorporate such town under the laws set out in Revised Statutes 1929, so as to be in a position to enforce its ordinances and collect its taxes, where such proof of its incorporation as above indicated has been destroyed and other records indicating such incorporation, especially where the question might arise that such town was not properly incorporated?
>
> As you might recall or have learned, the Montgomery County Records were burned at one time, and the towns in this county are often placed in an embarrassing situation."

In 22 Corpus Juris, page 1029, the general rule is stated as follows:

> "In respect to secondary evidence of their contents when the originals are lost or destroyed, public records do not differ from private documents; so where it is satisfactorily shown that public records have been lost or destroyed, their contents may be proved by parol or other competent secondary

> evidence, provided that the existence of other and better evidence is not disclosed by the circumstances of the case or the character of the evidence introduced.
>
> Accordingly, the courts have admitted secondary evidence with respect to the contents of land office records; school district records; the record of an organization of a plantation for election purposes, a record of an ancient grant from proprietors of a town, or the minutes of a municipal corporation; and have received such evidence to show the incorporation of a town, the qualification of a public officer; the proceedings of county commissioners; the sale of public lands; the establishment of a public road; the location of a railroad; or the provisions of a municipal ordinance."

In the case of Parry vs. Walser, 57 Missouri 169, l. c. 172, the Court said:

> "We think that the court improperly excluded the parol evidence to establish the existence and contents of the lost or destroyed record of the judgment. The general rule is, that if a record is lost, its contents may be proved like any other document, and the evidence given in this case, preliminary to the proof of the contents of the record, was sufficient to prove its destruction. In fact, the evidence seems to be almost conclusive on that subject. (Foulk vs. Colburn, 48 Mo. 225; 1 Green). Ev., Sec. 84, p. 509, and cases there cited; Newcomb vs. Drummond, 4 Leigh, 57.)."

In the case of The Inhabitants of Stockbridge vs. The Inhabitants of West-Stockbridge, 12 Mass. 400, a similar question was before the Court. In that case the Court said:

"But the act of incorporation is not to be found, nor can any record relating to it be discovered in the secretary's office. From the facts, however, the presumption is violent, that the town has been regularly incorporated, and that the record has been in some way lost or destroyed. The existence of the record is also proved by the deposition in question (a); and it cannot be doubted, that parole evidence is competent to prove the existence and loss of a record. This, then, being satisfactorily proved, secondary evidence of the incorporation of the town is clearly admissible by the rules of evidence (b).

CONCLUSION.

In view of the foregoing it is the opinion of this Department that secondary evidence may be admitted to prove the incorporation of a municipal corporation where the original records have been destroyed.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:MM

CIRCUIT CLERK AND EX-OFFICIO RECORDER OF DEEDS - not entitled to salary during time of suspension.

2-19

February 18, 1935.

FILED 6

Hon. E. W. Bennett,
Member House of Representatives,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of February 13 enclosing statement of William H. Welch, former Circuit Clerk and Recorder of Deeds of Dent County. Your letter is as follows:

> "The County Court of Dent County requests me to ask you for an opinion as to their liability in connection with the attached copies of a claim filed by William H. Welch against the county.
>
> Mr. Nolen of your department assisted in the trial of the case against Mr. Welch, and I presume will remember the facts in connection therewith. I might add that in addition to the case tried by Mr. Nolen, Mr. Welch was suspended by the Judge of the Circuit Court for failure to attend to his office and for being intoxicated. After the first of January of this year a new prosecuting attorney went into office and he has dismissed all of the cases pending against Mr. Welch."

As the writer recalls, the original action was brought under Section 11201, R.S. Mo. 1929, which is as follows:

> "If any public officer, whether state, county, city, town or township officer, shall be intoxicated while in the performance of any official act or duty, or shall become so intoxicated as to be incapacitated to perform any official act or duty at the time and in the manner required of him in the discharge of the duties of his office, he shall be deemed guilty of a misdemeanor in office, and punished by imprisonment in the county jail not exceeding six months, or by a fine of not less than fifty dollars, or by both such fine and imprisonment; and if there be no provisions made by law for the removal from office of such officer by impeachment, the court shall adjudge the defendant to have forfeited his office and declare the same vacant, and the same shall be filled as provided by law for filling such vacancy: Provided, that no court other than the circuit or criminal court of record shall have power to adjudge any such office to be forfeited and vacant."

Pursuant to Section 11201, supra, the Circuit Judge who presides over the Circuit Court of Dent County, either upon his own knowledge or from information obtained from others, suspended the Circuit Clerk during the time in which certain charges were pending.

Section 11682, R.S. Mo. 1929 provides:

> "When any court, or the judge or judges, or a majority of them in vacation, shall believe from their own knowledge or from the information of others, on oath or affirmation, that the clerk of the court in which they preside has been guilty of a misdemeanor in office, they shall give notice thereof to the attorney-general or prosecuting attorney, stating the charges against such clerk, and requiring him to prosecute the same; and they may suspend such clerk from office until a trial can be had, and appoint a temporary clerk, who shall possess the same qualifi-

> cations, take the same oath and give like bond as other clerks, and who shall possess the same power, perform the same duties and receive the like fees as other clerks, and shall continue in office until the regular clerk shall resume his office or a successor shall be elected: Provided, however, when the county court, or the judge or judges thereof of any county, shall prefer charges against the county clerk, as aforesaid, the said clerk shall remain in possession and perform the duties of his office by giving bond to the state with at least two solvent securities; said bond to be fixed and approved by the circuit judge of the county, conditioned that said clerk and his securities shall pay all costs, damages and fines which may be assessed against him upon his trial; and if said clerk shall fail to make and execute said bond within fifteen days after receiving notice to do so, then he may be suspended as provided for the clerks of other courts."

You state that the charges under the complaint, or information, have been dismissed and the Clerk now files the attached statement demanding salary during the period of time he was suspended. Dealing with this subject, 46 C.J. , page 1016, sec. 236, is as follows:

> "An officer lawfully suspended is generally not entitled to compensation during the period of suspension, whether finally removed or not, and especially where the statute provides that a suspension shall create a vacancy. But where the suspending officer is without power to suspend or having power, exercises it in a manner in contravention of a statute, the suspended officer is entitled to the compensation of the office during the period of suspension; and in some jurisdictions it is held that, when an officer is suspended pending proceedings upon removal, the right to recover the compensation of the office is forfeited only in case of a conviction. An officer suspended without

> cause from the performance of the duties of his office by the appointing power, but not removed, is entitled to the salary of the office during the period of the suspension, although the suspended officer may waive that right by express agreement or by conduct from which such an agreement or intention on his part may be fairly and reasonably inferred. An officer suspended under a statute which expressly provides that no salary shall be paid during the period of suspension is not entitled to the salary of the office during the period, although no person be nominated for the place or appointed to discharge its duties."

The question of an officer receiving a salary while suspended from office was discussed in the case of Blackwell v. City of Thayer, 101 Mo. App., l.c. 663-665, in which the Court said:

> "An officer who is lawfully suspended from the performance of his duties can not recover his salary or wages for the period covered by the suspension, whether he is finally removed from office or not. Westburg v. Kansas City, 64 Mo. 493; Howard v. St. Louis, 88 Mo. 656; Lewis v. St. Louis, 12 Mo. App. 570. Those cases are directly in point, while State ex rel. v. Carr, 3 Mo. App. 6, turned on certain ordinances of the City of St. Louis. The vital question in this case is: Was Blackwell's suspension by the mayor and council a lawful act; that is to say, within their charter powers? The office of marshal in a city of the fourth class is elective, but the power is conferred on the mayor and council to remove an elective officer for cause on a hearing. R.S. 1899, sec. 5904. But does the power of removal carry with it the power to suspend pending the investigation of the charges? On this point there is said to be a conflict of authority with

the better opinion in favor of the doctrine that the power to remove does not include the power to suspend temporarily. Mechem on Public Officers, sec. 453. Whatever conflict there may be the point was settled in this state by the decision of the Supreme Court in State ex rel. v. Lingo, 26 Mo. 494. In that case the mayor of the City of St. Louis, pursuant to the charter and ordinances, had suspended Lingo from the office of superintendent of the city workhouse, which appears to have been an elective office at that time, and had appointed the relator. The charter authorized the mayor and council to regulate the election of all elective officers and to provide for removing from office any person holding an office created by the act or by ordinance and not otherwise provided for. Under that charter authority an ordinance had been passed providing for the suspension and removal of city officers, which authorized the mayor to suspend any officer who willfully violated his official obligations and to appoint a person to fill the vacancy for the time being. The question arose for decision whether the portion of said ordinance which authorized the suspension of elective officers by the mayor was valid, and it was held to be valid because the power to remove includes the power to suspend, even in the case of elective officers. That decision is conclusive as to the validity of a similar ordinance of the City of Thayer, which provided that pending the investigation of charges preferred against an officer, he might be suspended from exercising the duties of his office by a vote of not less than three-fourths of the board of aldermen. Blackwell was suspended by a vote of that majority; hence, his suspension was legal. See also State ex rel. v. Police Commissioners, 16 Mo. App. 48; Shannon v. Portsmouth, 54 N.H. 183."

CONCLUSION

We are of the opinion that the Circuit Clerk and Ex-officio Recorder of Deeds of Dent County is not entitled to the salary of $3,513.26 during the time of his suspension, as per the attached statement, provided the procedure has been regular and according to the terms of the statute.

As to the item of $143.10, we conclude that this is a controversial item arising from the audit, and it may or may not be correct. This item is purely a question of fact and we cannot, therefore, give you an opinion on same.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

CITIES, TOWNS & VILLAGES: Authority of Board of Public Works

BOARD OF PUBLIC WORKS,
CITY OF LOUISIANA : Board of limited powers.

March 11, 1935.

FILED
6

Mr. Davis Benning
Vice-President
Board of Public Works
Louisiana, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request an opinion. Your letter is as follows:

> "I am writing you for an opinion for the Board of Public Works of the City of Louisiana, Missouri.
>
> The City of Louisiana has just completed the purchase of the local water company. A bond issue was carried for the purchase of the water company and in addition to the purchase price several thousand dollars was provided for the repairing and improvement of the plant. The purchase price has been paid, the water company has been turned over to the city and the money for repairs and improvements is now in the hands of the City Council.
>
> The Mayor has appointed the Board of Public Works and the appointments have been confirmed by the City Council. The members of the board have given bond as required by law and have taken their oaths of office. The water company and the plant have been turned over to the board and the board has assumed jurisdiction of the entire property.

> "Section 7654 of the Revised Statutes of Missouri defines the powers of the board but the question has arisen as to the expenditure of the money now in the hands of the City for repairing and improving the present plant. Shall this work be done under the supervision of the City Council or under the supervision of the Board of Public Works? Just where does the authority of the Board of Public Works begin?"

Supplementing your letter of request we have before us a copy of Ordinance No. 3634, adopted and approved by the City Council of the City of Louisiana, of date of February 2, 1934; and also in connection with your letter we have your telephonic communication in which you state, as we understand it, that the City of Louisiana has heretofore voted bonds to the extent of $210,000 for the purpose of constructing water works system, and bonds to the extent of $70,000 for the purpose of constructing sanitary sewer system. We are also informed that your City has purchased the two old systems now in use for the sum of $130,000 and that the balance of the fund, to-wit, $150,000 is desired to be used for the rehabilitation of both systems. We are also informed that the City of Louisiana is operating under a special charter.

Your question is -- Shall this money to be spent for repairing, improving and rehabilitating the system of water works and sewerage now owned by the City of Louisiana, be under the supervision of the City Council or under the supervision of the Board of Public Works of said city heretofore appointed?

Section 7651, R. S. Mo. 1929, provides as follows:

> "Any city of the third or fourth class, and any town or village, and any city now organized or which may hereafter be organized and having a special charter, and which now has or may hereafter have

"less than thirty thousand inhabitants, shall have power to erect or to acquire, by purchase or otherwise, maintain and operate, waterworks, gas works, electric light and power plant, steam heating plant, or any other device or plant for furnishing light, power or heat, telephone plant, or exchange, street railway or any other public transportation, conduit system, public auditorium or convention hall, which are hereby declared public utilities, and such cities, towns or villages are hereby authorized and empowered to provide for the erection or extension of the same by the issue of bonds therefor, and any city, town or village which may own, maintain or operate, and which may hereafter acquire, by purchase or otherwise, and operate, or which may engage in the construction of any of the plants, systems or works mentioned in this section, is hereby authorized and empowered to establish, by ordinance, within such city, town or village, an executive department to be known as the 'board of public works,' to consist of four persons, electors of said city, town or village, who have resided therein for a period of two years next before their appointment, who shall be appointed by the mayor of such city, town or village, and confirmed by the common council in such manner as other appointive officers of such city, town or village are appointed and confirmed. The members of such board shall hold office for a term of four years each, or until their successors are appointed and qualified: Provided, that the members of said board shall hold office for a term of four years each, except the first incumbents, as members of said board of public works, who shall be appointed and hold office for the term of one, two, three and four years respectively."

Section 7652, R. S. Mo. 1929, provides for the appointment of non-partisan board of public works.

The powers and duties of the Board of Public Works are provided in Section 7654, R. S. Mo. 1929, which is as follows:

> "Whenever any such city mentioned in section 7651 shall have by ordinance established a board of public works, as herein provided, such board so established in such city, town or village shall, during the existence of said board, have the power, and it shall be its duty, to take charge of and exercise control over any water works, gas works, electric light and power plant, steam heating plant or any other device or plant for furnishing light, power or heat, telephone plant or exchange, street railway or any other public transportation, conduit system or any other public utility whatever which may be owned by such city, town or village at the time such board is so established, or which may be thereafter established or acquired by such city, town or village, by purchase or otherwise, and all appurtenances thereto belonging, and shall enforce the performance of all contracts and work, and have charge and custody of all books, property and assets belonging or appertaining to such plant or plants."

And said Board of Public Works may be given additional powers by the common council of said city under the provisions of Section 7655, R. S. Mo. 1929, which is as follows:

> "Said board shall also exercise such other powers and perform such other duties in the superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance. Said board shall make all necessary regulations for the government of the department not inconsistent with the general laws of this state, the charter of such city or the ordinances thereof."

Section 7660, R. S. Mo. 1929, provides that the Board of Public Works may assess and collect and provide for the rates to be charged, all of which shall be under the supervision of the Board of Public Works subject to the ordinance of such city, town or village.

By the provisions of Section 7654, supra, quoted above, the Board of Public Works shall "have the power, and it shall be its duty, to take charge of and exercise control over any water works, gas works, electric light and power plant, steam heating plant or any other device or plant for furnishing light, power or heat etc."

And if the further powers are granted by the common council, under Section 7655, supra, the "said board shall also exercise such other powers and perform such other duties in the superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance."

We take it that when the city creates a Board of Public Works under Section 7651, supra, that the Board of Public Works has the powers as set forth in Section 7654, supra, and if the Council sees fit it may further give to the Board of Public Works the powers under Section 7655, supra.

In Ordinance No. 3634, of the City of Louisiana, creating the Board of Public Works, it is provided, among other things, as follows (Section 5):

> "Said board of Public Works shall have under its special charge the City Water Plant and City Sanitary Sewer System and all appurtenances thereunto belonging, and shall have the management and control of the City Water Plant and Sewer System and of the assessment of water rates and sewer rates and the collection of revenue therefrom."

By this section the City Council has only delegated certain powers to the Board of Public Works and limited their powers to the management and control of same. The question, then, is whether the Board of Public Works under the terms of

this ordinance would have a right to expend the $150,000, or part of sa e, for the rehabilitation of the two systems.

In determining what its powers are, we must first ascertain what the term "have the management and control" means.

In 38 C. J., page 521, the term "manage" is defined as follows:

> "A term meaning to administer; to carry on; to conduct; to control; to direct; to direct or conduct affairs; to direct the concerns of; to govern; to guide; to handle; to have under control and direction; to order; to oversee;"

The Century Dictionary defines the word "management" as "the act of managing by direction or regulation; conduct; administration; governing; direction; guidance; caring; charge; superintendence." It defines the word "control" as meaing, "subject to authority; direct; regulate; govern; dominate; to have superior force and authority over."

The Standard Dictionary defines "management" as "carry on; directing; conducting; superintendence; having the general management, conduct and direction of something; act as responsible or executive head", and defines "control" as, "to exercise a direct, restraining or governing influence over; regulate; regulating power; restraining or directing influence."

Bouvier's, 3d Revision, p. 2073, defines the word "manage" to mean, "direct; control; govern; administer; oversee."

In the case of Schneider v. City of Ann Arbor, 162 N. W. 113 (Mich.), the court said:

> "The board of public works is not the governing body of the city; it is a board of limited powers."

From the reading of the statutes, and Ordinance of the City of Louisiana creating the Board of Public Works and delegating to them certain powers under the ordinance, we think

that its powers have been limited to superintending the operation of the two systems and not delegated to them the power to expend the $150,000 for the rehabilitation of the two systems, and that the power of improving, repairing, and rehabilitation of the systems is still in the City Council of the City of Louisiana.

Of course, we do not mean to say that the Board of Public Works would not have the right to improve and make repairs of the two systems incidental to its operation, but, in the expenditure of such a large sum which in this case exceeds the original cost of both systems, we think that the expenditure is under the jurisdiction of the City Council.

CONCLUSION.

It is, therefore, the opinion of this Department that the expenditure of this money under the statutes, and ordinance as adopted, is under the supervision of the City Council.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

INTOXICATING LIQUORS: Change of corporate name does not require new license.

April 18, 1935.

FILED 6

Department of Liquor Control,
State of Missouri,
Jefferson City, Missouri.

Gentlemen:

This department is in receipt of your letter of April 17 requesting an opinion as to the following state of facts:

> "We are enclosing copy of letter written to the Williams-Jennings Co., Inc., 212 W. Phelps St., Springfield, Mo., attached to the original letter written by the Williams-Jennings Beverage Co.
>
> As stated in the copy, it is our opinion that the Jennings Beverage Co., Inc., must obtain a new wholesale liquor permit, due to the fact that the Williams-Jennings Beverage Company is no longer in business.
>
> Mr. Sam Ware, attorney for the Jennings Beverage Co., states that Mr. Jennings bought 1,000 shares of stock from Mr. Williams, and he now has full control of the business, with two other stockholders in the corporation. The records of the Corporation Department show that there has been a change in the corporate name.
>
> We are enclosing the copy of previous opinions which was submitted by Mr. Ware. In brief, he argues that a change in the corporate name does not necessitate a new permit. We argue that a new corporation must have a new permit. We base our contention on Section 16 of the Liquor Control Act."

Section 16 of the Liquor Control Act of Missouri (Laws of Mo. 1933-34, Extra Session, page 77) provides:

> "No license issued under this act shall be transferable or assignable."

The records in the Corporation Dep't. of the Office of Secretary of State of Missouri show that the Williams-Jennings Beverage Company, the original corporation, and the corporation in whose name the wholesale liquor permit was issued by the Supervisor of Liquor Control is still in existence and in good standing. However, the name of the corporation has been changed to the "Jennings Beverage Co., Inc."

With regard to the question of whether a change of corporate name creates a new corporation, we respectfully refer your attention to the case of Rawleigh Co. v. Grigg, 191 S.W. 1019, wherein the Court said (l.c. 1020-1021):

> "The contract of guaranty, as with any other obligation, was made to and for the benefit of the corporation and not the mere name, and whether such corporation retained its then name or took a new one would make no difference. 3 Thompson on Corporations, Sec. 3191, says:
>
> 'The fact that a corporation changes its name does not affect its identity, neither does it release it from the obligation to pay its debts, nor prevent it from recovering on contracts or promises made to it in its former name. Generally a change of name has no effect whatever upon either the existence or identity of a corporation, or any right flowing to or from it. Where the name has been lawfully changed, unless otherwise provided, the corporation should sue in its new name. A change of the corporate name affects neither its identity nor its rights, and neither lessens nor adds to its obligations. A contract entered into with a corporation which subsequently changed its name may be sued upon in the new name of the corporation; and the complaint and summons may be amended by inserting the new name.'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that the change of the corporate name from "Williams-Jennings Beverage Co." to "Jennings Beverage Co." worked no change in the entity of the corporation, which remained the same. Terminal Ice & Power Co. v. American Fire Ins. Co., 187 S.W. 564. It is therefore our further opinion that Section 16 of the Liquor Control Act, supra, is not applicable to the facts as presented in your letter and that a new wholesale liquor permit need not be obtained by the Jennings Beverage Co.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

NON-INTOXICATING BEER: New permit necessary under law as amended, by 58th General Assembly of the State of Missouri.

5-13

May 8, 1935.

FILED
6

Hon. E.J. Becker,
Supervisor of Liquor Control,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of May 7 requesting an opinion as to the following state of facts:

> "In confirming Mr. Becker's telephone conversation of today, we respectfully request an opinion on the following subject:
>
> "What is the status of the $10.00 3.2% beer permit that has been issued by the Food & Drug Department? Does Senate Bill #54, as recently passed by the Legislature and signed by the Governor, raising the license fee from $10.00 to $25.00, make the $10.00 permit void?
>
> "We quote this as a specific example, but in conclusion does Senate Bill #54 make all permits that have been issued by the Food and Drug Department void? This would, of course, include the $5.00 original package permit, the $50.00 distributors' permit, and the $500.00 manufacturers' permit. * * * * *"

Section 13139e, Laws of Missouri 1933, page 258 provides:

> "Before any permit required by this article shall be issued, the annual fee required therefor shall be paid

> into the State Treasury, and the receipt for such payment filed in the office of the Food and Drug Commissioner. * * * * *"

This section of our law has been by the 58th General Assembly of the State of Missouri expressly repealed and a new section 13139e enacted in lieu thereof, as found in Committee Substitute for Senate Bill No. 54 as passed by the 58th General Assembly. This section now provides:

> "Before any permit required by this article shall be issued, the annual fee required therefor shall be paid into the State Treasury, and the receipt for such payment filed in the office of the Supervisor of Liquor Control. * * * * *"

The general principle of law respecting this problem is found in 33 C.J. 534, wherein it is said:

> "A licensee takes his permit subject to the contingency that there may be changes in the laws, adopted in the exercise of the police power, which will render his privilege less valuable or his responsibilities greater; and the fact of his holding a valid license, or of his having paid money for it, does not exempt him from the operation of statutes or ordinances subsequently passed imposing additional burdens upon licensed dealers, or subjecting their business to new restrictions or limitations. A license granted to sell liquor in a county is no defense to a prosecution for selling therein after the taking effect in the county of a general prohibitory law."

In the case of Ex Parte Vaccarezza, 106 S.W. 392, the Court had before it a similar problem. In that case the relator on May 28, 1907 obtained a license entitling him to pursue the business of retailing intoxicating liquors for twelve months. A new law was enacted which went into effect on July 12, 1907 and provided for new regulations for the sale

of intoxicating liquors and declared that all laws or parts of laws in conflict therewith were expressly repealed. The Court held that relator had no authority to sell under his license obtained on May 28, 1907 after the passage of the new law on July 12, 1907, and said:

> "We deem it unnecessary to pursue this subject further, for the authorities are too clear for discussion that, when the Baskin-McGregor bill went into effect on the 12th of July, it not only expressly repealed all former laws with reference to retail of liquors in Texas, as provided for under the terms of the act, but that the repeal by substitution is as equally certain."

CONCLUSION

In view of the foregoing, it is the opinion of this department that inasmuch as Section 13139e, Laws of Mo. 1933, page 258 has been repealed by Committee Substitute for Senate Bill No. 54 as passed by the 58th General Assembly and a new section (Section 13139e) enacted in lieu thereof by said Act of the General Assembly, all persons desiring to deal in the manufacture or sale of non-intoxicating beer as provided in Laws of Mo. 1933, page 256 as amended by Committee Substitute for Senate Bill No. 54 as passed by the 58th General Assembly must secure new permits to engage in said business from the Supervisor of Liquor Control of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

jwh;ah

INTOXICATING LIQUOR: Corporation operating two wholesale liquor businesses in this State required to take out a wholesale liquor dealer's license for each place of business.

E-18

May 15, 1935.

FILED
6

Hon. E. J. Becker
Supervisor
Department of Liquor Control
State of Missouri
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of a letter from your office which reads as follows:

> "We find ourselves facing a condition which we think is not covered by the present liquor control act.
>
> "The Wagner Brewing Co., Granite City, Ill., have established branches at 3617 Hebert St. St. Louis, and 105 E. Coates St., Moberly, These wholesale permits were applied for and purchased by the Wagner Company at a cost of $100.00 each. The company also pays the state gallonage tax of $1.00 per barrel. The permits were issued as resident permits, and we are of the opinion that non-resident permits should have been issued. However,due to the fact that this is a very close question we are asking for an opinion to be rendered by your department.
>
> "We are enclosing the applications for the two branches, as well as the two permits and all literature that pertains to this specific case. We would appreciate your opinion at the earliest possible date, so that we may advise the Wagner Brewing Company as to their status in this state."

Section 21 of the Liquor Control Act of the State of Missouri, found at page 84, Laws of Missouri, Extra Session, 1933-1934, specifies the amount to be charged and collected by the Supervisor of Liquor Control for issuing various kinds of liquor licenses. Said section was not repealed or amended by the Act of the 58th General Assembly, recently signed by the Governor. Said section provides in part:

> "For the sale of intoxicating liquor by a wholesale dealer, or a wholesale liquor dealing agent, the sum of one hundred ($100.00) dollars, for handling intoxicating liquor containing not in excess of five (5%) per cent of alcohol by weight; ****."

Said section provides further:

> "For the sale of intoxicating liquors by every person residing without this state, who shall solicit, receive or take orders for the sale of intoxicating liquors within this state, by a wholesale liquor dealing agent, as herein defined, the sum of one hundred ($100.00) dollars, for handling intoxicating liquor containing not in excess of five (5%) per cent of alcohol by weight; ****"

And further:

> "Provided, however, the payment of one license by any non-resident liquor dealer, shall include the right to <u>solicit</u> business in this state by as many agents as he may wish to employ. ****"

Said section defines a wholesale liquor dealing agent as follows:

> "The 'wholesale liquor dealing agent' is defined to be any person who solicits, receives or takes orders for the purchase and delivery of any intoxicating liquor to any person in this state."

We call your attention to Section 20, which is still

in force and effect, not having been repealed or amended by the new Act of the 58th General Assembly. Said section reads in part as follows:

> "Section 20. On approval of the application and payment of the license tax herein provided, the Supervisor of Liquor Control shall grant applicant a license to conduct business in the state for one year from date of the license. A separate license shall be required for each place of business.***"

It is plain from a reading of Section 21, supra, that the payment of one license by a non-resident liquor dealer gives him the right to solicit business in this State by as many agents as he may wish to employ. However, according to your letter and files, the Wagner Brewing Company is doing more than merely soliciting business by agents. They have, in fact, established two branch offices in this State, and at both places are carrying on the business of a wholesale liquor dealer, including the storing and delivering of their products. We are informed by the corporation department that the Wagner Brewing Company has complied with the provisions of Section 4598, R. S. Mo. 1929, and has been licensed to do business in this State. This, in our opinion, would not have been necessary if they were only soliciting orders by agents.

Section 20, supra, plainly requires a license for each place of business and since the Wagner Brewing Company is operating two wholesale liquor places of business in this State and said places of business are doing more than merely soliciting orders for said company, it is our opinion that each place of business should be required to take out a resident wholesale liquor dealer's license.

Very truly yours,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED.

ROY McKITTRICK
Attorney-General.

JET/afj

INTOXICATING LIQUORS: Answering five questions regarding Senate Bill No. 30.

May 24, 1935



Hon. E. J. Becker
Supervisor, Liquor Control
Capitol Building
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "In confirming our conversation of today, we are requesting an opinion upon the following subject:
>
> "Section 21, lines 41 to 46, inclusive, of the old liquor control act provides for a non-resident wholesale permit. We are quoting this section, as this section was not repealed by the legislature in Senate bill 30 it is, therefore, still in effect.
>
> 'The sum of five hundred ($500.00) dollars for handling intoxicating liquor of all kinds, for a period of one (1) year; **Provided**, however, the payment of one license by any non-resident liquor dealer, shall include the right to solicit business in this state by as many agents as he may wish to employ.'
>
> "Section 21-A-2 of Senate bill 30 states in brief, that it shall be unlawful for any firm, partnership, etc. residing without this state to solicit, receive or take

orders within this state except thru a duly licensed wholesale liquor dealer who shall in this case be the agent of the non-resident firm or corporation.

"Under section 21, a non-resident wholesaler shipped into this state both to the wholesaler and retailer, when he shipped to the retailer he obtained the state stamp directly from this office. On liquor shipped to a wholesaler within this state, he did not affix the stamp. Does section 21-A-2 of Senate bill 30, prevent this department from furnishing non-resident permit holders state stamps? Does this section further mean, that the non-resident wholesaler does not have to have a permit in order to ship to the licensed wholesalers within this state?

"For example, we have 48 non-resident wholesale permits issued through out the country, of these 48 wholesalers 21 have obtained $500.00 permits covering the full year, the remaining 27 have permits for $250.00, expiring June 30. What effect does section 21-A-2 of Senate bill 30 have on these non-resident wholesale permits?

"Is it your opinion that section 21 is still valid and that a non-resident wholesaler must have a non-resident permit in order to sell to the licensed wholesaler in this state, also does section 21-A-2 prevent the non-resident wholesaler shipping directly to the retailer?

"As nearly one-third of our non-resident permits are issued in the city of Chicago, we are being beseiged with letters demanding that they be refunded the unused portion of their permits. The state of Indiana had exactly this same occurrence, they ruled that a non-resident wholesaler could not sell directly to the retailer, and called in all non-resident permits and refunded the unused portion. Of course, we cannot do this due to the fact that we do not have any fund from which we can make refunds. We realize that

the two sections mentioned above can be interpreted many ways, so we are more or less helpless unless we get a strict interpretation from your office.

"We will be pleased to have your opinion as rapidly as possible."

We will answer your questions in the order in which you ask them.

I.

STATE SUPERVISOR OF LIQUOR CONTROL MAY FURNISH NON-RESIDENT PERMIT HOLDERS STATE STAMPS.

You ask if Section 21-a-1 of Senate Bill No. 30 prevents your department from furnishing non-resident permit holders state stamps? Nothing is found in said section to prevent you from selling non-resident permit holders state stamps to be affixed to containers containing intoxicating liquors. Subsection "c" of Section 21-a-1 found in Senate Bill No. 30, at page 9 reads as follows:

"(c) The amounts required to be paid by this section shall be evidenced by stamps or labels purchased from the Supervisor of Liquor Control, and affixed to the container of such spiritous liquors. The person who shall first sell such liquor to any other person, firm or corporation in this state shall be liable for such payment and shall purchase, affix and cancel the stamps or labels required to be affixed to such container."

The above section requires that the person who shall first sell intoxicating liquor to any person, firm or corporation in this state shall purchase, affix and cancel the stamps or labels required to be affixed to such container.

In our opinion, the above section would apply to an outstate liquor dealer who first sells intoxicating liquor to a wholesale liquor dealer in this State. Furthermore, Section 41-a of the Liquor Control Act makes it unlawful for any person to transport intoxicating liquor into this State upon which the required inspection, labeling or gauging fee or license has not been paid. Said section reads as follows:

> "Any person who shall haul or transport intoxicating liquor, whether by boat, airplane, automobile, truck, wagon, or other conveyance, in or into this state, for sale, or storage and sale in this state, upon which the required inspection, labeling or gauging fee or license has not been paid, shall upon conviction thereof, be deemed guilty of a misdemeanor."

Since the above section makes it unlawful for any person to transport intoxicating liquor into this State, unless the required license fee has been paid, and subsection "c" of Section 21-a-1 requires that the gallonage license fee be evidenced by stamps or labels affixed to the container of such spiritous liquors, it is our opinion that the stamps must be affixed by the outstate permit holder before he transports any spiritous liquor into this State, and that the Supervisor of Liquor Control should sell said outstate liquor dealer the necessary stamps to be so affixed.

II.

A NON-RESIDENT WHOLESALE LIQUOR DEALER MUST HAVE A LICENSE TO SHIP INTOXICATING LIQUOR TO A LICENSED WHOLESALE LIQUOR DEALER IN THIS STATE.

Section 21 of the Liquor Control Act, passed by the 57th General Assembly in Extra Session, 1933-1934, reads in part as follows:

> "* * * For the sale of intoxicating liquors by every person residing without this state, who shall solicit, receive or take

> orders for the sale of intoxicating liquors within this state, by a wholesale liquor dealing agent, as herein defined, the sum of one hundred ($100.00) dollars, for handling intoxicating liquor containing not in excess of five (5%) per cent of alcohol by weight; the sum of two hundred ($200.00) dollars for handling intoxicating liquor containing not in excess of twenty-two (22%) per cent of alcohol by weight; the sum of five hundred ($500.00) dollars for handling intoxicating liquor of all kinds, for a period of one (1) year; Provided, however, the payment of one license by any non-resident liquor dealer, shall include the right to solicit business in this state by as many agents as he may wish to employ. * * *"

The above section was not expressly repealed by the 58th General Assembly. The Legislature did, however, amend the Liquor Control Act by repealing certain sections of the act and adding numerous sections thereto. Section 21-a-2 was added by the present General Assembly and reads in part as follows:

> "* * * It shall be unlawful for any person, firm, partnership or corporation residing without this state to solicit, receive or take orders for the sale of intoxicating liquor within this state except by or thru a duly licensed wholesale liquor dealer who shall be considered for the purpose of this Act as the agent of said non-resident person, firm, partnership or corporation or to haul or transport intoxicating liquor, or cause to be hauled or transported intoxicating liquor, in any manner whatsoever in or into this state, for sale, or storage and sale in this state, unless the same has been ordered by such duly licensed wholesale liquor dealer. * * *."

Section 30-d was also added by the present 58th General Assembly and reads in part:

> "It shall be unlawful for any person in this state holding a license or permit to sell beer or malt liquors or holding any retail liquor dealer's license or permit, * * * to purchase from any brewer, manufacturer, or distiller, any intoxicating liquor, manufactured outside of this state, except through a wholesaler or distributor, in this state holding, and operating under, a license or permit issued by the Supervisor of Liquor Control. It shall also be unlawful to sell, or offer for sale, any beer, malt liquor, or other intoxicating liquor, purchased in violation of the provisions of this section. * * *"

As stated above, Section 21 of the Liquor Control Act has not been expressly repealed and is still in force and effect unless it has been repealed by necessary implication.

Repeals by implication are not favored, however, when there is a plain repugnancy between a former and a latter law -- the latter will repeal the former by implication to the extent of the repugnancy.

In State ex rel. v. Wells, 210 Mo. loc. cit. 620, the Court quoting with approval Anderson's Law Dictionary said:

> "* * * 'A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy.' (Anderson's Law Dict., p. 879.)"

That part of Section 21, which provides that the payment of one license by a non-resident liquor dealer shall include the right to solicit business in this State by as

many agents as he may wish to employ, is plainly in conflict with Section 21-a-2, which makes it unlawful for any person, firm, partnership, or corporation residing without this State to solicit or take orders within this State except by or through a duly licensed wholesale liquor dealer, and with Section 30-d which makes it unlawful for any person in this State holding a license or permit to sell beer or malt liquors, or holding any retail liquor dealer's license or permit, to purchase from any brewer, manufacturer or distiller, any intoxicating liquor manufactured outside of this State except through a wholesaler or distributor, in this State, holding and operating under a license or permit issued by the Supervisor of Liquor Control.

There is nothing in Section 21-a-2 or Section 30-d, or in any other section of Senate Bill No. 30, which is inconsistent with or repugnant to that part of Section 21, which requires every person residing without the State who shall solicit, receive or take orders for the sale of intoxicating liquors within this State to obtain a license from the Supervisor of Liquor Control. Section 21, supra, requires all outstate dealers who solicit, receive or take orders for the sale of intoxicating liquor within this State, whether they be retailers, wholesalers, or distillers to obtain a license from the Supervisor of Liquor Control.

In view of the above, it is our opinion that Section 21-a-2 and Section 30-d have repealed by implication that part of Section 21, which provides that payment of one license by any non-resident liquor dealer shall include the right to solicit business in this State by as many agents as he may wish to employ but has not repealed that part of Section 21 which requires an outstate liquor dealer to obtain a license from the Supervisor of Liquor Control before receiving, soliciting or taking orders for the sale of intoxicating liquors within this State.

III.

A NON-RESIDENT WHOLESALE LIQUOR DEALER CAN ONLY SOLICIT AND RECEIVE OR TAKE ORDERS FOR THE SALE OF INTOXICATING LIQUOR WITHIN THIS STATE THROUGH A DULY LICENSED WHOLESALE LIQUOR DEALER.

As pointed out above, Section 21-a-2 and Section 30-d have repealed by implication that part of Section 21,

which provides that the payment of one license by a non-resident liquor dealer shall include the right to solicit business in this State by as many agents as he may wish to employ. Now under the provisions of Section 21-a-2, no person, firm, partnership or corporation residing without this State can solicit, receive or take orders for the sale of intoxicating liquor within this State except by or through a duly licensed wholesale liquor dealer within this State, or haul or transport intoxicating liquor into this State for sale or storage and sale in this State unless the same has been ordered by such duly licensed wholesale liquor dealer.

It is therefore the opinion of this office that a non-resident liquor dealer can only solicit, receive and take orders for the sale of intoxicating liquor within this State by or through a duly licensed wholesale liquor dealer.

IV.

A NON-RESIDENT WHOLESALE LIQUOR DEALER CANNOT SHIP INTOXICATING LIQUOR INTO THIS STATE DIRECT TO A RETAILER.

Section 21-a-2, supra, clearly makes it unlawful for any person, firm, partnership or corporation residing without this State to solicit, receive or take orders for the sale of intoxicating liquor within this State except by or through a duly licensed wholesale liquor dealer, or to haul or transport intoxicating liquor or cause to be hauled or transported intoxicating liquor into this State for sale or storage and sale in this State, unless the same has been ordered by a duly licensed wholesale liquor dealer. This section applies to all non-resident persons whether they be wholesalers or not.

It is therefore our opinion, in view of the above section, that a non-resident wholesale liquor dealer cannot ship intoxicating liquor into this State direct to a retailer.

V.

NON-RESIDENT PERMIT-HOLDER IS NOT ENTITLED TO A REFUND FOR THE UNUSED PORTION OF HIS PERMIT.

You state that many non-resident permit-holders are demanding that they be refunded the amount of the unused portion of their permits. It is true that a non-resident permit-holder's privilege to solicit business in this State by as many agents as he may wish to employ has been repealed by Section 21-a-2 which allows him only to solicit business by or through a duly licensed wholesale liquor dealer in this State. However, a licensee always takes his permit subject to the contingency that the law may be changed to render his privilege less valuable.

33 Corpus Juris, page 634, in regard to this general proposition of law reads as follows:

> "A licensee takes his permit subject to the contingency that there may be changes in the laws, adopted in the exercise of the police power, which will render his privilege less valuable or his responsibilities greater; and the fact of his holding a valid license, or of his having paid money for it, does not exempt him from the operation of statutes or ordinances subsequently passed imposing additional burdens upon licensed dealers, or subjecting their business to new restrictions or limitations. A license granted to sell liquor in a county is no defense to a prosecution for selling therein after the taking effect in the county of a general prohibitory law."

Black on "Intoxicating Liquors", Section 128, page 168, states the law as follows:

> "The fact that a person has been licensed to sell intoxicating liquors does not give him a vested right in

> the continuance of his traffic in such liquors, in any such sense that it cannot lawfully be abridged or abrogated by subsequent legislation enacted in the exercise of the police power, and for the benefit of the interests of society. 'The license being a mere privilege to carry on a business subject to the will of the grantor, it is not property, in the sense which protects it under the constitution. The revocation of the license does not deprive the citizen of his liberty or his property without due process of law.' * * *"

In any event said non-resident permit holders would not be entitled to any refund on their permits for the reason that the Legislature has not provided for the repayment of same.

In the case of Minneapolis Brewing Co. v. Village of Bagley, 170 N. W., loc. cit. 705, the Court said:

> "It is well-settled law that where license fees are paid voluntarily by the applicant for a license, without mistake of fact, the municipality receiving the same, in the absence of a statute otherwise providing, is not liable for a return of the money, even though exacted under an unconstitutional statute, or otherwise be not a legal demand. 23 Cyc. 152; 25 Cyc. 631; 15 R. C.L. 315; Custin v. City of Viroqua, 67 Wis. 314, 30 N. W. 515; Michel Brewing Co. v. State, 19 S. D. 302, 103 N. W. 40, 70 L. R. A. 911; Levy v. Kansas City, 168 Fed. 524, 93 C.C.A. 523, 22 L.R.A. (N.S.) 862. ***** The fact that there may be a moral obligation supporting the claim does not change the rule. The money in such case after reaching the public treasury can be withdrawn only when legislative authority exists therefor, and considerations of a moral character should be addressed to that department of state affairs. Such is the law of this state. ***"

In the case of People v. Sisson, 169 N. Y. S., loc. cit. 988, it was said:

> "Putnam, J. The order of the state excise authorities acting under the powers conferred by this statute has been held constitutional. 180 App. Div. 464, 167 N. Y. Supp. 801; 222 N. Y. 387, 118 N. E., 789. Relator, however, points out a distinction. After he had prepaid the tax for a year's traffic, the state has nevertheless suspended such traffic without providing any compensation, or for reimbursement by the return of the proportionate unexpired part of the excise year. ****
>
> "Obviously this suspension and stoppage of relator's privileges involved him in losses, since the Newton Law aforesaid contemplates a suspension for the period of the war. On the other hand, through the stay granted with this writ, relator was enabled to continue his traffic from August 11th up to the 30th of September, the close of the excise year. Whether or not relator should have a proportionate return of the tax money prepaid for the time that relator was prevented from engaging in the traffic in liquors we need not inquire. We recognize that a certificate which is thus should carry with it a right to a just rebate if the state stop or suspend its operation without fault of the certificate holder.
>
> "(2) We are agreed, however, that the rights conferred under such liquor tax certificate were not paramount to this exercise of the state's police power to suspend the privileges thereunder, even if the provisions for reimbursement were not full and complete. ****"

In the case of Neumer v. Jackson County, 271 Mo. loc. cit. 601, 602, the Court said:

"III. The only other theory which might be urged as a basis of recovery is that a dramshop licensee upon the surrender of his license is entitled to a rebate for the unexpired portion of the license.

"It would appear, however, that the great weight of authority is to the effect that a recovery can not be had under those conditions, in the absence of a statute so authorizing.

"The rule here applicable is stated in 15 R. C. L. 315, as follows: 'It seems to be well settled that ordinarily a licensee does not, on the voluntary surrender of his license, become entitled to the return of the license fee, in proportion to the unexpired term, in the absence of statutory enactment to the contrary.'

"To the same effect are the following authorities: Joyce on Intoxicating Liquors, sec. 330; 1 Woollen & Thornton on the Law of Intoxicating Liquors, sec. 500; case note to Allsman v. Oklahoma City, 16 L. R. A. (N.S.) 1. c. 515, and cases therein cited."

It is therefore the opinion of this department that non-resident permit-holders are not entitled to a refund of the amount of the unused portions of their permits, due to the fact that they are now under the provisions of Section 21-a-2 prevented from soliciting business in this State, except by or through a duly licensed wholesale liquor dealer.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/afj

BONDS: Counties may vote bonds under Sec. 2922, R. S. 1929, to relieve warrants, when reduced to judgments.
Warrant holders paying expenses of election does not invalidate bonds.
County Court may authorize election without petition.

June 20, 1935.

FILED
6

Hon. G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Mr. Beckham:

This is to acknowledge receipt of your letter of June 6, 1935, which letter is as follows:

"The County Court of Crawford County is considering calling a special election for the purpose of placing before the voters the proposition of a bond issue for funding the outstanding indebtedness of the County.

"We have approximately $65,000.00 outstanding warrants for 1931 and 1932. Approximately $50,000.00 of this has been reduced to judgment. As I understand Sec. 2922 we could issue bonds only for that part that has been reduced to judgment. We would like to 'clean the slate' while at it and vote bonds to take up the entire $65,000.00. I would like to have your opinion as to whether or not, this could be done.

* * * * *

"Holders of said judgments have offered to pay the expenses of a special election for this purpose. Would this place any cloud upon the validity of the bonds?

"Also, proceeding under Sec. 2922, I understand that no petition to the County Court is necessary. Is this correct?"

There are three questions asked in your letter and we shall undertake to answer them in their order as submitted in your letter.

I.

Your first question is whether or not, under Sections 2922 and 2923, R. S. Mo. 1929, your county court is authorized to issue bonds upon a vote of the people to pay outstanding warrants of Crawford County which have not been reduced to judgment.

We herewith set forth Section 2922 for the reason that it provides the method for issuing bonds for funding indebtedness of counties. Said section is as follows:

> "County and municipal authorities are hereby authorized to submit to the qualified voters of any county, city or village, at any special election held for that purpose, or at any primary or general election held under the laws of this state, a proposition whether any judgment indebtedness of such county or municipality shall be funded; and if two-thirds or more of the qualified voters of such county or municipality voting on the proposition shall assent thereto, such county or municipality shall be authorized to borrow upon its credit the amount of money authorized to be borrowed, and to issue, negotiate, and sell coupon funding bonds of such county or municipality, maturing serially, in not more than twenty years after their date in annual amounts as nearly equal as may be practicable, payable to bearer, with interest payable semi-annually, at a rate not exceeding six per centum per annum; and from the proceeds of the sale or sales thereof to satisfy and discharge such judgment indebtedness. The assent of two-thirds or more of the said qualified voters to such proposition and the issuance of

> such funding bonds under this section shall be deemed and held by all courts in this state to be, to all intents and purposes, the incurring of a new indebtedness; and thereafter no question shall ever be raised in any court as to the validity of such indebtedness, except questions of constitutional limitation of indebtedness. And such funding bonds shall not be exchanged or delivered in payment of such judgment indebtedness nor any part thereof. The provisions of this section shall not be deemed to be repugnant to nor inconsistent with section 2892, Art. 4. Chap. 15, R. S. 1929; but the power and authority hereby conferred shall be deemed to be comulative thereof."

It can readily be seen that only judgment indebtedness of such county or municipality shall be funded. Therefore, only that part of your warrant indebtedness which has been reduced to judgments, to-wit, $50,000.00, may be funded in the manner provided by the above statutes. When a judgment has been rendered for indebtedness against a county, such judgment is a conclusive adjudication that the debt is valid and is not open to collateral attack in a suit on bonds issued to refund such judgment debt.

The statute very properly provides that the bonds shall be issued only for judgment indebtedness and thereby does not subject bonds legally issued to collateral attack by reason of some infirmity in a warrant, and the county, and everybody else, is foreclosed from attacking the validity of the warrant, if reduced to judgment.

In the case of State ex rel. Clark County v. Hackmann, State Auditor, 218 S. W. 318, l. c. 320, the Supreme Court of this State said:

> "By failure to collect taxes, and other reasons, there are many valid outstanding county warrants in the several

> counties of the state--nearly $2,000,000 according to reports. By valid outstanding warrants, we mean warrants issued for the current expenses of the year, and warrants which, when issued, were within the anticipated revenue of the year. By the issuance of the bonds involved here, Clark County is seeking to discharge judgments upon warrants of this character. This we say because the validity of the warrants is vouched for by court judgments. If Clark County is successful, the other counties, to use a homely expression, 'will follow suit.'"

II.

Your second question is whether or not, if the holders of the judgments based on the warrants, paid the expenses of the special election held for that purposee, would this place any cloud upon the validity of the bonds?

It is our opinion that if someone other than the county paid the expenses of the bond election that that in itself would not render the bonds, which might be voted at said election, invalid. And the fact that the holders of judgments made arrangements with the county court to finance the election would not affect the validity of the bonds.

III.

Your third question is whether a petition is necessary to authorize your county to submit the bond question to the vote of the people.

Replying thereto will say that Section 2922, supra, does not provide for a petition but states that the "county and municipal authorities are hereby authorized to submit to

the qualified voters of any county, city or village, at any special election held for that purpose, etc." And said section does not provide that a petition shall be the basis of the authority of the county court to order said election. It is our opinion that the county court may order said election on its own initiative and without a petition.

We might add that the Supreme Court in the cases of State ex rel. Clark County v. Hackmann, State Auditor, 218 S. W. 318, 280 Mo. 686, and State ex rel. City of Jefferson v. Hackmann, 229 S. W. 1082, 287 Mo. 156, has discussed at great length the necessary steps to be taken in the bond election of this kind.

We shall be glad to serve you at some future time.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

CRH:EG

INTOXICATING LIQUOR: License for the sale of intoxicating liquor cannot be issued for any place or premise within one hundred feet of a church or school building, measured from the nearest point or place described in license to nearest point of church or school building.

July 26, 1935

FILED
6

Honorable E. J. Becker
Supervisor of Liquor Control
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "Please favor this department with an an opinion on section 44-A-14, page 37 of the liquor control act.
>
> "Does the 100 feet mentioned in this particular section mean from property to property, or from entrance to entrance?
>
> "We shall be pleased to have your opinion on this subject as soon as possible."

Section 44-a-14 of the Liquor Control Act reads as follows:

> "No license shall be granted for the sale of intoxicating liquor, as defined in this act, within one hundred (100) feet of any school, church or other building regularly used as a place of religious worship, without the applicant for such license shall first obtain the consent in writing of the majority of the Board of Directors of such school, or the consent in writing of the majority of the managing board of such church or place of worship. The Board of Aldermen, City Council or other proper authorities, of any incorporated City, town or village, may by ordinance, prohibit

> the granting of a license for the sale of intoxicating liquor within a distance as great as three hundred (300) feet. In such cases, and where such ordinance has been lawfully enacted, no license of any character shall issue in conflict with such ordinance while such ordinance is in effect."

We fail to find from a review of the authorities that a Statute worded exactly as section 44-a-14, supra, has ever been construed. Similar Statutes have been construed, and a review of the decisions construing same may tend to assist us in arriving at a correct construction of the Missouri Statute.

In the case of Lanning v. Board of Excise Commissioners, 76 N. J. Law, l. c. 129 and 130, the Court said:

> "'No license shall be granted to sell spirituous, vinous, malt or brewed liquors by less measure than one quart * * * in any new place within two hundred feet of the curtilage of a church edifice * * * measured between the nearest point of the same and the nearest point of the building wherein such liquors, or any of them, are intended to be sold.'
>
> "In the present case the license applied for was for a 'new place.' The building wherein the liquors are intended to be sold is, if the entire building is considered, within twenty-five feet of the 'curtilage of a church edifice,' or, if we consider that part of the building only which is devoted to hotel purposes, within one hundred and fifty-six feet of such curtilage.
>
> "But it is contended by the prosecutor that he is relieved of the inhibition of the statute by the fact that the entrance to the hotel is more than two hundred feet distant from the church curtilage.
>
> "We see no force in this contention.

> "The purpose of the legislature seems to have been clearly expressed in language unambiguous and definite. It is that no license shall be granted in a new place within two hundred feet of the curtilage of a church measured between the nearest point of the same and the 'nearest point of the building wherein such liquors are intended to be sold.' "

In the case of People v. Lammerts, 40 N. Y. S. 1107, the Court construed a Statute prohibiting the sale of intoxicating liquor in premises within two hundred feet of a building occupied by a church, the Court passing on the question of whether the distance prohibited by the Statutes was measured from the church or from property owned by the church, at l. c. 1110 said:

> "It does not seem to me, however, that the conceded fact that a church society owns property within 200 feet, upon which no building has been erected, is within the prohibition. The language of the statute is, 'within two hundred feet of a building occupied exclusively as a church'; and, as there is no building there, it cannot be, and is not, occupied as a building for a church, and hence the language of the statute has no application to a case of this kind."

From the above it would seem that a prohibition against liquor being sold in a place within a prohibited distance of a church, or a building used for a church, applies to the church building and not to the property owned by the church.

In the case of In Re Place, 50 N. Y. S. 640, the Court construed the following Section:

> "Sec. 43. No person or persons who shall not have been licensed prior to the passage of this act, shall hereafter be licensed to sell strong or spirituous liquors, wine, ale and beer

> in any building not used for hotel purposes, and for which a license does not exist at the time of the passage of this act, which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a church or a school-house. The measurements shall be taken between the principal entrances of the buildings used for such church or school purposes and the place for which an application for a license has been made.' "

Although the above section provides that the measurements shall be taken between the principal entrance of the buildings used for such church or school purposes, and the place for which an application for a license has been made, the Court at l. c. 644 said:

> "I think it cannot be successfully contended, under any of these acts, that, in case a license existed authorizing a person to sell liquor just outside of the prescribed limits, he can, by renting an adjoining building within 200 feet of a church, and cutting an opening between them, become entitled to a license to sell liquors in the buildings so united, the entrance to which is, as in this case, within less than 200 feet of a church."

In the case of In Re Finley, 110 N. Y. S. page 71, the facts were as follows: The Liquor Tax Law of New York forbid the traffic in liquor in any place on the same street and within two hundred feet of a building occupied exclusively as a church or school house. The measurements were to be taken between the principal entrances of the school or church, and the place for which the application for a license had been made. A saloon was situated on the corner of Fifth Avenue and a cross-street. On the Fifth Avenue side, and within two hundred feet of a church were large double doors which had been used as a main entrance under a previous license, but had since been glassed over and a small side door on the cross-street, not within two hundred feet of the church was used as the only entrance. The Court on passing on said facts at l. c. page 72, said:

"Contrary to the contention of the respondent, the liquor tax law is to be construed liberally, that it may accomplish the purposes for its enactment. People ex rel. Cairns v. Murray, 148 N. Y. 171-175, 42 N. E. 584. There I consider the attempted closing of the main entrance of the saloon in question on Fifth avenue and the opening of the side door on Seventy-Sixth street a mere subterfuge, which the court should brush aside. The respondent's place where he is trafficking in liquor is situated on the corner of Fifth avenue and Seventy-Sixth street, in the borough of Brooklyn. When a previous license for this place was revoked and canceled by the court because of the failure to procure the requisite consents from dwelling house owners, the main entrance to the saloon was on Fifth avenue. Since then, and prior to the issuance of the certificate here sought to be revoked, this main entrance, consisting of large double doors, has been glassed over, the show windows on each side of the doorway being continued so as to pass over or in front of the door, and the small side door on Seventy-Sixth street is now used as the only entrance. The point to all this is that the entrance on Fifth avenue is within 200 feet of the property of the Bay Ridge Presbyterian Church, while the side door is beyond that limit. That the window extension is but a temporary closing of the Fifth avenue entrance, and a mere evasion of the law, is quite evident from the exhibit, which shows the main door or entrance still open and ready for use and men standing in the doorway. The entrance is not permanently blocked up, and appearance indicate that it was not meant to be. I therefore, for the purposes of this case, consider the entrance to be on Fifth avenue, and the distance of 200 feet to be measured from that doorway."

In the case of In Re Fleming, 38 N. Y. S. at l. c. page 610, it was said:

> "Upon the return to a writ of certiorari to review the action of the excise board in refusing a liquor license to the relator, the facts are not in dispute, and the controversy involves only the construction of this provision of the statute, namely: 'No person * * * shall be licensed to sell strong or spirituous liquors, etc., in any building * * * which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as * * * a schoolhouse' (Laws 1893, c. 480, Sec. 43); the distance to be ascertained by measurement from the center of the nearest entrance of such building to the center of the nearest entrance of the place for which the license is solicited. In view of its obvious policy in protecting the school against the evil influences of the saloon, the statute should be so expounded as to accomplish its benign intent, and to that end be accorded a literal or a liberal interpretation as may most effectually avert the apprehended mischief. People v. Murray, 148 N. Y. 171, 173, 42 N. E. 584; People v. Excise Board, 7 Misc. Rep. 415, 417, 27 N. Y. Supp. 983. The prohibition is explicit and imperative that no license is allowable for a saloon on the same street and within 200 feet of a schoolhouse. In this instance the schoolhouse and the saloon are on Fifty-Eighth street, and are separated by less than the requisite distance. The case, then, is within the terms of the enactment. But the relator insists that, as the entrance to the saloon is on Sixth avenue, the actual predicament is not within the policy of the law. Were the court authorized, upon pretense of construction, to nullify a plain and peremptory provision of the statute by imputing to the legislature a meaning

> contradictory of its language, still, I do not precsive that the situation is exempt from the evil against which the enactment is a studious safeguard. The schoolhouse and the saloon are on the same street, and the entrance to the latter, though on another street, is still within the prohibited proximity. That entrance may be out of view, but access to the saloon is not the less easy and inviting, and I cannot say that the scenes of vice and disorder of which it may be theprovocation will not be of disturbance and detriment to the inmates of the schoolhouse."

The case of Greenough v. Town Council of Warwick, 31 R. I. 559, was an action attacking the validity of a liquor license issued by the Town Council on the ground that said Town Council had no right or jurisdiction to issue said license, because the building in which the liquor was to be sold was located within two hundred feet, measured by a public traveled way, of the premises of a school. The licensee denied the charge and the action was unsuccessful because of failure of proof. The Court, however, in passing upon what constituted the premises of a school, at l. c. page 561, said:

> "The premises of a public or parochial school can be neither more nor less than the duly constituted authorities, having jurisdiction in the matter, may see fit to appropriate for that purpose, and the same may be abridged or enlarged by them in their discretion. For example, the premises may consist of one or more rooms in a building, or of the entire building itself with no additional grounds; or the land, whereon several buildings have been erected by the owner thereof, may be apportioned as premises appurtenant to the several buildings in such proportion as the owner may deem proper, or may be left to be used in common as appurtenant to the several buildings thereon at the will and pleasure of the owner. However it may be, it is a matter susceptible of proof, and ought not to be left to conjecture."

In the case of Commonwealth v. Jones, 142 Mass. the Court at l. c. page 574, 575 and 576 stated the facts and law as follows:

> "This case presents the question as to the construction of the St. of 1882, c. 220, Sec. 1, which is as follows: 'No license. . . . shall be granted for the sale of intoxicating liquors in any building or place on the same street within four hundred feet of any building occupied in whole or in part by a public school.' The defendant's license authorized him to sell 'at the West Stockbridge House, northeast room, first floor, known as the Campbell Hotel, in said West Stockbridge.' No part of this northeast room was within four hundred feet of the school house. But portions of the Campbell Hotel, in which was the licensed room, were within four hundred feet of the schoolhouse.
>
> "The language of the statute is plain. It does not use the word 'room,' or 'tenement,' but 'building.' Its apparent object was to prevent the sale of liquor in any building on the same street with a public school-house, and within four hundred feet of it. If the defendant sold intoxicating liquors in the northeast room of the Campbell Hotel, and the Campbell Hotel was within four hundred feet of a public school-house and on the same street with it, then his license to sell intoxicating liquors in such northeast room would be no defence."
>
> "Whenever the school-house and the building in which a license is granted are situated upon the same street, whether close to the street or some distance from it, the four hundred feet between them are to be determined by measuring the nearest point of each house to the other. This will determine the distance required by the statute."

From a reading of the above cases it is apparent that the Courts have uniformly held that the exception in respect to churches and schools should be liberally construed in their favor, and strictly construed against applicants for licenses within the proscribed distance, so as to prevent the mischief aimed at by the limitation.

The above cases, however, are of little help in construing the Missouri Statute for the reason that said decisions are based upon Statutes containing provisions not found in the Missouri Law. For example, theStatute in the New York cases, supra, provided that the measurements shall be taken between the principal entrance of the buildings used for such churhh or school purposes, and the place for which an application for a license has been made. The New Jersey Statute construed in the case of Lanning v. Board of Excise Commissioners, supra, provided that no license to sell intoxicating liquor shall be granted to any place within two hundred feet of the curtilage of a church edifice, the distance to be measured between the nearest point of the same and the nearest point of the building wherein such liquors are intended to be sold. The Statute construed in Greenough v. Town Council of Warwick, supra, provided that no license shall be granted for the sale of liquors in any building or place within two hundred feet measured by any public traveled way of the premises of any public or parochial school. The Mass. Statute construed in Commonwealth v. Jones, provided that no license shall be granted for the sale of intoxicating liquor in any building or place on the same street within four hundred feet of any building occupied by a public school.

Section 44-a-14, supra, merely provides that no license shall be granted for the sale of intoxicating liquor within one hundred feet of any school, church or other building regularly used as a place of religious worship, unless the applicant shall first obtain the consent, in writing, of the majority of the Board of Directors of such school, or the consent, in writing, of the majority of the managing board of such church or place of worship. The Statute does not say that a license cannot be issued for the sale of intoxicating liquor within one hundred feet of the property, premises or curtilage of such school or church, neither does the Statute direct that the prohibited distance shall be measured by the nearest public traveled way, nor from entrance to entrance; nor from the nearest point of the building wherein liquor is sold, to the nearest point of

the church or school, or premises, or curtilage of such church or school. To hold Section 44-a-14 contained any of the above provisions would be writing a provision in the Statute not therein contained, something which we have no authority to do.

Section 20 of the Liquor Control Act, however does provide as follows:

> "Every license issued under the provisions of this Act shall particularly describe the premises at which intoxicating liquor may be sold thereunder, and such license shall not be deemed to authorize or permit the sale of intoxicating liquor at any place other than that described therein."

By reading Section 20 and Section 44-a-14 together, it is plain that the Legislature intended that no license should be issued for the sale of intoxicating liquor on any premises or place within one hundred feet of any school or church or other building regularly used as a place of religious worship, unless the applicant for such license shall first obtain the consent, in writing, of the majority of the managing board of the directors of such school or church. It is also apparent from the wording in Section 44-a-14 that the prohibition against issuing a license for the sale of intoxicating liquor within one hundred feet of a school or church or other building means that the license cannot be issued for the sale of intoxicating liquor at a place within one hundred feet of a church building or school building, and does not mean that a license may not be issued for a place within one hundred feet of the property of such school or church.

From the above we have arrived at the conclusion that no license can be issued for the sale of intoxicating liquor at any place or for any premises within one hundred feet of any school or church building. The Legislature, however, failed to direct from what points the distance is to be measured. In the case of Evans v. United States, 261 Fed. 902, the Court at l. c. page 904, said:

> "Distance is to be measured in a straight line in a horizontal plane, unless there is a clear indication that another mode of measurement is to be adopted. 9 Am. & Eng. Encyc. of Law, p. 614. Distance is a straight

line along the horizontal plane from point to point. It is measured from the nearest point of the one place to the nearest point of the other. 18 C. J. 1287."

CONCLUSION.

In view of the above it is the opinion of this Department that no license for the sale of intoxicating liquor can be issued for any place or for any premises, described in the license, within one hundred feet of any church or school building, unless the applicant shall first obtain the consent, in writing, of the majority of the Board of Directors, of such school, or the consent, in writing, of the majority of the managing board of such church or place of worship. It is our further opinion that the prohibited distance is to be measured in a straight line from the nearest point of the place or premises described in the license, to the nearest point of such church or school building or other building regularly used as a place of religious worship.

The Board of Aldermen, City Council, or other proper authorities of any incorporated city, town or village may, by ordinance, prohibit the granting of a license for the sale of intoxicating liquor within a distance as great as three hundred feet of a church or school building. The distance specified by a city should be measured in the same manner as pointed out above for the measurements of the distance prohibited by the Statute.

Respectfully submitted

J. E. TAYLOR
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

JET:H

CITIES TOWNS AND VILLAGES:)
) Authority of Board of Public Works.
BOARD OF PUBLIC WORKS)
CITY OF LOUISIANA :) Board of limited powers.

(Supplemental opinion)

August 19, 1935. 8-21

FILED
6

Mr. Davis Benning
Vice President
Board of Public Works
Louisiana, Missouri

Dear Mr. Benning:

This is to acknowledge receipt of your letter of recent date, which letter is as follows:

"Will you please refer to your opinion to this writer dated March 11, 1935?

"This opinion was given to me at my request as Vice President of the Board of Public Works of the city of Louisiana regarding the expenditure of monies for the rehabilitation of the water plant in this city, the question being whether this expenditure shall be under the supervision of the Board of Public Works or the City Council. At the time the opinion was requested I sent you a copy of the ordinance of the city of Louisiana establishing the Board of Public Works.

"Your opinion on this question was to the effect that under the ordinance as adopted by the City Council, the expenditure of this money was under the supervision of the City Council, the ordinance having been passed under Section 7654, R. S. Mo., 1929. In your opinion you state that under Section 7655 R. S. Mo., 1929, said Board of Public Works may be given additional powers by the City Council.

"The City Council and the Board of Public Works have not yet agreed upon the interpretation of said Section 7655 and the further question has arisen as to whether or not under this Section, the common council may authorize the Board of Public Works to spend this money, by an ordinance duly passed and approved.

"We would greatly appreciate your opinion on this question at your earliest convenience."

This opinion is supplementary to our opinion of March 11, 1935, to you, mentioned in your present letter of request.

Our conclusions in that letter were that, under the ordinances of the City of Louisiana, as passed and approved, submitted in your former letter, the Board of Public Works did not have the power and authority to expend the $150,000, for the purpose of reconstructing and rehabilitating the water system and sanitary sewer system in the City of Louisiana, and that the power and authority to expend said money was in the common council of said city.

Your present request is whether or not the common council of your city may authorize the Board of Public Works to expend this money by an ordinance under the provisions of Section 7655, R. S. Mo. 1929, which section we herewith set forth:

"Said board shall also exercise such other powers and perform such other duties in the superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance. Said board shall make all necessary regulations for the government of the department

> not inconsistent with the general laws of this state, the charter of such city or the ordinances thereof."

Your request calls for the interpretation and construction of the above section.

Under Section 7654, R. S. Mo. 1929, it is provided that the Board of Public Works shall "have the power, and it shall be its duty, to take charge of and exercise control over any waterworks, gas works, electric light and power plant, steam heating plant or other device or plant for the furnishing of light, power or heat, etc."; and then further powers may be granted under Section 7655, supra.

As stated in the case of Schneider v. City of Ann Arbor, 162 N. W. (Mich) 113, the court said:

> "The board of public works is not the governing body of the city; it is a board of limited powers."

In the case of Chittenden v. City of Lansing, 79 N. W. (Mich.) 797, the court said:

> "Under the charter the city council determines whether it will build a public building. The board then procures plans and specifications, and reports them, with an estimate of cost, to the council. Bids are advertised for, but before a contract can be made it must be authorized by the council. In this case the council authorized a contract to be made binding it to pay $108,000 for the construction of a building according to certain plans and specifications. The board of public works cannot bind the city by an agreement to increase the contract price. We are not cited to any case upholding such

> power. If this arrangment binds the city, then there is no limit to the power of the board to make changes in material and construction at the public expense."

It is thus seen that the Board of Public Works is a body of limited powers and can exercise only such powers as are given it by the statute under which it is created. When Section 7655, supra, is read in connection with the other sections relative to the Board of Public Works, to-wit, Sections 7651 to 7660, inclusive, we do not believe that it was intended that a board of public works should have complete charge and control of the construction of public works, and this is true even though the common counsel delegated that authority to said board.

It is our opinion that the further powers as mentioned in Section 7655, supra, only give the board further powers in the "superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance.", and does not give it power to construct said public works. And in the construction of this section it is significant that the word "superintendence" is used and that it has reference to the superintendence of same after the public improvements have been made. We are further inclined to this construction for the reason that if it had been intended by the Legislature that this authority to construct, build and rehabilitate the systems, such as mentioned in your letter, was to have been given to the board of public works, then it would have been easy to have stated in plain and unequivocal terms that this right of construction could be delegated to the board of public works.

Conclusion.

It is, therefore, our opinion that the duty of letting the contracts for the construction and the obligation of reconstructing and rehalilitating the two systems, to-wit, the water system and the sanitary sewer system, rests with the

Common Council and it cannot delegate that authority to the Board of Public Works.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED;

ROY McKITTRICK
Attorney-General

CRH:EG

TAXATION: Procedure for sale of mineral rights for delinquent taxes.

9-18

September 9, 1935.

FILED
6

Hon. C. C. Beckham,
Prosecuting Attorney,
Crawford County,
Steelville, Missouri.

Dear Sir:

We wish to acknowledge your recent request for an opinion wherein you state as follows:

> "Kindly inform me as to what proceedure is to be taken in case of default in the payment of taxes on mineral rights on real estate. Should the County Collector proceed to sell the mineral right in the same way that he sells land for delinquent taxes?"

Senate Bill No. 94, found in the Laws of Missouri, 1933, pp. 425 to 449, sets out the procedure for the collection of delinquent and back taxes and the foreclosure, sale and redemption of delinquent property. Section 9952a of said bill, found on p. 430, provides as follows:

> "All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale; provided, however, delinquent taxes, with penalty, interest and costs, may be paid

> to the county collector at any time before the property is sold therefor. The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

61 C. J. 179 discusses the taxation of minerals and mineral rights and states in part as follows:

> "Ores or minerals 'in place,' that is, unsevered, are taxable to their owner as realty; but minerals extracted and brought to the surface are taxable as personalty."

You state in your letter that the default in the payment of taxes is on "mineral rights" on real estate; hence we assume that you refer only to minerals "in place" and not minerals that have been extracted and brought to the surface.

The court in the case of In re Colby, 169 N. W. (Iowa) l. c. 444, in discussing the subject of mineral rights, said:

> "Minerals beneath the surface may be made the subject of separate ownership, either by a grant of the minerals by the owner of the land, or of a grant of the land excepting the minerals, and thereby an estate in fee simple is created in the minerals, as corporeal things real. 1 Tiffany on Real Property, sec. 219; Snoddy v. Bolen, 122 Mo. 479, 24 S. W. 142, 25 S. W. 932, 24 L. R. A. 507; Marvin v. Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322; Sloan v. Lawrence Furnace Co., 29 Ohio St. 568; Manning v. Frazier, 96 Ill. 279.
>
> "It is equally well settled that, when the fee in the mineral has been separated from the fee in the surface, the fee or interest in the former is assessable and taxable to the owner thereof as real estate. This much is settled by the statutes heretofore referred to, for surely

> the title to minerals in situ constitutes an interest in land. See In re Major, 134 Ill. 19, 24 N. E. 973; Kansas Natural Gas Co. v. Board of Commissioners, 75 Kan. 335, 89 Pac. 750; Wolfe County v. Beckett, 127 Ky. 252, 105 S. W. 447, 32 Ky. Law Rep. 167, 17 L. R. A. (N.S.) 688, and note collecting the cases."

The Supreme Court of Missouri in the case of Young v. Young, 307 Mo. l. c. 225, in holding that minerals "in place" are land, said:

> "That coal and other minerals in place are land and may be conveyed as such, and, when thus conveyed, constitute a separate and distinct estate and inheritance was decided by this court in Wardell v. Watson, 93 Mo. 107, * * *."

From the foregoing we are of the opinion that minerals in place are "land" and that the county collector, upon default in the payment of taxes, may sell the mineral rights in the manner provided for by Senate Bill No. 94, supra, for the sale of lands for delinquent taxes.

Respectfully submitted,

Wm. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

COUNTY HOSPITAL - Trustees not liable for tort.

November 25, 1935 11-25

FILED 6

Mr. Davis Benning
Prosecuting Attorney
Pike County
Louisiana, Missouri

Dear Sir:

We have your request of November 21, 1935 for an opinion, which request is as follows:

"Under the provisions of Article 4, Chapter 120, Revised Statutes of Missouri, 1929, this County has established and is maintaining a county hospital.

"I have been requested by the County Court to get an opinion from your office on the following questions

1 - To what extent is the County liable for damages, either to employees or to third parties, resulting from the negligence of the hospital employees?

2 - Is there any personal liability on the part of the trustees for damages resulting from the negligence of the hospital employees, either to third parties or to other employees?"

As to your first inquiry as to the extent of liability of the court for tort, I enclose here-

with a copy of an opinion written by this office under date of August 30, 1935, which holds that the county is not liable for tort.

By reference to Article 4, Chapter 120, R. S. Mo. 1929, we find that county hospitals are built from public funds, Section 13976, R. S. Mo. 1929, and are supported by funds from the county revenue, Section 13984, R. S. Mo. 1929. The county treasurer is treasurer of the Board of Trustees, receives and pays out all monies belonging to the hospital fund, Section 13978, R. S. Mo. 1929.

The trustees are elected at the regular general election, as other public officers are elected, Section 13977, R. S. Mo. 1929. It therefore appears that the Board of Hospital Trustees are performing public functions of a governmental nature and are therefore not liable for tort. White v. Alabama Insane Hospital, 138 Alabama, 479; Maia v. Eastern State Hospital, 34 S. E. 617; Leavell v. Kentucky Asylum, 91 S. W. 671.

We note that under Section 13978, R. S. Mo. 1929, no bond is required of the trustees, but if a bond were given there would be no liability on that bond for negligence for which third parties could sue. State ex rel. v. Harris, 77 S. W. (2d) 846.

It is, therefore, the opinion of this office that the Board of Trustees of a county hospital, under Article 4, Chapter 120, R. S. Mo. 1929, are not liable for tort.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE
Enc.

SHERIFFS' FEES - Howard County controversy.

June 27, 1935.

FILED
7

Honorable C. R. Biswell
Presiding Judge of County Court
Howard County
Fayette, Missouri

Dear Sir:

We have your request for an opinion, accompanied by a brief statement of facts as to certain charges and fees claimed by the sheriff of Howard County. We shall treat these items separately.

I.

" Drawing petit Jury April 1933, 24 regular jurors.
Drawing petit Jurors August 1933, 24 regular jurors.
Drawing petit Jurors Dec. 1933, 24 regular jurors.
Drawing petit Jury April, 1934 24 regular jurors.
Drawing petit Jury, August, 1934, 24 regular jurors.
Drawing petit Jurors December 1934, 24 regular jurors.
Drawing petit Jurors March 1935, 24 regular jurors.
at $8.40 times 7 equals $58.80
200 Mil. .10 times 7 equals. 140.00

$198.80 "

From the statement of facts, these services were performed by the sheriff. Such fees are allowed under and by virtue of Section 11789, R. S. Mo. 1929.

We are enclosing a copy of an opinion relative to that matter, which will be found under point I in an opinion of this office under date of February 4, 1935.

#2 - Honorable C. R. Biswell

II.

The second matter presented for consideration is as follows:

"Special Repeal Election (wet & dry) Aug. 19, 1933,
Special Bond Issue Election, May 15, 1934,
August Primary Election, Aug. 7, 1934,
General Election, Nov. 6, 1934.

Notifying judges of the above 4 elections at $.50 each .... 92 in each election, would be the same as notifying 368 judges, equals $184.00

Mileage, 135 miles at $.10 times 4 would equal 54.00

19 Precincts at $3.00 each would equal $57.00 and, 4 elections times $57.00 would equal $228.00, but I was paid $50.80 mileage, which would leave 177.20

Total amount due under (II) $415.20 "

It appears from the brief statement of facts that the sheriff did not perform the services in notifying the judges of election, but did perform the services of delivering the ballots to the judges of election.

We are enclosing a copy of an opinion of this office written by Mr. Drake Watson under date of June 8, 1935 relative to the duty of the county court to audit and correct accounts before paying, which opinion in substance holds that the sheriff is not entitled to any fees for services not rendered. This opinion therefore disposes of the claim of $184.00 and mileage amounting to $54.00 for notifying judges of election. This claim is not payable because the services were not rendered.

Relative to the claim for delivering ballots to the judges of election, all of which services appear to

have been performed, we note that the sheriff's claims total $228.00, and the county court has paid the total of $50.80, leaving a claimed balance of $177.20. In this connection, we refer you to part IV of an opinion of this office under date of February 4, 1935, which is enclosed herewith, and which opinion holds that the sheriff is entitled to reasonable compensation for such services under and by virtue of Section 10305, R. S. Mo. 1929. As to what constitutes a reasonable fee for the services rendered, we are unable to determine. That is a matter of fact for the county court to decide. All questions of fact are for the county court, and the Attorney General's office is without authority to enter into controversial matters and decide questions of fact. 6 C.J., Section 16, p. 811.

It is, therefore, the opinion of this office that the sheriff is entitled to reasonable compensation for delivering ballots; said compensation to be fixed by the county court in its judgment.

III.

The third and remaining portion of your request for an opinion is as follows:

"112 Miles at $.10 a mile equals $11.00
Deputy Hire for each 4.00
Custody charge allowed 1.00

Total amount allowed for each patient. $16.20

15 patients times $16.20 would equal . 243.00
or the total amount due. "

We understand from the agreed statement of facts that the sheriff was not allowed to take the fifteen patients to the insane hospital at Fulton and that no part of said services were performed by the sheriff. It appears that

two of the patients were taken by relatives, but it does not appear who took the other thirteen, except that the sheriff did not. We enclose herewith copy of an opinion under date of February 16, 1935 which in substance holds that insane persons sent by the county court to a state hospital are to be taken under and by virtue of a warrant, as provided in Section 8649, R. S. Mo. 1929, and which opinion further holds that if relatives do not take the patient to the hospital, it is the duty of the sheriff to convey such persons to the state hospital, and that the compensation fixed by Section 8662, Laws Mo. 1933, page 409, is payable to either the sheriff or relatives.

It is, therefore, the opinion of this office that the sheriff is not entitled to the fees claimed in point III of this opinion for the reason that the services were not performed.

In the preparation of this opinion, we have assumed the facts stated in the request to be true, as the same appeared to be an agreed statement of facts signed by both the sheriff and the prosecuting attorney of Howard County. We have not touched upon the right of the sheriff, at the proper time, to have, by proper court procedure, the county compelled to allow him to perform duties which were herein denied to him. Neither do we pass upon the question of whether the county is entitled to recover fees paid to persons other than the sheriff or relatives for the transportation of patients to state hospitals.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

TAXATION AND REVENUE: Procedure for collection of delinquent city real estate taxes in cities of the third class.

CITIES OF THE THIRD CLASS.

April 4, 1935.



Hon. Geo. N. Blossom
City Collector
Brookfield, Missouri

Dear Mr. Blossom:

Acknowledgment is herewith made of your request of recent date for an opinion of this office on the following subject:

> "In reference to the collection of delinquent taxes, will you please advise me the proper procedure for Brookfield, a city of the third class. Please give me your opinion in detail so that no mistake will be made.
>
> Should the expenses of the sale, such as commission, and advertising be charged against the property in addition to the delinquent taxes? Is it necessary for a city of the third class to make up a tax book as the county does?"

The collection of city taxes for cities of the third class is provided for in Article IV, Chapter 38, R. S. Mo. 1929. We shall assume that the city of Brookfield does not operate under a special charter but is governed by the provisions of this article. In respect to the collection of delinquent city taxes, Section 6781 R. S. Mo. 1929, a part of Article IV of Chapter 38 provides as follows:

> "Sec.6781. Collector, duties of--delinquent taxes, etc.--* * * * The city council shall cause the land and lot delinquent list and the personal delinquent list to be returned to the city collector who shall be charged therewith, and who shall proceed to collect the same in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal taxes for state and county purposes: Provided, that all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector."

The foregoing section makes it mandatory upon you as city collector to make out as soon as possible after the first meeting of the City Council in April of each year, lists of delinquent taxes remaining due and uncollected for that year. One list is to be made for delinquent real estate taxes designated as the "land and lot delinquent list" and the other list is to be known as the "personal delinquent list", and which is composed of delinquent personal taxes. After examining this list the City Council returns the same to you and you are required to

> "proceed to collect the same in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal property for state and county purposes."

Prior to the enactment of Senate Bill 94, page 425, Laws of Missouri 1933, state and county real estate and personal taxes were collected by suit brought by an attorney appointed by the County Collector, the appointment of whom was approved by the county court. By virtue of Section 6781 the City Collector proceeded to collect delinquent real estate and personal city taxes in the same manner.

With the enactment of Senate Bill 94 however, this entire procedure was changed in respect to the collection of real estate taxes and a new system inaugurated eliminating the bringing of suit and the employment of a counsel for such purpose. As this new system has been adopted for the collection of state and county real estate taxes this new system must be followed for the enforcement of the collection of delinquent city real estate taxew.

While it will be possible to roughly outline the principal steps in the procedure adopted for the collection of delinquent real estate taxes, we shall only be able to pass upon the salient features of the law andsuggest that you obtain a copy of the Session Acts of 1933 and study this new act carefully, beginning on page 425 of such Acts.

Section 9952, page 429, provides for the making of a list of delinquent lands and lots, describing such lands and lots as described on the tax books, charging them with the delinquent tax, naming the year delinquent, separately stated, and in addition thereto a penalty of ten per cent per annum on taxes for each year delinquent, but not more than one per cent per month for the delinquent taxes for the preceeding year. This list will be sufficient to satisfy the requirements of Senate Bill 94 and also Section 6781, R. S. Mo. 1929.

Under the provisions of Section 9952a, page 430, it is provided that the lands and lots on the delinquent list shall be subject to sale on the first Monday of November of each year.

Section 9952b provides that a copy of said delinquent lands and lists shall be published in some newspaper of general circulation published in the county for three consecutive weeks, one insertion weekly before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. It is suggested that the last publication of this notice occur between sixteen and thirty days before the first Monday of November at which the sale is to be held. The publication shall contain the aggregate amount of taxes, penalties, interests and costs due thereon, each year separately stated. The land to be described in forty acre tracts or other legal subdivisions, and the town lots to be described by lot number, block, addition etc. With such list there shall be attached to and printed in like manner a notice that so much of said lands and lots as may be necessary to discharge the taxes, interests and charges that may be due thereon at the time of sale, will be sold at public auction at the court house door of such county on the first Monday inNovember next thereafter, commencing at ten o'clock of said day andcontinuing from day to day thereafter until all are offered. You should on or before the day of the sale, place on your record a copy of such notice and certify on such record immediately following such notice the name of the newspaper of the county in which such notice was printed and published, and the date of insertions of such notice. The cost of printing the notice shall be paid by the purchaser of the lot and shall not exceed the rate fixed by the county printing contract but in no event to exceed the legal rate fixed by Section 13773 R. S. Mo. 1929. The total cost of the printing of the notice is to be prorated against all the lands and lots advertised, and that proportionate share assessed as costs and collected from the party purchasing the certificate or redeeming the property. The land shall be sold to the bidder offering the amount due for the smallest part of the tract or lot; Section 9952c. No sale shall be consumnated for less than the amount of taxes, penalties, interest and costs. If sufficient bid is not obtained the first sale the land should again be advertised the following year and if sufficient is not then received the land should be advertised the next year and sold for what it will bring; Sections 9953 and 9953a. In the event sufficient sum is bid to cover all costs and penalties, interests and taxes on a part of the land, such part only shall be offered and sold; Section 9952d.

The purchaser at the sale is to receive a "certificate of purchase" stating the amount of taxes, penalties, interest and costs due, the sum bid on the tract, the interest which the certificate is to bear, Section 9953d. The owner has two years from the day of the sale within which to redeem the property by paying the amount of the certificate of purchase with interest at the rate specified in the certificate, together with the cost of the sale, and all subsequent taxes paid by the purchaser of the certificate with interest on such sums at eight per cent per annum. Undivided or specific shares of tracts or lots may be redeemed, Section 9956a. If no redemption is made within two years the purchaser is entitled to a deed to the tract, Section 9957; as prescribed by Section 9957a. You are to keep a record of all tracts sold, containing a brief description of the land conveyed on sales for taxes, the name of the person charged therewith, the date of the sale, the name of the purchaser, the amount for which it is sold, the name of the grantee in the deed and the date of its execution, Section 9958. The State Tax Commission is required to prescribe the forms of all certificates, blanks and books required by the act, Section 9960d. If in your opinion it is advisable to charge the tax on personal property against real property in order to insure the collection of the tax you may do so, Section 9962. This new law applies to all taxes delinquent on the date of its effectiveness and all taxes which subsequently became delinquent, and you may if you so desire dismiss any suits which have been brought for the collection of taxes prior to the effective date of this act and proceed to collect the taxes by virtue of the new law, Section 9962d.

In respect to Collector's commission and advertising costs, Section 9969 provides:

> "Fees shall be allowed for services rendered under the provisions of this article, as follows: To the collector, except in such cities, two per cent on allsums collected; in such cities, two percent on all sums collected--such per cent to be taxed as cost and collected from the party redeeming. To the county collector, for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

Section 9952b referring to the cost of advertising provides in part:

> "* * *which cost of printing at the rate specified shall be taxed as part of the costs of the sale of any land or lot contained in such list and disposed of at such sale, and the total cost of printing such notice shall be prorated against all lands or lots so sold or redeemed prior to any such sale."

It therefore appears that your commission and the cost of advertising are proper charges as costs to be charged against the property in addition to the delinquent taxes.

We have heretofore quoted Section 6781 R. S. Mo. 1929 relative to your duties as City Collector to proceed to collect delinquent city taxes in the same manner as delinquent State and County taxes are collector. Before the enactment of Senate Bill 94 you were required to make up the land and lot delinquent list. Under the new law you are to follow the procedure prescribed for collecting State and County taxes, which requires that you make up a land and lot delinquent list under the provisions of Section 9952, page 429, Laws of Missouri 1933. Therefore, you are required under the new law to make up a list of delinquent lands and lots containing delinquent city taxes, as the County Collector is required to make a delinquent list of lands and lots respecting delinquent State and County taxes.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

COUNTY BUDGET ACT; Conditions under which County Court may reallocate funds.

June 26, 1935.

FILED 8

Hon. Louis W. Block,
County Clerk,
Gasconade County,
Hermann, Missouri.

Dear Sir:

This department is in receipt of your inquiry requesting an opinion as to the following matter:

> "This county is in need of additional funds other than what was set aside in Class 3 to buy right-of-way for farm-to-market roads, which was unforseen when the budget was made. We have ample funds in Class 1, 2 & 4 to buy this right-of-way and need not protest warrants in any class if we could apply the funds where needed.
>
> "Gasconade County has always operated on cash bases and has never protested any warrants, and it is our desire to remain so. At the close of 1934 business all cash on hand in the classes of expenditures as outlined in Sec. 2 of 1933 laws was carried over into the 1935 budget according to a ratio what we then thought to be right. But now the court is called to buy right-of-way with plenty of money on hand but in the wrong class. Please advise how we use this excess money now in the other classes for class 3. * * * *"

You state in your letter above quoted that you desire to purchase the rights-of-way for farm-to-market roads from the funds in Class 3 of the budget (Sec. 2, page 341, Laws of Mo. 1933), but in making up the original budget you did not include sufficient funds to take care of this unforseen expenditure. Class 3 of the County Budget Act provides as follows:

> "The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

We are of the opinion that funds for rights-of-way for farm-to-market roads should not be taken from this class. The language of the statute is not broad enough to include such an expenditure; it refers solely to the "upkeep, repair or replacement of bridges on other than state highways (and not in any special road district."

Classes 1, 2 and 4 are definite in their terms and funds for the purchase of rights-of-way could in no event come from those classes. Class 5 is general in its terms and provides for a fund to be used as contingent and emergency expense. We deem this class sufficiently general in its terms to include funds for the purchase of rights-of-way providing your county has surplus funds in this class.

Class 6 provides that any funds remaining after the five previous classes have been provided for may be used for any lawful purpose. You state that your county is on a cash basis and has no outstanding warrants; hence, any funds in this class may be used for the purchase of rights-of-way for farm-to-market roads.

Regarding the use of surplus funds which exist in Classes 1, 2 and 4, the County Budget Act does not provide for the shifting of balances from one class to another. There is a special prohibition under Section 8 of the Act (page 345) wherein the amount as placed by the county court in class 1 cannot be changed after the estimate is made. This section further provides that within five days after the approval of the budget, a certified copy must be filed with the county treasurer.

Section 12167 and Section 12168 provide that any balance at the close of the year may be used by any fund which may be in need of said balance. We are of the opinion that if any balances exist in any of the classes which you have mentioned at the close of the fiscal year, and such balance is not needed by any other fund, the balance may be used for the purchase of the rights-of-way in question.

Taking into consideration the fact that your county appears to be in splendid financial condition, the main duty of the county court as contained in Section 1 of the County Budget Act (p. 341) is to "classify proposed expenditures according to the

classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved." That burden rests upon the county court and the other officers, and if the surplus funds from one of the classes can be used so that the priority of payment will not be jeopardized, then the spirit of the Budget Act will have been preserved and we can discern no liability on the part of the officers under Section 8, which provides in part as follows:

> "Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

This method, however, is merely in the form of a suggestion and if followed by the county court, it must be done at their peril in the event the funds of any of the classes are jeopardized and priority of payment is not sacredly preserved. It is our opinion, however, that a safer plan is as suggested above, i.e., to use the surplus funds, if any, in Class 5 or the funds of Class 6.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

OWN:AH

ASSESSORS: Laws of Missouri 1931, page 376, did not increase compensation of assessors then in office.

11-15

November 13, 1935.

FILED
8

Mr. C. W. Blakeley
Bosworth, Missouri

Dear Sir:

This Department is in receipt of your letter of October 30, requesting an opinion as to the following state of facts:

> "I would appreciate your opinion on the act passed by the Assembly of May in 1931 whereby they raised the scale of pay for assessors from twenty-five cents to thirty-five cents on personal lists.
>
> I would like to know whether the assessors already in office would be entitled to the increase in pay?"

In 1931 the General Assembly of the State of Missouri passed the following act (Laws of Missouri 1931, page 376):

> "He shall receive, as compensation for his services, thirty-five cents for each list taken by him; and for each tract of land or town lot assessed by him, and properly entered in the township land book, he shall receive ten cents, one-half to be paid by the county and one-half by the state, as now provided by law: Provided, that all the personal property listed belonging to any one individual or company, or firm, shall

> constitute only one list, and all the land owned by the same person in any one section, shall constitute but one tract, and all the land owned by the same person in any one block shall constitute but one lot, as to compensation."

Article XIV, Section 8 of the Constitution of the State of Missouri provides:

> "The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

CONCLUSION.

In view of the foregoing it is the opinion of this Department that the Act of the General Assembly passed in 1931 (Laws of Missouri 1931, page 376), in view of the Constitution of the State of Missouri, did not increase the compensation of assessors then in office.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:MM

RECORDER OF DEEDS:)
) Fee that recorder of deeds may charge for marriage license - $1.00, and if he takes
MARRIAGE LICENSE:) an affidavit from a person he may only charge 25¢ for taking of such.

March 26, 1935.

3-30

FILED
9

Mr. John E. Bohon
Recorder of Deeds
Pettis County
Sedalia, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"I notice of late several articles in different newspapers as to the fee for a Marriage License and would like to have the matter made more plain. I notice an article of the Associated Press from Jefferson City in which it states that you say the maximum fee for a marriage license, including all affidavits, could only be $1.50. I also have in my possession an Opinion from your department which was rendered by Franklin E. Reagan, Assistant Attorney General, in which it states, that the fee allowed for issuing and recording a marriage license as provided by statute is $1.00, and the fee for attaching the certificate and seal as provided by Section 11804 is $.50 making the license when both parties are of legal age $1.50, and in case one of the applicants is under the legal age his parents affidavit is $ .50 and in case both applicants are under the legal age the affidavits giving their consent are $ .50 each, or $1.00. This would make three different prices for licenses $1.50, $2.00 and $2.50. I know the statute provides a fee of $ .50 for each acknowledgment he takes."

In your letter you state that you are in possession of an opinion from this Department, written by Honorable Franklin E. Reagan, Assistant Attorney-General, and such is causing confusion, due to articles in different newspapers. We will again write on the subject so that any confusion which has arisen may be removed.

Chapter 19, R. S. Mo. 1929, pertains to "Marriage and Marriage Contracts", and Section 2977 provides that, "Previous to any marriage in this state, a license for that purpose shall be obtained from the officer herein authorized to issue the same", and said section does away with common law marriages in this state.

The Legislature, then, has provided that marriage in the State of Missouri must be solemnized and in order for one to marry in this state a license must be obtained as a condition precedent. Section 2978, R. S. Mo. 1929, provides that the recorder of deeds shall issue the license, and Section 2979 provides, "for which he shall receive a fee of one dollar, to be paid for by the person obtaining the same." Thus, the fee for issuing a license is one dollar.

Section 2983, R. S. Mo. 1929, in part provides as follows:

> "* * *, and no recorder shall issue a license authorizing the marriage of any male under the age of twenty-one years or of any female under the age of eighteen years, except with the consent of his or her father, mother or guardian, which consent shall be given at the time, in writing, * * *. The recorder shall state in every license whether the parties applying for same, one or either or both of them, are of age, or whether either or both are minors, and if either party is a minor, etc. * * *."

From the above then it is seen that the duty of issuing licenses to marry is imposed upon the recorder and he is

restricted as to whom he shall issue them, in particular as to the age of the parties. In other words, he must use reasonable care and diligence to ascertain if the parties are adults or minors. There is no provision in the statutes that provides how the recorder shall acertain the facts as to age of the parties applying for license. However, the statutes do penalize him if he knowingly makes a mistake and issues a license to one not entitled to same. Thus, the practice of many recorders, if not all, in the state has been to exact an affidavit from the persons applying for license, to the effect that the parties are single and unmarried, of a certain age and may lawfully contract and be joined in marriage. The obtaining of the affidavit is for the protection of the recorder. If the affidavit shows that the person applying is under the age limit, then an additional affidavit must be obtained from the parent or guardian or custodian of the minor in order for the marriage to be solemnized.

The question then presents itself as to how much the recorder may charge if he takes an affidavit from the parties applying for a marriage license when he exacts as a condition precedent the facts to show capacity to marry.

A public officer in order to charge any fee for services or do any act must have statutory authority for doing it. To entitle an officer to compensation he must point to the statute authorizing such. As early as 1885 the Supreme Court of Missouri in the case of Williams v. Chariton County, 85 Mo. 642, held (quoting from the syllabus):

> "No fees are allowed an officer except where expressly given and allowed by law."

In King v. Riverland Levee District, 279 S. W. 195, the St. Louis Court of Appeals, page 196, said:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract,

> and that compensation exists, if it exists at all, solely as a creation of law and then as incidental to the office. (Cases cited)"

We then must find the statute that permits the recorder to charge for taking a person's affidavit. Section 11804, R. S. Mo. 1929, is captioned "Fees of recorders" and in said fees it will be noted that there is nothing said as to what shall be charged for taking an affidavit. However, said section does provide:

> "For every certificate and seal.... .50"

Section 11562, R. S. Mo. 1929, provides that the recorder may adminster oaths, and reads as follows:

> "Hereafter whenever, under any law of this state relating to the duties of the recorder of deeds in any county of this state, it becomes necessary for any person to be sworn to any statement, affidavit or other papers of any kind, the recorder of deeds shall be authorized to administer an oath to any person in matters relating to the duties of his office, with like effect as clerks of courts of record: Provided, he use his seal of office to the jurat, as clerks of courts of record do. He shall receive the same compensation allowed by law for like service as clerks of courts are now allowed."

A recorder may swear a person to an affidavit or other paper and when he does so and uses his seal of office to the jurat he receives the same compensation for doing that as clerks of courts are now allowed.

Section 11781, R. S. Mo. 1929, pertains to"fees of clerks of county courts", and in part provides the following:

> "For oath and certificate to an affidavit . . . . . .25"

Section 11785, R. S. Mo. 1929, pertains to"fees of clerks of circuit courts and of courts of common pleas" and in part provides as follows:

> "For oaths and certificate to affidavits . . . . . .25"

Therefore, applying the rule that a public officer must put his finger on the statute in order for him to be entitled to charge for services (or receive compensation) he could only point to the statute that permits the clerks of courts of record to charge for oath and certificate to an affidavit, and said charge is only twenty-five cents.

There is a distinction between an "affidavit" and a "certificate." Corpus Juris, Vol. 2, page 317, defines "affidavit" as follows:

> "An affidavit is a declaration in writing sworn to or affirmed by the party making it before some person who has authority to administer an oath."

"Certificate" is defined by Corpus Juris, Vol. 11, page 77, in part as follows:

> "a documentary declaration regarding facts from the public authority, as an attestation of facts contained in a public record; * * *. Popularly the term would import a document in which the officer issuing the same purports to state on his own authority that certain acts have been done."

Webster's Dictionary defines "certificate" as follows:

> "A certified statement; a written testimony to the truth of any fact."

In common parlance the distinction between "certificate" and "affidavit" being that a "certificate" is something that the officers certify to as being an existing fact, for example, a recorder of deeds certifies that a deed is of record and puts his seal on it, while an "affidavit" is taken from a person and sworn to before an officer. The recorder of deeds, if he certifies to a paper, that such is on file in his office, charges fifty cents for that certificate. However, when he swears a person to an affidavit or paper the only charge that he can make is twenty-five cents. Section 11562, supra.

Assume, therefore, that two parties would come before you as Recorder and ask for a marriage license. If you were not satisfied that these parties were of age and single and unmarried, then you would have the right to inquire as to those facts, and if you were of the opinion that in order to protect yourself that affidavits should be executed by the parties and they, signifying a willingness to have you take their oaths, would sign separate affidavits and swear to them in your presence and you put your jurat on same, then, under such circumstances, you could only charge twenty-five cents per person, or a total of fifty cents, which amount, plus the one dollar, would be one dollar and fifty cents, and that is all you could charge for services rendered in connection with the issuance of such marriage license, in our opinion.

If a person was a minor, and so stated the fact, it would not be necessary to take that person's affidavit but you should then require the affidavit of the parent or guardian giving consent to said minor to marry, and if you took the parent's or guardian's affidavit you could only charge such parent or guardian, twenty-five cents, the same charge as to the adult person applying for a license.

You state, "I know the statute provides a fee of $ .50 for each acknowledgment he takes." We know that you are in error as to this because if you swear one to an affidavit you can only charge twenty-five cents. However, if you certify to papers as being true and correct and on file in your office, and attach your seal, then you may charge fifty cents for that certificate.

From the above and foregoing it is our opinion:

1. The fee for issuing a marriage license is $1.00. Section 2979, supra.

2. The fee for taking an affidavit is 25¢. Sections 11562, 11781 and 11785, supra.

We have reached the conclusion that the opinion issued by this department, dated February 20, 1935, is not a correct statement of the law and that the fee for issuing a marriage license is $1.00, and the fee for taking an affidavit is 25¢.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

PROSECUTING ATTORNEY: Duty to bring quo warranto proceedings against persons not qualified to hold public office.

FILED
9

5-13

April 30, 1935

Honorable F. C. Bollow
Prosecuting Attorney
Shelbyville, Missouri

Dear Sir:

This Department is in receipt of your letter of April 17, wherein you state as follows:

> "I have been considerably harassed in my office by country school district troubles. I am willing to and have been giving free advice to the Directors of country school districts regarding school affairs. But in my county in two or three instances directors are holding directorships when they were not qualified at the time of their election by reason of the fact that they were not tax payers. Their opponents in the district have been beseigeing my office to get me to bring proceedings to oust those directors. If it is the duty of my office to so act in those cases I presume that I will have to do so. However, I am unable to find any provision in the law directly requiring the prosecuting attorney to act in those cases or in any way making it a part of his official duties to so act. Of course I have no desire to meddle into affairs of this kind and am entirely content

to let them alone; they generally arise from personal antagonisms rather than from any question of real merit. Please advise if it is a part of the duties of my office to maintain action to oust directors of school districts now holding office who were not qualified at the time of their election by reason of not being tax payers."

Section 9287 Revised Statutes Missouri 1929, provides as follows:

"The government and control of the district shall be vested in a board of directors composed of three members, who shall be citizens of the United States, resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding his, her or their election, and who shall have resided in this state for one year next preceding his, her or their election or appointment, and shall be at least twenty-one years of age. Said directors shall be chosen by the qualified voters of the district at the time and in the manner prescribed in section 9283 of this article, and shall hold their office for the term of three years, and until their successors are elected or appointed and qualified, except those elected at the first annual meeting held in the district under the provisions of this chapter, whose term of office shall be for one, two and three years, respectively. A qualified voter within the meaning of this chapter

> shall be any person who, under the general laws of this state, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote."

Under the above section, a school director must have been a taxpayer within a year preceding his election.

Section 1618 Revised Statutes Missouri 1929, provides as follows:

> "In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney-general of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney. If such information be filed or exhibited against any person who has usurped, intruded into or is unlawfully holding or executing the office of judge of any judicial circuit, then it shall be the duty

> of the attorney-general of the state, or circuit or prosecuting attorney of the proper county, to exhibit such information to the circuit court of some county adjoining and outside of such judicial circuit, and nearest to the county in which the person so offending shall reside."

In the case of State ex inf. Norman v. Ellis 325 Mo. 154, our court held that a prosecuting attorney of a county had the authority to bring a quo warranto proceeding against a person unlawfully holding a public office.

From the foregoing, it is seen that school directors must at the time of their election be taxpayers, and if such are not taxpayers they are not qualified. The statutes and cases are to the effect that a prosecuting attorney may bring a quo warranto proceeding to oust an unqualified director. The prosecuting attorney being charged with the duty of enforcing all laws pertaining to matters civil, quasi civil and criminal in the county, it is our opinion that you not only have the authority but it is also mandatory and your duty to bring quo warranto proceedings against persons not qualified to hold public office.

Respectfully submitted,

Wm. ORR SAWYERS
Assistant Attorney General

APPROVED

ROY McKITTRICK
Attorney General.

WOS
MW:LC

PUBLIC OFFICERS: Same person cannot hold office of Assistant Postmaster and Public Administrator at same time.

May 22, 1935

FILED
9

Honorable Joseph M. Bone, Jr.,
Prosecuting Attorney,
Audrain County,
Mexico, Missouri.

Dear Sir:

This department is in receipt of your letter of May 17 making the following inquiry:

> "Porter H. Cauthorn of Mexico, Missouri referred to this office the following question, upon which I would like to have your department's opinion, namely: W.S. Eller, who holds the office of Public Administrator in Audrain County, was recently appointed as Assistant Postmaster at Mexico, Missouri. Under the laws and the Constitution of Missouri, may this party legally hold both offices at the same time?"

Your question relates to the right of a person to hold the office of Assistant Postmaster, which is a Federal office, and the office of Public Administrator, same being a county office, at one and the same time.

Section 4, Article XIV of the Constitution of Missouri provides that "No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State." It cannot be disputed that the office of Assistant Postmaster is an office of profit under the United States Government.

In 1933 the Legislature of Missouri enacted into law Section 296-A (Laws of Mo. 1933, page 165) relating to Public Administrators, same being as follows:

> "Each Public Administrator elected, as now or as hereafter provided for in this Article, is hereby declared to be an officer for the county in which he is elected and for the City of St. Louis, if elected therein. The county courts of each county in this state now or hereafter having a population of 100,000 inhabitants or more according to the last federal census shall make suitable provision for an office for the Public Administrator in the Courthouse of the county if suitable space may be had for same, and shall be provided as soon as the county court shall be of the opinion that the business in charge of the Public Administrator is such as to reasonable require a separate office for the convenience of the public: The Public Administrator of the City of St. Louis shall have suitable and convenient offices provided for him in the Civil Courts Building by said city."

This section declares a Public Administrator to be an officer of the county in which he is elected. We are therefore of the opinion that both of the offices mentioned in your letter are offices of profit.

The constfuction of the phrase "under this state", as contained in Sec. 4, is discussed in the case of State ex rel. v. Buss, 135 Mo. l.c. 335, as follows:

> "Under this section all officers (except those under the United States) are divided into two classes, viz.: 'officers under the state' and officers 'under a municipality thereof.' The language 'officers under the state' would include justices of the peace, or they would not have been excepted. Officers of a county, though not named, would be included under the expression 'officers under the state.'"

The interpretation of this phrase is also ably decided in the case of Wood v. Miller, 242 S.W. 573, wherein the Court said (l.c. 575):

> "The words 'under this state', as used in the Constitution, mean under the laws of this state, or by virtue of or in conformity with the authority conferred by the state as sovereign. It embraces all offices created by the laws of the state as contradistinguished from other authority. Municipal offices are created by the statutes of the state, and are therefore civil offices 'under this state.' Our conclusion is that appellee is ineligible to hold the office in controversy."

CONCLUSION

It is the opinion of this department that it is violative of Section 4, Article XIV of the Constitution of the State of Missouri for a person to hold the office of Assistant Postmaster of Mexico, Missouri and the office of Public Administrator of Audrain County at one and the same time.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

SHERIFFS FEES - County Court,- Duty of county court to audit and correct before paying.

L-8

June 8, 1935

FILED
9

Honorable Joseph M. Bone
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

Your letter is received which makes the following inquiry:

> "Assuming the facts to be that neither the sheriff nor his deputy was present, in person, in the county court room nor probate court room of Audrain County during the sessions of said courts for the last term thereof, and that neither the sheriff nor his deputy waited upon or served either of said courts during said quarter, and that the sheriff thereafter presented a bill to the County Court of udrain County for per diem for services for twenty-five days' attending and waiting upon the county court of said county at $3.00 per day, and for thirteen days' attending and waiting upon the probate court of said county at $3.00 per day, is the County Court of Audrain County required, under the law, to order warrants and pay said bill?"

We construe your inquiry to be: Is the sheriff entitled to per diem compensation for each day said courts

were in session, regardless of whether he attended such court, and should the County Court audit and pay the same regardless of facts outside of the statute?

Considering first the question as to the liability and duty of the County Court to pay the sheriff for the days the County Court was in session, we note that Section 1870 of the Revised Statutes of Missouri for 1929 is as follows:

> "The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

Section 1871 thereof is as follows:

> "The court shall audit and adjust the accounts of the officer attending it, made pursuant to this chapter, and certify the same for payment."

It is a basic rule of law as to official fees that statutes providing therefor must be strictly construed. Likewise, that officers are not entitled to any fees unless the statute authorizes payment thereof.

In the case of State ex rel. Troll v. Brown, 146 Mo. 401, l.c. 406, the Supreme Court of this State said:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co.

> 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

With these rules in mind, the answer to your inquiry turns on the meaning of the above two quoted statutes.

The word "shall", not "may", is used in the statute requiring the sheriff to attend the court.

The word "shall" has been construed by courts of various States, and, in such decisions, it has been given the meaning that it does not leave the way open for the substitution of a discretion.

Baer v. Gore, 90 S. E. 530, 79 W. Va. 50, L.R.A. 1917B 723.

In the Indiana case of State v. Meeker, 105 N. E. 906, 907, 182 Ind. 240, and in the Iowa case of Vale v. Messenger, 168 N. W. 281, 283, 184 Iowa 553, it is stated that the word "shall" in a statute is presumed to be used in a mandatory sense. Likewise, the word "attend" has been defined and construed.

In the case of Robson v. Dickinson County, 8 Kan. App. 374, 55 P. 820, it is held that a sheriff was not entitled to a per diem for attending on the probate court when not expressly requested by the probate judge so to do, and when it is not necessary for him to attend, although the statute provides that the sheriff shall attend upon the several courts of record held in his county, and that he shall receive for attending any court of record a certain per diem.

#4 - Honorable Joseph M. Bone

In the case of People ex rel. Gray v. Livingston County (1903), 89 App. Div. 152, 85 N.Y.S. 234, the sheriff was held not entitled to a per diem for attending the County Court on Saturdays, on which the Judge designated the Court to be held in his Chamber, for days when the Judge was not present where no adjournment of these Courts was made by the sheriff, and he performed no service in regard thereto.

In the case of Mason v. Culbert, 41 P. 464, 108 Cal. 247, in construing the meaning of the word "attendance" of a juror on court, it is said that a juror may be in attendance on court without being impaneled to try any cause; after he has been drawn he may be excused until some future day. In such cases they are not in "attendance" upon the court during any period that they are excused therefrom with the opportunity to be engaged in ordinary vocations.

From the above expressions of the courts, we think the fair meaning of the words "shall attend" court is that the sheriff is actually at court ready to carry out the orders or requirements of the court by the judge thereof with the speaking voice directing him, and that he does not have the right to be about and engaged in other usual vocations.

In the California case last above cited, the court makes the distinction between attendance and non-attendance turn on whether the party is about the business of the court as a juror or is free to go elsewhere. On reason, it seems to us that if the sheriff absents himself, without leave of court, from attendance and performance of his duties at the court, that he can certainly not have greater rights to compensation than if he were excused by the court.

The apparent intent and reason of the Legislature in enacting Section 1871, supra, providing that the "court shall audit and adjust the accounts of the officer attending it", was that the court in which the services were charged or claimed would know whether it was a just and true statement of fact. The County Court would know whether the sheriff attended that court, and the probate court would know whether the sheriff attended that court and on what days he did so attend.

Each respective court is required to audit and adjust the accounts of the officers of that particular court. After being so corrected by the court which actually knew of the facts, that court certifies the corrected bill for payment.

In the case of State ex rel. Bensick v. Smith, Auditor, 5 Mo. App. 427, the court construed the right of an auditor to pass on a bill as being a valid charge against the county, the bill being on account of board furnished juries under a court order of the St. Louis Criminal Court. The Court of Appeals said:

> "The General law directs that all accounts for expenditure accruing in courts shall be paid out of the treasury of the county in which the court is held in the same manner as other demands, and shall be audited and adjusted by the court in which the services were rendered. That tribunal has the means of determining the correctness of the account as to which the auditor can know nothing, and to that tribunal alone have the people delegated the power of determining what expenditures are necessary to carry on with efficiency and decorum the public business of the court."

In the case of State ex rel. McNeil v. The St. Louis County Court, 42 Mo. 496, l.c. 499, the court said:

> "On the contrary all warrants upon the treasury must be ordered by the court itself. Thus giving to that body power to allow and pay the amount of a claim notwithstanding the objections of the auditor."

And l.c. 500:

> "The general law directs all such accounts to be audited, adjusted and certified for payment by the court in which the service

> is rendered and the articles furnished; such tribunal is presumed to have the means of determining almost with positive certainty as to the correctness of the items of such an account."

In the case of Crouch v. Plummer, 17 Mo. 421, the Supreme Court passed on the duty of the County Court to pay a bill that had been certified by the circuit judge and circuit attorney to the County Court as being correct. It included a bill by the sheriff for per diem for attendance on court and also of a deputy thereon. The county court took the position that there was no law justifying payment of the deputy, and struck that part out of the bill and paid the remainder. Thereupon the sheriff sued out a writ of mandamus against the county court, seeking to require the payment of the part stricken out. On Appeal, the Supreme Court held the writ to be improper and that the county court was justified, saying, l.c. 423:

> "It was the right of the county court to examine the account produced for allowance and if that court found that in such account charges had been made for services not by law permitted to be charged against the county, it was the duty of the court to reject and refuse to allow for such."

The only difference between the bill for services for attendance on the county court and on the probate court is that, as to the latter, the probate judge should first pass on and audit and certify it to the county court for payment.

CONCLUSION.

e think that the statute not only gives the right to the sheriff to attend each court, in this instance the county court and the probate court, but also places that duty on him,

and, if he performs that duty, he is entitled to the statutory fees therefor; however, if he does not perform that duty, the county court should not pay him for such days as he fails to perform such duties.

The county court has the right, and the duty is placed upon said court by Section 1871 of Revised Statutes of Missouri for 1929 of auditing the sheriff's bills, and, if they find the fact to be that the sheriff did not attend said court, or either of them, on some or all of the days for which he has charged the county such per diem, then it is the duty of the county court to decline to pay the sheriff for such days.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

DW:PH

COUNTY COLLECTOR: Is required to give bond to drainage district which has property situate in his county.

June 25, 1935.

FILED
9

Mr. L. G. Boatright
Collector of Revenue
Saline County
Marshall, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads in part as follows:

> "Please advise me if it is necessary for a county collector, to make a separate bond for each drainage district, or does my bond to the County and State cover this too."

You failed to state whether the drainage districts in question are organized by a circuit court under the provisions of Article I of Chapter 64, R. S. Mo. 1929, or by a county court under the provisions of Article II of said chapter.

Section 10761, R. S. Mo. 1929, relates to drainage districts organized by circuit courts and provides in part as follows:

> "It shall be the duty of the collector of revenue of each county in which lands or other property of any drainage district organized under this article are situate to receive the 'drainage tax book' each year, and he is hereby empowered and it shall be his duty to promptly and faithfully collect the tax therein set out and to exercise all due diligence in so doing. **** Before receiving the aforesaid 'drain-

> age tax book' the collector of each county in which lands or other property of the drainage district are located shall execute to the board of supervisors of the district a bond with at least two good and sufficient sureties in a sum that is equal to the probable amount of any annual installment of said tax to be collected by him during any one year, conditioned that said collector shall pay over and account for all taxes so collected by him according to law. ****"

Section 10827, R. S. Mo. 1929, which is applicable to drainage districts organized by county courts reads in part:

> "It shall be the duty of the collector of revenue of each county in which lands or other property of any drainage district organized under this article are situate, to receive the 'drainage tax book' each year and he is hereby empowered and it shall be his duty to promptly and faithfully collect tha tax therein set out and to exercise all due diligence in so doing. **** The collector shall give bond payable to the drainage district for the probable amount of all drainage taxes to be collected in any one year conditioned for the faithful performance of all his duties in accordance with this article. Said bond shall be signed by at least two resident freeholders in the county or by a surety company authorized to transact business in the state. The bond shall be approved by the court and the premium, if any, may be paid out of any funds belonging to the district."

The above sections are clear and unambiguous and plainly require the county collector to give a bond to the Board of Supervisors of each drainage district which has property situate in the county whether the district was organized by a Circuit Court or by a County Court.

Section 10827, supra, provides however that the premium, if any, of the bond given to a drainage district organized by the county court may be paid out of any funds belonging to said district. No provision is made, however, for the payment of the premium of a bond given to a district organized by a circuit court out of the funds of such district.

CONCLUSION.

In view of the above, it is the opinion of this department that the county collector in each county in which lands or other property of a drainage district are situate must give a bond to the Board of Supervisors of such district conditioned that said collector shall pay over and account for all drainage taxes collected by him.

Very truly yours,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JET/afj

SCHOOL DISTRICT: Not liable for maintenance and construction of division fence.

6-7

June 26, 1935.

FILED 9

Honorable F. C. Bollow,
Prosecuting Attorney,
Shelbyville, Missouri.

Dear Sir:

We wish to acknowledge your request for an opinion under date of June 7, wherein you state in part as follows:

> " * * * would you please refer to the proper Assistant Attorney General, whoever he may be, the following question which can only be amivably settled here by an opinion from the Attorney General's office. Query: Whether a country school district, adjoining a land owner, is liable for the construction and maintenance of one half the fence between the land of the school district and the adjoining landowner. This question is about to cause a law suit here; one side has been advised by local attorneys that the district is liable to build such a fence and the other faction has been advised by another local attorney to the contrary, and I have gotten them to agree to abide by the decision of the Attorney General's office without any litigation."

Section 12911, R. S. Missouri 1929, provides as follows:

> "Whenever the fence of any owner of real estate, now erected or constructed, or which shall hereafter be erected or constructed, the same being a lawful fence, as defined by sections 12906 and 12907, serves to enclose the land of another, or which shall become a part of the fence enclosing the lands of another, on demand made by the person owning such fence, such other person shall pay the owner

> one-half the value of so much thereof as serves to enclose his land, and upon such payment shall own an undivided half of such fence."

Section 12916, R. S. Missouri 1929, provides in part as follows:

> "Every person owning a part of a division fence shall keep the same in good repair according to the requirements of this chapter, * * * Either party owning land adjoining a division fence * * * may, upon the failure of any of the other parties, have all that part of such division fence belonging to such other parties repaired, upon the failure of such other party to do so, such repairing * * * to be at the cost of the party so failing to repair * * *"

We must determine whether the phrase "owner of real estate" can be applied to a "school district".

The Court in the case of Florman v. School District No. 11, El Paso County, 6 Colo. App. 319, 40 Pac. 469, l. c. 470, said:

> "It therefore becomes necessary to inquire whether the relations sustained by a school district to the school property is that of owner. The education of the children of the state is a duty which devolves upon the state government. Article 9 of the Constitution provides for a general system of public schools, the details to be supplied by legislation. The administration of the laws in relation to schools is confided to state officers, county officers and district officers. A school district is a subdivision of the state for educational purposes. The several officers charged with the supervision of the schools, from the state board of education are merely the instruments of the state government, chosen for the purpose of effectuating its policy in relation to schools. The duties which they perform are prescribed by state law. The property which

> may be acquired for the purposes of the school, the manner of its acquisition, and the uses to which it shall be applied, are all regulated by legislative enactment pursuant to the constitution. No sale of the property, or disposition of the proceeds, is valid unless it is authorized by the laws of the state. The school district is created as a means for the more convenient and effective carrying out of the educational policy of the state. The entire control of schools and school property is in the state, to be exercised as it may see fit, subject to the requirements and restrictions contained in the Constitution, and school officers and school districts are merely the agencies through which it acts in the performance of duties with which it is charged by that instrument. By the terms of the statute all school property within the district is held by the school board in trust for the school district, for the benefit of the school, and the school is a state institution. We do not think that either the school board or the school district is, within any definition of the term, the 'owner' of the school property;
> * * * "

Again in the case of a "school board" the Court in the case of Board of Education of Cincinnati vs. Volk, 72 Ohio State 469, 74 N. E. 646, l. c. 649, said:

> "The title to school grounds and other school property is by express terms of the statute vested in the board of education. But for what purpose? It is not the private property of the board, but it is authorized to hold it for the state for the promotion and advancement of the education of the youth of the commonwealth, and its control is limited according to the will of the sovereign power. The board is a mere instrumentality of the state to accomplish its purpose in establishing and carrying forward a system of common schools throughout the state.
> * * * "

Section 9269, R. S. Missouri 1929, deals with title to property under laws applicable to all classes of schools and provides as follows:

> "The title of all school house sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for such school district."

Title to school house sites and other school property is by express terms of the statute vested in the district in which the same may be located. We use the words of the court in the Volk case, supra: "But for what purpose? It is not the private property of the board, but it is authorized to hold it for the state for the promotion and advancement of the education of the youth of the commonwealth, * * *"

From the foregoing, we are of the opinion that a country school district is not an "owner of real estate" within the meaning of Section 12911, supra, so as to make it liable for the construction and maintenance of one-half of the fence between the land of the school district and the adjoining landowner.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

MW:MM

MOTOR VEHICLES: A City owned truck operated on City business side of the municipality does not have to be registered and the employees driving the trucks are not violating any criminal law.

9-17

September 11, 1935.

FILED 9

Hon. F. C. Bollow
Prosecuting Attorney
Shelbyville, Missouri

Dear Mr. Bollow:

This is to acknowledge your letter as follows:

> "The City of Shelbina has made an inquiry concerning whether or not City owned trucks used in the business of the City are required to carry State license plates when operated on the City's business outside the corporation limits of the City.
>
> "No doubt you have already prepared an opinion on this character and have the same on file in your office.
>
> "About two years ago the City of Shelbina sent in the license fee for its trucks and the money was returned to the City by the Motor Vehicle Registration Department with a letter stating that the City was not required to carry license plates. The Highway Patrol has threatened to arrest the City drivers if they catch them outside the corporation limits.
>
> "The City of Shelbina always wants to do the right thing about the matter and if licenses are required are perfectly willing to buy them, and are very anxious to have your opinion on the matter at once."

The answer to your question is found in Section 7767, R. S. Mo. 1929, which in part provides as follows:

> "(b) Motor vehicles used as ambulances, patrol wagons and fire apparatus, owned by any municipality of this state, shall be exempt from all of the provisions of this article while being operated within the limits of such municipality, but the municipality may regulate the speed and use of such motor vehicles owned by them; and all other motor vehicles owned by municipalities, counties and other political subdivisions of the state shall be exempt from the provisions of this article requiring registration, proof of ownership and display of number plates; ****."

We are also enclosing copy of opinion dated June 21, 1935, to Colonel E. M. Casteel, Superintendent, Missouri State Highway Patrol, pertaining to the necessity of municipal employees to be registered as registered operators, wherein you will note our conclusion in the matter to the effect that employees of a municipality or political subdivision do not have to be registered operators.

It is our opinion, from the above and foregoing, that the City of Shelbina is not required to register city owned trucks used on business of the city, or have license plates therefor, whether such trucks are operated inside or outside of the incorporated limits of the City.

It is our further opinion that the drivers of these city owned trucks, when on business of the city outside of the limits of the city, are not violating any State law, whether from the standpoint of operating the truck without a license or by not being registered operators.

Yours very truly,

APPROVED:

James L. HornBostel
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

FARM:)
) Under the provisions of Section 75 of the Bankruptcy
) Act, a farmer who files a petition in the court im-
DELINQUENT TAXES:) mediately subjects all of his property to the ex-
) clusive and sole jurisdiction of the court. Sales
) of property for delinquent taxes cannot be had ex-
) cept from the petition made to the Judge of the Court
) and order granted permitting the sale of the same.

November 14, 1935.

11-14

FILED
9

Mr. L. G. Boatright
Collector of Revenue
Saline County
Marshall, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "We have a farmer who is delinquent five years on his real estate taxes, and in the last few days he has filed a petition in Bankruptcy or Provision for Relief Of Debtor."
>
> "Now can we sell this in the Nov. sale? Or does it extend his time of paying taxes?"

Under the provisions of Article I of the Constitution of the United States, Section 8, relating to the enumerated powers of Congress, there is provided in part as follows:

> "**** to establish **** uniform laws on the subject of Bankruptcy throughout the United States. *****"

Under the powers granted by the Constitution of the United States, as above referred to, the Congress of the United States, under date of July 1, 1898, passed the Bankruptcy Act and said act has been subsequently amended to the present date.

It is with the provisions of the amendments to Section 75 of said act that we are concerned for the purpose of answering your inquiry.

Under the provisions of Section 203, 11 U S C A (Bankruptcy Act, Section 75), relating to provisions for relief of debtors, a farmer who is insolvent or unable to meet his debts as they mature may file a petition praying for a composition or extension of time to pay his debts. Pertinent part of Section 203, Subdivision "c", as amended, reads as follows:

> "At any time within five years after March 3, 1933, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. The petition or answer of the farmer shall be accompanied by his schedules. The petition and answer shall be filed with the court, but shall, on request of the farmer or creditor, be received by the conciliation commissioner for the county in which the farmer resides and promptly transmitted by him to the clerk of the court for filing. ****"

You are directed to Subdivision "n" as amended of Section 203, supra, relating to the filing of the petition, which reads as follows:

> "The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under this section, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of re-

> demption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition."

We construe the above section to mean that, when a petition is filed in the court praying for relief, the effect is to subject the farmer and all of his property immediately wherever located to the exclusive jurisdiction of the court.

You are further directed to Subdivision "o" of Section 203, supra, relating to the prohibitions directed to judicial or official proceedings in any court or proceedings under the direction of any official. The pertinent parts of said subdivision read as follows:

> "Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:
>
> "* * * * * * * * * * * * * * * * * * * *
>
> "Proceedings to acquire title to land by virtue of any tax sale; ****"

Under the provisions of the above subdivision, no proceedings to acquire title to land by virtue of any tax sale shall be instituted except upon petition made to and order granted by the Judge after hearing had been had and report submitted by the conciliation commissioner.

In the instant case, the county collector would petition the Court for permission to proceed in collecting the delinquent taxes due.

Subdivision "p" of Section 203, supra, provides as follows:

> "The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtorb property, wherever located. All subh property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in this section."

Your attention is further directed to paragraph numbered 2 of Subdivision "s" of Section 203, supra, which provides in part as follows:

> "When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court or under the direction of any official, against the debtor or any of his property, for a period of three years. ****"

When the conditions set forth in Section 203, (Bankruptcy Act, Section 75), have been complied with, the Court shall stay any proceedings under the direction of any official against the debtor or any of his property for a period of three years.

CONCLUSION.

In light of the above, it is the opinion of this department that a farmer who is delinquent five years in his real estate taxes and has filed a petition with the Court under Section 75 of the Bankruptcy Act relating to provisions for relief of the debtor would subject the farmer and all of his property to the exclusive and sole jurisdiction of the court.

We further conclude that the county collector is prohibited under the provisions of Section 75 of the Bankruptcy Act from advertising the property of the farmer, pursuant to the Laws of 1935, relating to the sale of delinquent property, except upon petition made to and granted by the Judge of the Federal Court permitting said collector to proceed.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

INTOXICATING LIQUOR: Non-resident dealer must have non-resident license regardless of fact he has a wholesale license.

1216

December 2, 1935

FILED
9

Mr. W. H. Bouchard
Chief Auditor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "We are enclosing a letter from Fleishmann Distilling Corporation which is self-explanatory.
>
> Our side of the case is this: Fleishmann holds a resident wholesale permit at their St. Louis office which according to our interpretation of the law, permits them to make sales to wholesalers and retail trade in Missouri, but they do not hold a non-resident permit to ship liquor into Missouri. We have notified them that it is necessary they make application for non-resident permit before any shipments can be made to their warehouse in St.Louis, but according to the enclosed letter, they do not seem inclined to take our view. Therefore, to clear up the case, we would like to have an opinion on the matter. "

Your question, as we understand it, is whether or not a non-resident liquor dealer who owns and operates a resident wholesale liquor business and has a license therefor, is required to have a non-resident license in order to do business in this state.

Section 21 of the Liquor Control Act requires every person residing without this State who shall solicit, receive or take orders for the sale of intoxicating liquors within this State to have a state license, said section reads in part,

> "For the sale of intoxicating liquors by every person residing without this state, who shall solicit, receive or take orders for the sale of intoxicating liquors within this state, by a wholesale liquor dealing agent, as herein defined, the sum of one hundred ($100.00) dollars, for handling intoxicating liquor containing not in excess of five (5%) per cent of alcohol by weight;
>
> The sum of two hundred ($200.00) dollars for handling intoxicating liquor containing not in excess of twenty-two (22%) per cent of alcohol by weight;
>
> The sum of five hundred ($500.00) dollars for handling intoxicating liquor of all kinds, for a period of one (1) year; "

We ruled in an opinion given to Honorable E. J. Becker under date of May 24, 1935, that that part of Section 21 which requires non-resident liquor dealers to take out licenses has not been repealed. That part of said section

which provides that the payment of one license fee by a non-resident liquor dealer shall include the right to solicit business in this state by as many agents as he may wish to employ, has been repealed by Section 21a-2.

Section 21a-2 makes it unlawful for any person residing without this state to solicit, receive or take orders for the sale of intoxicating liquor within this state, except by or through a duly licensed wholesale liquor dealer in this state. Said section reads, in part:

> "It shall be unlawful for any person, firm, partnership or corporation residing without this state to solicit, receive or take orders for the sale of intoxicating liquor within this state except by or thru a duly licensed wholesale liquor dealer who shall be considered for the purpose of this Act as the agent of said non-resident person, firm, partnership or corporation or to haul or transport intoxicating liquor, or cause to be hauled or transported intoxicating liquor, in any manner whatsoever in or into this state, for sale, or storage and sale in this state, unless the same has been ordered by such duly licensed wholesale liquor dealer."

A resident wholesale liquor dealer is, of course, required to have a Missouri state license. Section 21 provides in part,

> "For the sale of intoxicating liquor by a wholesale dealer, or a wholesale liquor dealing agent, the sum of one hundred ($100.00) dollars, for handling intoxicating liquor containing not in excess of five (5%) per cent of alcohol by weight;
>
> The sum of two hundred ($200.00) dollars for handling intoxicating liquor containing not in excess of twenty-two

(22%) per cent of alcohol by weight;

The sum of five hundred ($500.00) dollars for handling intoxicating liquors of all kinds, for the period of one year."

It is plain from the above that a non-resident liquor dealer must have a license to solicit, receive or take orders for the sale of intoxicating liquors within this state, and can only solicit, receive or take orders by or through a duly licensed wholesale liquor dealer in this state. It is also perfectly apparent that such wholesale liquor dealer must have a state license. The fact that an out state liquor dealer owns a licensed wholesale liquor business in this state, would not permit him to do business in this state as a non-resident liquor dealer. The non-resident license and the resident wholesale license are separate and distinct. A wholesale license permits the resident wholesaler to carry on a wholesale business in this state, while the non-resident license permits a non-resident to solicit business in this state by or through a wholesale dealer in this state.

CONCLUSION

It is, therefore, the opinion of this department that a non-resident liquor dealer who solicits, receives or takes order for the sale of intoxicating liquors within this state by or through a wholesale liquor dealer, must

have a non-resident license, although he may own and operate a wholesale liquor business in this state and have a license therefor.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

COUNTY CLERKS--COUNTY DEPUTIES: Salary of County Clerk and his Deputy in Conties having more than eleven thousand five hundred (11,500) persons and less than twelve thousand five hundred (12,500) persons. Salary not to be fixed by County Court.

January 23, 1935.

FILED
10

Honorable F. M.Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Sir:

This department is in receipt of your letter of recent date wherein you state in part as follows:

> "I would like to have an opinion from you relative to the correct method of arriving at the Salary of the County Clerk and his Deputy, also of the Circuit Clerk and Ex-officio Recorder of Deeds and his Deputy, in Benton County, Missouri, which had a population of 11,708 under 1930 United States Census; also, how the fees are to be paid, whether by the Clerk of Fees taken in or out of the County Treasury, also, if the amounts to be paid for deputy hire of Deputy of Circuit Clerk and County Clerk are to be fixed by the County Court.
>
> "The law relative to these salaries was amended by the State Legislature in 1933, page 369, but there seems to have been some Claims by the Clerks that the Law would not hold up, and it may be that you have already rendered an opinion in the matter and if so then a copy would serve my purpose, but if no opinion has been rendered I would like to have an opinion as the new Clerks will be taking office shortly and it will be necessary to know how to arrive at their compensation and also of the Deputies, as well as to know who will fix the amounts of Compensation for Deputies and manner of payment."

Section 11808, Laws of Missouri, 1933, page 370, reads as follows:

> "The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of feeshe may retain, or the amount he shall be allowed to pay for deputies or assistan ts."

The population of Benton County, according to the United States Census of 1930, is 11,708 inhabitants--Official Manual of the State of Missouri, 1933-1934, page 546.

Section 11811, Laws of Missouri, 1933, page 370, provides in part as follows:

> "The aggregate amount of fees that any clerk of the County Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. * * * *In counties having more than 11,500 persons and less than 12,500 persons, the clerks shall b e allowed to retain $1300.00 for themselves, and shall be allowed to pay for deputies and assistants $1100.00;* * * *."

You will note that the above section provides a maximum of fees that any county clerk may retain for his personal services for one year. This means that the county clerk is entitled to retain fees up to the maximum amount allowed for in this section.

The language in the beginning refers to "the aggregate amount of fees" that a county clerk may retain for one year's service. In view of the foregoing, we are of the opinion that the clear meaning of this language is that, out of the fees collected by the county clerk in his official capacity he shall b e allowed to withhold or retain from the money in his custody and

possession all of it up to a certain amount and none over that amount.

The statutory authority to appoint deputy county clerks in Benton County is found in Section 11680, R. S. Mo, 1929, which provides:

> "Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

Section 11811, supra, provides that the County Clerk shall be allowed to retain $1300.00 for himself and to pay $1100.00 for deputies and assistants. This statutory authority is expressly given to the County Clerk and not to the County Court, and it is clearly evident that he is not limited to the retention of merely his own fees for personal services up to a limited amount but may also retain the maximum fees allotted to him by statute for the pay of his deputies and assistants. It is true that Section 11680, supra, does provide for the approval of the deputy or deputies appointed by the County Clerk but is limited to approval of the appointment and not as to salary.

In view of the foregoing, we are of the opinion that the amount to be paid for deputy hire of county clerks is not to be fixed by the County Court.

As to the questions in your letter dealing with the Circuit Clerk and ex officio recorder of deeds and his deputy, we believe that you will find same fully answered by a ruling of this Department directed to Honorable Birt P. Bryant, Clerk of the Circuit Court of Dunklin County, dated March 7, 1934, and signed by Roy McKittrick, Attorney General, and Franklin E. Reagan, Assistant Attorney General, a copy of which is enclosed;

and from such ruling you will observe that it is the opinion of this Department that the number of Deputy Circuit Clerks is left to the judgment of County Court, and the county court fixes their compensation and is liable to pay the sum out of the general revenue fund of the county.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:MW:H

CIRCUIT CLERK: Compensation of a deputy clerk is to be fixed by the County Court. In counties having a population of 12,500 persons and less, compensation shall not exceed the amount allowed a deputy county clerk.

2-22

February 1, 1935.

FILED 10

Hon. Peter C. Breit
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, by your predecessor in office, which reads as follows:

"In re: Circuit Clerk's compensation beginning 1935, pay of deputy constitutional, page 369.

"I am in receipt under date of December 21 opinion given to Hon. Birt P. Bryant, Clerk of the Circuit Court of Dunklin County, Kennett, Missouri, relative to the above subject-matter, and referring to this opinion under the subject 'deputy circuit clerk', at page 4, referring the laws of 1933 at page 317, and particularly to 'county court in its orders permitting the clerk to appoint deputies or assistants shall fix the compensation of such deputies or assistants in counties having 12,500, etc.

"As an interpretation of this statute, citing that our county has a population of less than 15,000, I would like your official opinion as to how much the circuit clerk would be entitled to for deputy hire.

"Further, is it discretionary with the county court as to the amount of deputy hire which shall be paid the circuit clerk and can this amount exceed that of the county clerk? Andrew County is a county with a population not in excess of 12,500 persons."

> Is it only in counties having a population of 12,000 and less, that the deputy hire of the circuit clerk cannot exceed that of the county clerk, or is it a matter for the county court to fix the amount as they deem necessary in counties of 12,500?"
>
> "Asking your official opinion, ***"

Section 11812, Laws of Missouri, 1933, pages 371 and 372, reads as follows:

> "Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the county court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

The above section provides that the County Court shall fix the compensation of a deputy or an assistant circuit clerk which, in counties having a population of 12,500 persons and less, shall not exceed the amount allowed deputies or assistants to the County Clerk for the actual time employed. In counties having a population of over 12,500 persons, no mention is made of the amount of compensation that the County Court is permitted to allow

a deputy or assistant Circuit Clerk.

It is therefore the opinion of this department that the County Court in counties having a population of 12,500 persons or less shall fix the amount of compensation allowed a deputy circuit clerk, which compensation shall not exceed the amount allowed a deputy or assistant to the county clerk. In counties having a population of over 12,500 persons, the amount of compensation allowed a deputy or assistant circuit clerk is discretionary with the County Court.

You state in your letter that Andrew County has a population not in excess of 12,500 persons. We notice however that the 1930 decennial census of the United States shows that Andrew County has a population of 13,469 persons. We therefore call your attention to Section 11808, Laws of Missouri, 1933, page 370, which provides:

> "The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants."

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/JLH:afj

PROSECUTING ATTORNEY - Duty to pay over fees.

February 4, 1935

FILED
10

Honorable G. R. Breidenstein
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

We have your request for an opinion under date of January 18th, 1935, as follows:

> "I would like to have the opinion of your department in regard to whether it is permissible for the Prosecuting Attorney to retain fees for the conviction of defendants in Criminal Cases.
>
> "Section 11783 of the Revised Statutes of 1929 prescribe fees due the Prosecuting Attorney for convictions in certain cases. I find no law requiring him to turn these fees over to the county or state.
>
> "Please let me know whether the Prosecuting Attorney has a right to retain these fees and if not what disposition he should make of them.
>
> "The population of this county is under 11,000."

#2 - Honorable G. R. Breidenstein

The salary of the prosecuting attorney is now fixed by Section 11314, Laws Mo. 1933, p. 178.

Section 11315, R. S. Mo. 1929 makes it the duty of the prosecuting attorney to charge and collect for the county every fee that accrues in his office, and at the end of each month pay over said fees to the county treasury.

It is, therefore, the opinion of this office that it is the duty of the prosecuting attorney to collect and pay over all fees of his office to the county treasury, monthly.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

BONDS: SURETIES: Where statute requires a surety bond to be given a department can not compel the giving of a corporation surety thereon.

February 7, 1935

FILED 10

Honorable J. C. Breshears
Commissioner
Jefferson City
Missouri

Dear Mr. Breshears:

Receipt of your letter dated February 1, 1935 is acknowledged. Your letter is as follows:

"This is a request for a prompt opinion on Section 12650, R. S. Missouri 1929, as to whether this Department has authority to require a corporation surety bond, and whether this Department has authority to reject any bond that does not seem adequate."

Section 12650 Revised Statutes Missouri 1929, in part, is as follows:

" Before any license shall be issued, the applicant therefor shall make and execute to the State of Missouri a surety bond in the penal sum of two thousand dollars * * * * * if at any time the commissioner be of the opinion that the responsibility of any surety or sureties on any existing bond is, or is in danger of becoming, impaired for any reason,

> he shall require the giving of a new bond with good and sufficient <u>surety</u> or sureties."

Plainly, the quoted portion of Section 12650 does not specifically require the giving of a corporation surety bond. The word 'surety' is defined in 50 C. J. page 13, section 2, as follows:

> "In a broad sense, a 'surety' is one who becomes responsible for the debt, default, or miscarriage of another. But in a narrower sense a 'surety' is a person who binds himself for the payment of a sum of money, or for the performance of something else, for another who is already bound for the same, and in some jurisdictions there are statutory definitions to this effect. A 'surety' has also been defined as a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so."

In Stifel Estate v. Cella 220 Mo. App. 657, 664, the St. Louis Court of Appeals defined the qualities of a bond in the following language:

> "This court has defined a bond as a written instrument containing a provision that a sum, affixed as a penalty, shall be binding upon the obligor and conditioned that the penalty may be avoided by the performance by the obligor of certain conditions."

In Sandoval v. Madrid 294 Pac. 631, a case involving the recount of election ballots, and where the giving of a 'surety bond' for the payment of costs was required was under consideration, the contention of the litigant and the conclusion of the court is stated at page 632,

> "The bond to secure payments of costs was executed by individuals as sureties. Respondent contends that it was insufficient, because the statute (section 41 - 619) requires a 'surety bond.' He contends that this expression means one executed by a corporate surety company organized for the purpose of acting as surety and authorized to do business in the state. So to interpret the statute would be to read into it something which the Legislature left out."

There is nothing in the definitions of a 'surety' and of a 'bond' as heretofore set out that would restrict the giving of a surety bond to a corporate entity, and the case of Sandoval v. Madrid, supra, is positive authority against such a construction. In addition to that, your attention is called to the fact that the bond required by Section 12650 may be signed by a surety or sureties, which rather implies that individuals, as well as a corporation surety, would be entitled to sign the required bond, it being a matter of common knowledge that unless more than one surety is required on a bond that the signing of a surety bond by a corporation surety is usually and ordinarily accepted and taken as sufficient.

CONCLUSION

We are of the opinion that Section 12650 Revised Statutes Missouri 1929, does not authorize your

department to require the bond given pursuant to that section to be signed by a corporation engaged in the business of a surety.

Yours very truly,

GILBERT LAMB
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

COUNTY COLLECTORS: County Collector relieved of liability in event of bank failure where he has deposited his funds in county depository as required by county court under Section 9885, Laws of 1933, pp. 464-465.

February 13, 1935.

FILED
10

Hon. P. C. Breit
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Mr. Breit:

This is to acknowledge receipt of your letter of January 22, 1935, with request for an opinion; which letter is as follows:

> "Our county collector elect, Lloyd R. Zahnd, has brought up the question of liability for loss of funds collected by the county collector due to bank failure when the depository used by the collector has been designated by the county court and he has been ordered to deposit all collections in this depository daily in keeping with Section 9885, Laws of Missouri 1933.
>
> Section 9885, Laws of Missouri 1933, provides that the county collector shall deposit daily '--all collections of money in such depositories as may have been selected by such county court pursuant to the provisions of Section 12184, Revised Statutes of Missouri 1929---'. The county collector has no alternative but to deposit the collections as directed, and he is given no authority to demand or take security from these depositories, the presumption being that the security furnished by these depositories to the county court for the 'county treasurer's funds'

"shall also cover the collector's funds. This being so, is it your opinion that the county collector would be relieved of responsibility for loss of such funds due to the failure of any designated depository? The county treasurer is relieved of such liability by Section 12198, Revised Statutes of Missouri for 1929, and it is our presumption that this relief would extend to the county collector since he must deposit his funds in banks designated by the county court and not banks of his own selection.

I will greatly appreciate your giving me your opinion on this point. Is the county collector relieved of liability in the same manner as the county treasurer whenever the county court requires the county collector to deposit all collections in banks designated and selected as provided in Section 12184, Revised Statutes of Missouri 1929.

It is quite obvious that the intention of the framers of this new legislation was to provide a place of safekeeping for the collector's funds and also provide security, and it is reasonable to suppose it was their intention that the collector be relieved of personal responsibility for the loss of funds due to bank failure, as the law gives him no alternative but to deposit his collections as directed and it gives him no authority to require security. Your opinion on this point will be greatly appreciated."

The opinion which you request is whether or not a county collector, in counties having a population of less than 75,000, is relieved of responsibility for loss of funds due to the failure of a depository designated by the county court

in such counties under Section 9385, R. S. Mo. 1929, as amended by Laws of Missouri, 1933, at pages 464-465.

We are setting forth in full the above section, as amended, for the reason that this is the particular section which must be construed to answer your question. Said section reads as follows:

> "Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent, of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties. Provided, that in all counties which now have or which may hereafter have a population of less than 75,000 inhabitants, according to the last preceding federal decennial census, the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected

> "by such county court pursuant to the provisions of Section 12134, Revised Statutes of Missouri for 1929, to the credit of a fund to be known as 'County Collector's Fund;' provided further, that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount;" provided further, that no such county collector shall be required to make daily deposits for such days when his collections do not total at least the sum of One Hundred Dollars ($100.00); and provided further the collector shall not check on such 'County Collectors' Fund' except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositories."

The new Section 9885, as amended by Laws of 1933, is the same as old Section 9885 down to the word "provided" in the seventeenth line thereof, except the word "two" of the old section in the twelfth line is changed to "one" in the new section and the year 1909 in the twenty-first line of the old section is left out of the new section entirely, both of which minor changes as to the question involved are immaterial.

That portion of the section beginning with the word "provided" in the seventeenth line to the end of the section, was added by the Legislature of 1933. This amendment applies to Andrew County for the reason that it is a county having a population of less than 75,000 inhabitants according to the last preceding federal decennial census. This amendment makes it optional with the county court, by using the term "may require the county collector thereof to deposit daily all

collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184, Revised Statutes of Missouri, 1929, to the credit of a fund to be known as 'County Collectors' Fund'", and the statute further provides, "that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the week immediately preceding his election or appointment, plus ten per cent of said amount."

We assume from your letter that the county court of Andrew County has exercised its discretionary powers as given it by Section 9885, as amended, and has required the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184, R. S. 1929, to the credit of a fund to be known as "County Collectors' Fund", and if so the county collector has no discretion in the matter and must deposit the moneys received by him in the county depository or depositories in accordance with the provisions of this section.

Prior to the amendment of 1933, the county collector was not required to deposit funds in his possession in any designated depository, as was stated in the case of Deal v. Bank of Smithville, 52 S. W. (2d) 201, l. c. 204:

> "The law does not appear to require the collector to deposit funds in his possession or to which he is entitled in any designated depositary. No provision of that character has been called to our attention. Article 9, chapter 85, R. S. 1929 (section 12184 et seq. (Mo. St. Ann. Sec. 12184 et seq.)), deals with the subject of county depositaries, and section 12186, R. S. 1929 (Mo. St. Ann. Sec. 12186), provides for specified depositaries of all public funds coming into the hands of the county treasurer or into the hands of the ex officio collector in counties under township organization. There is no such provision applicable to a county collector. It appears that he is personally invested with the care and

> "custody of funds in his hands until such time as he is required to deliver them to the county treasurer, and he is required to give a bond to the state, satisfactory to the county court, conditioned that he will faithfully collect and pay over the county and state revenue and perform the duties of his office according to law. Section 9885, R. S. 1929 (Mo. St. Ann. Sec. 9885)."

In answering your question, we are not unmindful of the rule in this state that a public officer intrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer, and that a public officer is an insurer of public funds which he has lawfully received. This rule of law is sustained by a long line of cases in Missouri.

> University City v. Schall, 275 Mo. 667, 205 S. W. 631;
> City of Fayette v. Silvey, 290 S. W. 1019, l. c. 1021;
> Bragg City Special Road District v. Johnson, 20 S. W. (2d) 22, l. c. 24;
> Glaze v. Shumard, 54 S. W. (2d) 726, l. c. 728.

Where a depository has been duly designated by the proper officials in accordance with a statute giving that power to the county court or other fiscal agent of any political subdivision, the rule is otherwise, and the public officer is not an insurer of public funds deposited in a depository or depositories in the event of the failure of such designated depository. In support of this rule of law we cite the following authorities:

In 29 Cyc. 1439, it is stated as follows:

> "Any violation of law, as the deposit of public funds in the officer's personal account, will make the officer liable. But if the law has <u>designated banks as depositories for public moneys</u>, the

"deposit of an officer of public money in such a depository relieves him from all liability."

And, also, in 46 C. J. 1040, Section 315, the rule is stated as follows:

"The general rule that a public officer is an insurer of public funds in his custody has been applied also where a loss is occasioned by the failure of a public depository, but if the law has designated public depositories for public moneys, the deposit by an officer of public moneys with such a depository relieves him from all liability."

City of Parsons v. Fidelity and Deposit Company, 29 Fed. (2d) 417, cited approvingly the following:

"In Stephens v. City of Ludlow et al., 159 Ky. 729, 169 S. W. 473, it is held that:
'When * * * the selection of the depository is taken out of his (treasurer's) hands and he is directed by the city to keep its funds in an institution selected by it, the city and not the treasurer assumes responsibility for the integrity and solvency of the institution so selected."

In City of Newburgh v. Dickey, 150 N. Y. S. 175, l. c. 178, it is said:

"It is the settled law of this state that a public official assumes all risk of loss and is charged with the duty to act as debtor for the funds in his custody. Tillinghart v. Merrill, 45 N. E. 375, 34 L. R. A. 678. But in that case the

> "court say that they do not wish to be understood as establishing a rule as absolute liability in either event. Neither the requirement of this bond nor the general rule would extend to moneys received by the official while those moneys were held by a depository designated by another body or officer of the city in accord with law and exclusive of any power cast upon him. Dillon on Municipal Corporation, 5th Ed., page 764, citing Perley v. Muskegon County, 32 Mich. 131; Hobbs v. United States, 17 Ct. of Claims 189."

Mechem, on "Public Officers", page 610, Section 912, says the following:

> "It is made the duty of the officer, either by the terms of the statute prescribing his duties, the performance of which the bond, in general terms, is given to secure or by the very language of the bond itself, to safely keep the public moneys which come into his hands and to pay them over according to law. In a few instances it is further provided that they shall be deposited in certain manner or shall be kept in certain places or other receptacles provided by the public; in which cases the officer who complies with the requirements is relieved from liability."

In the case of Jordon v. Baker et al., 66 S. W. (Ky.) (2d) 84, l. c. 88, is said the following:

> "In the Stephens case, supra, 159 Ky. 729, 169 S. W. 473, 475, in discussing the question as to the effect of the selection and designation of the depository by the taxing authority, upon the liability of the collecting officer, we said:

"'When, however, the selection of the depository is taken out of his (official custodian's) hands and he is directed by the city to keep its funds in an institution selected by it, the city, and not the treasurer, assumes responsibility for the integrity and solvency of the institutions so selected. Commonwealth v. Godshaw, 92 Ky. 435, 17 S. W. 737 (13 Ky. Law Rep. 572).'"

In Edwards et al. v. Logan County, 50 S. W.(Ky.) (2d) 83, l. c. 85, is stated the following:

"A county treasurer is a ministerial officer or agent with his powers and duties minutely delineated in section 931 of the Statutes. If an official act or conduct be not prescribed by the statute, it is subject to the will and order of the fiscal court. Whatever discretion he may have in discharging the duties of office, it is subordinate to the exercise of the discretion of that body. Where it has not specifically exercised its discretionary control, the treasurer within the scope of his powers may use his own judgment, with accompanying responsibility. So, with respect to keeping the funds of the county, in the absence of specific orders he may, as a necessary corollary to his duty as custodian, choose the depository. The fiscal court is the master; the treasurer, the servant. When it speaks authoritatively, he must obey; and, when he does, he is protected. Authority for these statements and conclusions may be found in Harrison v. Logan County, 129 Ky. 48, 110 S. W. 377, 33 Ky. Law Rep. 465; Cain v. Burroughs Adding Machine Co., 180 Ky. 567, 203 S. W. 315; Stephens v. City of Ludlow, 159 Ky. 729, 169 S. W. 473; Pulaski County v.

> "Richardson, 225 Ky. 556, 9S.W. (2d) 523. Compare Johnson v. Fleming, Commissioner, 116 Ky. 680, 50 S. W. 855, 21 Ky. Law Rep. 4. Therefore, when the fiscal court of Logan county directed its treasurer to deposit its funds in the bank of Russellville, and he obeyed, the fiscal court assumed responsibility for the integrity and solvency of the institution and exonerated him from loss of funds if suffered solely on that account. Commonwealth v. Godshaw, 92 Ky. 435, 17 S. W. 737, 13 Ky. Law Rep. 572; Stephens v. City of Ludlow, supra. Among foreigh cases to the same effect are Perely v. County of Muskegon, 32 Mich, 131, 20 Am. Rep. 637; City of Newburgh v. Dickey, 164 App. Div. 791, 150 N. Y. S. 175; State v. Bobleter, 83 Minn. 479, 86 N. W. 461; Holt County v. Cronin, 79 Neb. 424, 112 N. W. 561. See, also, 46 C. J. 1040; Stearns on Suretyship, Sec. 166."

Also, in Thomas J. Hobbs v. United States, 17 U. S. Court of Claims 189, we find the following:

> "If a disbursing officer in good faith, without knowledge of the suspension of a bank's solvency and without the expectation of gain or other private motive, withdrew public moneys from the treasury and deposited them with the bank, it being a <u>designated depository</u>, and the deposit being at that time authorized by law, <u>the loss of the moneys through the failure of the bank cannot be imputed to the fault or negligence of the officer.</u>"

It is, therefore, our opinion that if the county court has selected a county depository in accordance with the provisions of the statutes and has further exercised its discretionary power and required the county collector to deposit his

collections of money in accordance with the amendment, Laws of 1933, page 464-465, that is, to the credit of a fund to be known as "County Collector's Fund" in the county depository, in that event the county collector would be relieved of liability by reason of the failure of such designated depository.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

JUSTICE OF THE PEACE JURISDICTION--SHERIFFS POWERS TO RELEASE: (1) Have no right to fine or imprison for misdemeanors where no information by Prosecuting Attorney be filed. (2) Have no right to accept cash bonds or any bonds but a surety bond. (3) Has no right to remit the whole of fine and costs assessed, but can commute to jail sentence at one day for every $10.00 for fine and costs. (4) Has no right to order release except as allowed by Statute.

March 19, 1935.

3-22

FILED
10

Honorable G. R.Breidenstein
Prosecuting Attorney of Clark
County, Missouri
Kahoka, Missouri

Dear Sir:

Your request for an opinion dated March 2, 1935, is as follows:

> "I would like to have the opinion of your department in regard to the following questions:
>
> "Does a Justice of the Peace have a right to assess a fine or jail sentence against an individual if no information has ever been filed by the Prosecuting Attorney?
>
> "Does a Justice of the Peace have a right to accept money to be held in his custody as surety for the appearance for trial of a defendant in case the defendant could put up such cash bond but can not produce the required sureties to enter into recognizance for the appearance of the defendant for trial before the Justice?
>
> "If a Justice upon plea of guilty or upon conviction of a defendant assesses a fine which is the minimum allowed by statute, can the justice remit all or any portion of that fine?
>
> "If the sheriff of a county is acting as Jailor of such county may he release a prisoner without the order of the Judge who has passed the sentence?"

As to your first question:

The Missouri Constitution, Article II, Section 10, provides:

> "The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

The Missouri Constitution, Article II, Section 12, provides:

> "No person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be construed to apply to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger."

The Missouri Constitution, Article VI, Section 23, provides:

> "The circuit court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace, and all inferior tribunals in each county in their respective circuits."

The Missouri Constitution, Article VI, Section 37, provides:

> "In each county there shall be appointed, or elected, as many justices of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law."

In the case of Brownfield v. Thompson, 96 Mo. App. 340, l. c. 342, the Appellate Court said:

> "A justice's court is not only a court of limited jurisdiction, but its powers are limited within its jurisdiction. It can only do such things where it has jurisdiction as the Legislature has provided it may. The manner of exercising its jurisdiction is limited by the same law that created it.* * * * The Legislature has defined the jurisdiction of justices of the peace and has provided in a very careful and specific manner their duties and their mode of procedure."

Section 3415 R. S. Mo., 1929, provides:

> "Prosecutions before justices of the peace for misdemeanors shall be by information, which shall set forth the offense in plain and concise language, with the name of the person or persons charged therewith: Provided, that if the name of any such person is unknown, such fact may be stated in the information, and may be charged under any fictitious name; and when any person has actual knowledge that any offense has been committed that may be prosecuted by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the justice of the peace having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a justice of the peace in his county, or shall

be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with a justice having jurisdiction of the offense, founded upon or accompanied by such complaint."

Section 3418 R. S. Mo. 1929, provides:

"Upon the filing of a complaint before a justice of the peace, verified by the oath or affirmation of a person competent to testify against the accused, if the justice be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged, it shall be his duty to forthwith forward such complaint to the prosecuting attorney; and it shall be the duty of the complainant to forthwith inform the prosecuting attorney what facts can be proved against the accused, and by what witnesses, and the residence of such witnesses; and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made, it shall be his duty to immediately file his information before the justice taking the complaint, and give to said justice a list of the witnesses to be subpoenaed on the part of the state; and upon the filing of the information by the prosecuting attorney, as herein provided, with the justice of the peace, or upon the filing of an information by the prosecuting attorney upon his own information and belief, without complaint of a private individual having previously been filed, it shall be the duty of the justice to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff of the

> county or constable of the township, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the justice to execute the same, by written indorsement to that effect on such warrant."

Section 3420 R. S. Mo., 1929, provides:

> "When any person shall be arrested upon the verbal order of the justice, or upon a warrant issued upon his own knowledge, as directed in the next preceding section, the person so arrested may be kept in custody for the space of two hours, unless he shall be sooner taken from such custody by virtue of a warrant issued upon an information or complaint under oath, as required in other cases; but the person so arrested shall not be confined in jail, nor put upon trial for any offense until he shall be charged therewith by information."

In the case of State v. Powell, 44 Mo. App. 21, l. c. 24, the Appellate Court said:

> "When the complaint was filed by Haseltine, the justice had authority to issue a warrant for Powell's arrest (sec. 4332), but he could not be placed on trial, neither could it be said that there was a prosecution against him, until there was an information filed by the proper officer."

CONCLUSION AS TO QUESTION "ONE".

It is the opinion of this office that a justice court is a court of limited jurisdiction and that its powers are even limited within its jurisdiction. Such

was the holding in the Thompson case, supra. A justice of the peace has no power beyond the constitution and statutes, and is limited in power to act only within the constitution and statutes.

Although a justice of the peace is a constitutional officer of a constitutional court, his jurisdiction in criminal cases is yet limited to that constitutional provision which limits the prosecution for misdemeanors in any court, to persons charged by indictment or information. (We take it that your case in question "one" is but a misdemeanor for you speak of punishment by fine and jail sentences. We do not want this opinion construed that a justice cannot hear a complaint for a felony upon the affidavit of a complaining witness without an information filed before him and certify said case upon proper finding. The power of a justice of the peace at a preliminary hearing for felony and a trial for misdemeanor are altogether different.)

The jurisdiction of a justice of the peace is constitutional and statutory, and except for these acts which are expressly allowed or necessarily implied from the Constitution and Statutes, he has no other authority upon which to justify his acts, and any act beyond his authority to act is illegal and void.

Following in the wake of the constitutional limitations, misdemeanors may be prosecuted before a justice of the peace in a trial for that purpose, for the Legislature has so provided, but before proceeding to trial it is our opinion that the constitutional and statutory jurisdiction of the justice of the peace must necessarily depend on an information being duly filed before him by the proper officer. The Constitution and Statutes above set out are unequivocal. Without said information he has no jurisdiction to proceed to legally try or to legally commit to jail. Since he cannot legally try he cannot legally fine without an information being previously filed.

* * * * * * * * * * * * *

As to your second question:

The Missouri Constitution, Article II, Section 24, provides:

"That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."

The Missouri Constitution, Article II, Section 25, provides:

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Thus we see that the Constitution guarantees the right to appearance bonds for those charged with a crime, and these Sections apply to justice courts.

After conviction in a justice court the written form for appearance bond for a defendant who appeals to the circuit court is set out in Section 2501 R. S. Mo. 1929, which provides:

"If the appeal be taken by the defendant, the recognizance may be in the following form:

'We, H. I., as principal, and E. F., as surety, acknowledge ourselves indebted to G. H. in the sum of** dollars, upon this condition: That, whereas, H. I. has appealed from the judgment of J. K., a justice of the peace of _____county, Missouri, in an action of forcible entry and detainer (or unlawful detainer, as the case may be), between the said G. H, complainant, and the said H. I., defendant: Now, if the said H. I. shall prosecute his appeal with effect and without delay, neither commit nor suffer to be committed any waste or damage on the premises whereof restitution is adjudged, and pay all rents and profits, dam-

ages and costs that may be adjudged against him, and shall otherwise abide the judgment of the circuit court in said cause, then this recognizance shall be void. Given under our hands this ____day of _____19____. H. I.

Attest: J. K. justice of the peace. E. F. ' "

Thus we see that the recognizance bond after conviction, in a justice court, must be in writing in order to comply with the Statute, and must be a surety bond to comply with the Statute. Your second question deals primarily with the essentials of a recognizance bail bond, after arrest yet before conviction, in a justice court.

Section 3401 R. S. Mo. 1929, provides:

"The following magistrates shall have power and jurisdiction to cause to be kept all laws made for the preservation of the public peace, to issue process for the apprehension of persons charged with criminal offenses, and hold them to bail; require persons to give security to keep the peace, and to execute the powers and duties herein conferred in relation thereto: The judges of the supreme court throughout the state; judges of the courts of record within their respective jurisdictions; judges of the county courts and justices of the peace within their respective counties; the mayors and police judges of incorporated cities and towns within the limits of their respective corporations: Provided, that nothing herein contained shall be so construed as to authorize the mayors and police judges of incorporated cities and towns to exercise jurisdiction in prosecutions under the laws of this state, other than those instituted under this article for surety

to keep the peace."

Section 3495 R. S. Mo. 1929, provides:

"Whenver any person shall be committed to jail on a warrant of commitment by any magistrate for a bailable offense, the recognizance, with proper security, may be taken by the court or judge of the court having criminal jurisdiction, and in case of the absence of the judge of such court having criminal jurisdiction from the county, such recognizance may be taken by any judge or justice of the county court, or any judge of a court of record.

Section 3573 R. S. Mo., 1929, provides:

"When the defendant is in custody or under arrest for a bailable offense, the court in which the indictment or information is pending may let him to bail and take his bond or recognizance, or, if the court is not in session, the clerk of the court may fix the amount of such bail and take his bond or recognizance."

Section 3574 R. S. Mo. 1929, provides:

"If the defendant is not arrested or in custody during the term at which an indictment for felony is returned, the court must fix the amount of bail required of the defendant, and the clerk must indorse the amount of the warrant; but if no order fixing the amount of bail has been made, the sheriff may present the warrant to the judge of the court, and such judge may thereupon indorse the amount of bail required; or if the judge is not in the county, the clerk may fix the amount of bail."

Thus far we have seen that the amount of the recognizance bond is pretty much in the sound discretion of the justice of the peace before whom the case is pending.

Section 3425 R. S. Mo. 1929, provides:

"Upon good cause shown the justice may pospone the trial of a cause to a day certain; in which case he shall require the defendant to enter into a recognizance with sufficient security, conditioned that he will appear before the justice at the time and place appointed then and there to answer the charge alleged against him in the information and not th depart without leave."

Section 3428 R. S. Mo. 1929, provided:

"When a continuance is granted, the recognizance required of the defendant may be in the following form:

'We, A. B. as principal, and E. F. and G. H., as sureties acknowledge outselves to owe and be indebted to the state of Missouri, in the sum of _____dollars, to be void upon this condition: That said A. B. shall personally appear before O. K., a justice of the peace within and for the county of _____, and state of Missouri, at his office, on hhe _____day of_____, 19____, at _____ o'clock __M., then and there to answer to an information for _____(here state the offense), and not to depart without leave; otherwise to remain in force.

"Witness our hands and seals, this _____day of _____, A. D. 19__.

A. B., (seal)
E. F., (seal)
G. H., (seal)

"Taken and acknowledged before me this _____day of_____,19__

O. K. justice of the peace.' "

Thus we see that the justice of the peace must take a surety bond, from those arrested on a warrant from his court who ask for a continuance, with sufficient sureties for his appearance, and that said bond is to be in writing.

Section 3468 R. S. Mo. 1929, provides:

"If the offense charged is a bailable one, the magistrate who issued the warrant shall, at the request of the person arrested, take from him a recognizance in such sum as may seem to be sufficient and proper, with sufficient sureties for his appearance at the next term of the court having jurisdiction of the offense."

Section 3511 R. S. Mo. 1929, provides:

"Upon the filing of the information, a warrant shall issue for the apprehension of the person charged with the offense, unless he be in custody or voluntarily surrender himself in custody of the court; and if such warrant be issued in term, it shall be made returnable forthwith; but if issued in vacation, it shall be made returnable at the next term thereafter; and if defendant be arrested during the term he shall be brought into court, but if he be arrested in vacation of the court, the officer making the arrest shall admit him to bail in a recognizance in any sum not less than one hundred dollars nor more than five hundred dollars, with good and sufficient sureties, to be approved by such officer, conditioned for the personal appearance of the defendant in the court in which the case is pending on the first day of the next term

> thereof, and not depart without leave, which recognizance shall be returned with the warrant and filed in the court; and in default of the prisoner to give such recognizance, he shall be committed to the jail of the county by the officer until the next term of court, or until he gives such recognizance, and if default be made in such recognizance, the same shall be adjudged forfeited, and shall be proceeded on asother recognizances in criminal cases."

This last section the Supreme Court has interpreted to apply only to misdemeanor cases when in State v. Schmidt, 200 S. W. 1071, l. c. 1071, the Court said:

> "While section 5064, R. S. 1909, allows the officer in certain cases to take bail, it is held to apply only to middemeanors."

CONCLUSION AS TO QUESTION "TWO".

It is the opinion of this office that although it be the constitutional duty of a justice of the peace to take recognizance bail in certain cases, yet within his limited constitutional and statutory powers there is no provision made for the taking of a cash recognizance bail, as suggested in your query. The taking of a cash recognizance bail is beyond his jurisdiction and illegal and void.

* * * * * * * * * * *

As to your third question:

Section 3434 R. S. Mo. 1929, provides:

> "If the defendant shall plead guilty or confess the charge, the justice shall assess the punishment and enter up the proper judgment, and in order

thereto he may hear evidence touching the nature of the case, or otherwise ascertain the facts thereof; but in no case shall he accept the plea of the defendant and assess his punishment without giving the injured party notice and an opportunity to be heard. The entry following the plea of guilty, assessing the punishment, may be as follows:

'And I do, for said offense, assess his punishment at a fine of _____dollars (and imprisonment in the county jail for _____ days). It is therefore adjudged by me that the state of Missouri do recover from the defendant, for the benefit of the school fund of _____ county, the said sum of _____ dollars, the fine so assessed, together with the costs of this prosecution, taxed at _____ dollars and _____ cents, and that said defendant be imprisoned in the county jail of said _____ county, for the period of _____ days, and until said fine and costs are paid, or he be discharged according to law.

Section 12179, R. S. Mo. 1929, provides:

"It shall be the duty of each justice of the peace, at each term of the county court, when not other-

wise provided by law, to make out a list of all fines by him imposed, to the use of the county, stating therein the name of the officer who has or ought to have collected the same, which he shall certify and deliver to the clerk of the county court, who shall charge the same accordingly."

Section 12215 R. S. Mo. 1929, provides:

"It shall be the duty of every justice of the peace of such county within ten days after any judgment has been rendered in his court against any person for a fine or forfeiture to report to the auditor the name of the party against whom such judgment was rendered, the amount of the judgment, and on what account rendered"

We do not believe the above section on reporting to county auditor applies in your county, but is applicable to larger counties.

Section 3441 R. S. Mo. 1929, provides:

"When any person shall be unable to pay any fine and costs assessed against him, the justice shall have power, at the request of the defendant, to commute such fine and costs to imprisonment in the county

jail for any period of time not exceeding one day's imprisonment for every two dollars of said fine and costs, nor less than one day's imprisonment for every ten dollars of such fine and costs."

Section 3442, R. S. Mo. 1929, provides:

"The order commuting a fine and costs to imprisonment may be as follows:

'At the request of the defendant, who is unable to pay the fine and costs of ____ dollars assessed against him in this cause, I do hereby commute the same to imprisonment in the county jail for the period of _____days. It is therefore ordered that the said defendant shall in lieu of said fine and costs be imprisoned in the county jail of _____county for the space of _____ days.' "

In the case of State v. Griffie, 23 S. W. 878, l. c. 882; 118 Mo. 188, the Supreme Court has said of a judgment entered in justice court docket:

"The justice had no right to change his judgment after it was written, and after the lapse of the time within which it was his duty to enter it upon his docket. Revised Statutes, 1889, sec. 4354.

"These unauthorized changes, however, would not render void what he had lawfully done at the proper time, nor would his failure to date the judgment and sign it render it void."

CONCLUSION AS TO QUESTION "THREE".

It is the opinion of this office that a justice of the peace, on a pleas of guilty to a misdemeanor, must render judgment as the Legislature has provided and has no jurisdiction or authority to remit all of the minimum fines assessed. His power to commute is statutory and commutationmust be limited to the provisions of the above set out commutation statute in manner, form of court order, and in substance of same. In no instance can it be for less than one day's imprisonment for every $10.00 of said fine and costs. Once a justice renders final judgment, said judgment has the force of any other final judgment, on conviction. It is final as far as he is concerned, subject only to reprieve or pardon of the proper authorities. According to the Griffie case, commutation would not be allowable by a justice unless made in a reasonable time and before entry of final judgment on the docket.

*** * * * * * * * * *

As to your fourth question:

Section 648 R. S. Mo. 1929, provides:

"No person's body shall be imprisoned or restrained unless by authority of law."

Section 3440 R. S. Mo. 1929, provides:

"Whenever the defendant shall be tried and found guilty, either by the justice or a jury, or shall enter a plea of guilty, and a fine shall be assessed, the justice shall enter judgment against the defendant for such fine, and if the punishment shall be imprisonment in the county jail, or shall be both a fine and imprisonment, the justice shall enter judgment according to the finding of the court or verdict of the jury, and immediately commit the defendant

to the county jail for the time designated in the judgment, and the defendant shall be adjudged to pay the costs, and may be committed to the county jail until the judgment for both fine and costs shall be paid, or until he shall be discharged therefrom under the provisions of the next succeeding section."

Section 3448 R. S. Mo. 1929, as amended by Laws of Missouri, 1931, page 202, provides:

"Any person convicted before a justice of the peace for any misdemeanor under the provisions of this article may appeal to the circuit or other court having jurisdiction in criminal cases, if he shall, immediately after judgment is rendered, file an affidavit stating that he is aggrieved by the verdict and judgment in the case, and that he does not make his appeal for vexation or delay, and shall also enter into a recognizance in such sum as the justice shall deam proper, with good and sufficient sureties to be approved by him, condititioned that the defendant shall appear at the next term and from day to day and term to term thereafter, of the said circuit court, and prosecute his appeal with due diligence to a decision, and obey every order, sentence and judgment, which shall be made in the premises and not depart the dourt without leave: Provided, that the justice of the peace taking such recognizance for an appeal shall not consider the judgment of the justice and costs accrued therein in fixing the amount of such recognizance, but shall only require the recognizance to be sufficient to secure his attendance at the next term of the cir-

cuit court, and such appeal shall operate as a stay of execution thereon, until trial of the case anew has been had in the circuit court: Provided further, that failure to give the recognizance shall not prevent the appeal, but the appellant shall remain in custody or be committed to jail until recognizance be given or the appeal determined. In case the defendant shall, after he has been committed, give a bond conditioned as herein required, the same shall be approved by the sheriff, and when so approved, defendant shall be released by the sheriff or marshall from custody."

Section 3458 R. S. Mo., 1929, provides:

"Any justice of the peace, clerk, county treasurer, sheriff, coroner, or constable, who shall willfully neglect or refuse to perform any duty enjoined on him by this article, shall be deemed guilty of a misdemeanor in office, and shall, moreover, pay the sum of fifty dollars; and any person who shall, when summoned to aid in arresting or securing an offender, refuse to give such assistance, shall pay five dollars."

Section 3476 R. S. Mo. 1929, provides:

"When such person fails to recognize, he may be committed to prison by an order under the hand of the magistrate, stating concisely that he is committed for further examination on a future day, to be named in the order, and on the day appointed he may be brought before the magistrate, by his verbal order to the officer who made the commitment, or by his order in writing to a different person."

Section 3487 R. S. Mo. 1929, provides:

"If the offense be not bailable, or sufficient bail be not offered, the prisoner shall be committed to the jail of the county in which the same is to be tired, there to remain until he be discharged by due course of law."

Section 3716 R. S. Mo, 1929, provides:

"Whenever a sentence of imprisonment in a county jail shall be pronounced upon any person convicted of any offense, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county a transcript of the entry of such conviction, and of the sentence thereupon, duly certified by such clerk, which shall be sufficient authority to such sheriff to execute such sentence, and he shall execute the same accordingly."

Section 3921 R. S. Mo. 1929, provides:

"If any sheriff or other officer shall willfully or corruptly fail or refuse to execute any lawful process which by law it is his duty to execute, requiring the apprehension or confinement of any person charged with a criminal offense, whereby such person shall escape, the officer so offending shall be punished in the same manner as persons convicted of aiding or assisting such escape."

Section 4459 R. S. Mo. 1929, provides;

"Whenever any offender is declared by law punishable upon conviction by imprisonment in the penitentiary, or by imprisonment in a county jail, or by fine, or by both such fine and imprisonment, and no limit is fixed by law to the duration of imprisonment in

> the jail or to the fine in such cases, the convict shall, in no instance, be sentenced to a longer term of imprisonment in the county jail than twelve months, nor shall the fine in any such case exceed one thousand dollars."

CONCLUSION AS TO QUESTION "FOUR".

This office is of the opinion that where the form and substance of a commitment from a justice court, in the hands of a sheriff and jailor, is sufficient in form and substance, then the imprisonment of the person mentioned in the commitment, rendered within the jurisdiction of said court, is by authority of law, and the sheriff or jailor must execute it as it reads.

Of course there is a duty on the part of a sheriff or jailor to release where a prisoner has been committed without authority of law in which case, commitment or no commitment, he needs no order from the judge who passed sentence.

Where the commitment was issued after final judgment, the Statutes allow a stay of execution upon taking an appeal and giving a recognizance bond to the sheriff, in which case the sheriff does not need an order from the justice of the peace, so long as he follows the Statute in such cases.

It is true that a justice of the peace, under certain circumstances outlined in the Statutes, may change the terms of a commitment and order the sheriff or jailor to release the prisoner, but the general rule is that after final judgment and commitment the justice of the peace has no more jurisdiction to order a prisoner released from the sheriff and jailor than the sheriff has to release a prisoner contrary to the terms of the commitment.

Where a sheriff or jailor releases a prisoner in his charge, without authority of law, he throws himself criminally liable and subject to ouster.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

CONSOLIDATED SCHOOL DISTRICTS: Transportation of pupils.

March 23, 1935 3-27

FILED 10

Honorable G.R. Breidenstein
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

This Department is in receipt of your letter of March 11, requesting an opinion as to the following state of facts:

> "I would like to have the opinion of your department upon the following case.
>
> A consolidated school district votes for free transportation for all pupils living more than one-half mile from the school building, according to the provisions of Section 9197 R. S. Mo. The board of education establish transportation routes and serve said routes by busses. These routes as laid out by the board are more than one-half mile at their nearest point from the homes of some pupils.
>
> Can resident pupils of the district force the board to provide transportation for them from a point not more than one half mile from their respective homes? If the Board refuses upon demand being made to furnish transportation from some point not more than one-half mile from the homes of the pupils, and said pupils

furnish their own transportation, would the district or board be liable for the reasonable value and cost of such transportation furnished by said pupils?

I would appreciate very much having your opinion on this matter at an early date."

Section 9197 Revised Statutes Missouri 1929, provides as follows:

"Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district: Provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in section 9228. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the

> free transportations of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district."

The general rule respecting this question is found in 56 Corpus Juris at page 838, as follows:

> "Where the statute does not control the exercise with his discretion by a trustee in laying out a route, the fact that pupils must walk to meet the school bus on the established route, even though a child must cross a railroad track, or a frozen river to do it, is not a violation of the transportation statute in the absence of evidence that the trustee had abused his discretion."

In the case of Lyle v. State (Supreme Court of Indiana) 88 N. E. 850, the court had before it a statute similar to the one under consideration. In construing this statute the court said,

> "It is beyond belief from these and many other considerations that present themselves that the spirit of the statute requires the trustee to cause a conveyance to be driven to the home in the morning, and again in the evening, and take up and leave every child residing beyond the limited distances at his own doorstep, when many of the children might reduce the time en route twofold by the generally pleasurable and health-

giving exercise of a reasonable walk. Being a matter of administration, the whole subject must necessarily rest largely upon the sound discretion of the trustee reasonably exercised. The determination of questions arising in the establishing of such a route relate to school matters, and, if a patron is dissatisfied with any decision of the trustee with respect to the walking distance, or any other decision relating to the transportation of children, an appeal may doubtless be had to the county superintendent under the provisions of section 6667, Burns' Ann. St. 1908. State v. Black, 166 Ind.138, 76 N.E.882; State v. Schmetzer, 156 Ind. 528, 60 N. E. 269. As a public officer, it is the duty of the trustee to furnish the children of his township of school age with reasonable facilities for attendance upon the public schools. It is just as plainly his duty to subject his township to no unnecessary or unreasonable expense. If he can,by requiring the pupils to walk a reasonable distance to meet the conveyance,comfortably,safely,and timely transport all of the children of the district in one wagon or conveyance, he should not subject his township to the expense of two wagons in performing the same service. It can hardly be doubted that the mirthful play of well-clad children in the open in journeying over fences and fields,and along highways for short distances, is more hygienic and sanitary, and in the end better for the children, than to assemble and haul them in closed vehicles - sometimes too warm, sometimes too cold - for hours at a time in doubling the travel to the several homes. The health and protection of the children should in all cases be fundamentally considered. Their ages and sex,whether they must travel alone or in company, the character of the way, the facilities for

> rest and shelter while waiting for the conveyance in inclement weather, are all proper matters to be weighed in determining what is reasonable. It seems to us that it should not be difficult to make just and reasonable arrangements in all cases where there is a proper cooperation by the parents and trustee."

A similar construction was placed upon a statute of this nature by the Supreme Court of North Dakota, in the case of State v. Mostad 148 N. W. 841, wherein the court said:

> "There is, in our opinion, no material conflict in the evidence on the real issues in the case, and the only questions to be determined are whether the language of section 232, chapter 266, of the Laws of 1911, which provides for transportation 'to and from school,' is to be strictly construed, so that in all cases children must be actually conveyed from their house doors to the doors of the schoolhouse, or whether a reasonable discretion in such matters has been left with the school board; also, whether, if such discretion exists, there was an abuse thereof in the case at bar.
>
> We are firmly of the opinion that the legislative intention was that actual transportation from the door of the home to the door of the schoolhouse should only be furnished as far as the same was reasonably practicable; in other words, that, though the statute is mandatory and cannot be avoided, it should be construed as if passed by reasonable men, and should be interpreted according to its spirit, rather than according to its letter."

The Supreme Court of Indiana, in the case of State ex rel. v. Miller 193 Ind. 492, affirmed the ruling in the Lyle case

and said:

> "The facts alleged in the complaint, together with any other pertinent facts, might properly be considered by the township trustee and the county superintendent in determining where the school wagon shall be driven. But so long as those officers are not shown to have abused the discretion vested in them by law the courts cannot interfere to control their action. Whether it was better for four small children to cross the railroad twice each day on foot, or for a school wagon with children in it to be driven across four times each day, was a question for the officers to decide in laying out a route for the school wagon. No error was committed in sustaining a demurrer to the complaint."

CONCLUSION

It will be noticed that Section 9197, supra, provides that the board of education shall have authority to make all needful rules and regulations for the free transportation of pupils. While it is a question of fact whether or not the board of education has abused its discretion in the instant case, it is our opinion that the intention of the legislature was that actual transportation from the door of the home to the door of the school house should only be furnished as far as reasonably practicable.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

JWH:LC

COUNTY COLLECTOR: County Collector to make daily deposits in such depository as county court may select.

CIRCUIT CLERKS: (1) Deputy to be paid from general revenue of county.
(2) Ex-officio recorder of deeds not to charge a fee for recording conveyances made to county.

5-13

May 10, 1935.

FILED
10

Hon. G. R. Breidenstein
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

This will acknowledge your request for an opinion which reads as follows:

> "I would like to have an opinion from your department upon the following questions.
>
> "Section 9885, of the Laws of 1933, page 464, provides that 'the County Court may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184, R. S. Mo. 1929, to the credit of a fund to be known as County Collecters Fund.' If the county court requires the Collector to make such deposits, and the bank where such deposits are made should fail, would the collector and his bondsmen be liable for the loss or would the loss fall on the county? Is it compulsory that the court should select such depository and require the collector to make his deposits there, or may the court if it prefers let the collector select his own depository?
>
> "The population of this county is between 10,000 and 12,500. The circuit clerk is ex-officio Recorder of Deeds. The fees from this office are sufficient to pay the circuit clerk the

salary to which he is entitled by law, but are not sufficient to pay the salary of his deputy in addition. Should not the circuit clerk turn in to the treasurer all fees collected over and above his own salary, and the deputy be paid from the general revenue of the county?

"May the Recorder of Deeds charge a fee for recording conveyances made to the County."

Section 12184, R. S. Mo. 1929, provides:

"It shall be the duty of the county court of each county in this state , at the May term thereof, in the year 1909, and every two years thereafter, to receive proposals from banking corporations, associations, or individual bankers in such county as may desire to be selected as the depositaries of the funds of said county. For the purpose of letting such funds such county court shall, by order of record, divide said funds into not less than two nor more than ten equal parts, and the bids herein provided for may be for one or more of such parts. Notice that such bids will be received shall be published by the clerk of said court twenty days before the commencement of said term in some newspaper published in said county, and if no newspaper be published therein, then such notice shall be published at the door of the courthouse of said county: Provided, that in counties operating under the township organization law of this state, township boards shall exercise the same powers and privileges with reference to township funds as are herein conferred upon county courts with reference to county funds at the same time and manner, except that township funds shall not be divided, but let as an entirety: Provided, also, that in all cases of the letting of township funds, three notices posted in three public places by the township clerk, will be a sufficient notice of such letting."

We must rule under the provisions of the above statute that it was the intent of the Legislature to make it mandatory upon the county courts in each of the counties of this State to select the depositories of county funds. It is further our opinion that superintending control of funds of the county are to be exercised by the respective county courts and that they shall be charged with carrying out the provisions of the above statute and of subsequent statutes hereinafter referred to.

Section 12185, R. S. Mo. 1929, provides the procedure that shall be followed in the selection of a county depository.

Section 12187, R. S. Mo. 1929, provides that within ten days after selection of a depository (by county court) that it shall be the duty of each successful bidder pursuant to the provisions of Section 12185, of R. S. Mo. 1929, to execute a bond payable to the county with not less than five solvent sureties, who shall own unencumbered real estate in this State as of great a value as the amount of the bond, and said bond shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon said depository.

Section 9885, R. S. Mo. 1929, Laws of Mo. 1933, page 464, provides in part:

> "Provided, that in all counties which now have or which may hereafter have a population of less than 75,000 inhabitants, according to the last preceding federal decennial census, the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184, Revised Statutes of Missouri for 1929, to the credit of a fund to be known as 'County Collector's Fund;' provided further, that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment,

> plus ten per cent of said amount;
> ****."

In light of the foregoing, it is our opinion the Legislature intended to make it discretionary with the county court as to whether or not it should require collector to make daily deposits in such depositories as may have been selected under the provisions of Section 12184, supra. Further, you will note under the provisions of Section 9885, supra, in the event the county court requires daily deposits to be made, it (county court) shall require a bond. We rule that the county court shall select such depositories as herein above set forth in Section 12184; that the county collector nor his sureties will be liable on his bond in the event such bank or banks would fail; such banks having been selected by the county court; that the county collector, under the above provisions, could not select his own depositories as that is a function of the respective county courts.

In answer to the question set forth in paragraph 3 of your request for an opinion, we are enclosing a copy of an opinion dated March 7, 1934, addressed to Honorable Birt P. Bryant, Clerk of the Circuit Court, Dunklin County, Kennett, Missouri, signed by Franklin E. Reagan, Assistant Attorney-General, approved by Roy McKittrick, Attorney-General.

Your attention is directed to page numbered 2 and titled "II. Deputy Circuit Clerks." You will find that this fully answers the question set forth in your letter.

In consideration of your last question, we direct your attention to Section 11814, R. S. Mo. 1929, Laws of Missouri, 1933, page 372, which reads in part as follows:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices under the provisions of sections 11785, 11787 and 11788, or of any other statute, except such fees as are chargeable

to the county, ****."

We are of the opinion in construing the above section, that the Circuit Clerk is not permitted to charge or collect any fees from a county under the provisions of section as set forth above.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

RCS/afj

I. COUNTY COLLECTOR - Selection of depositary for funds.

II. SALARIES AND FEES - Source and method of compensation of deputy circuit clerk.

5-28

May 10, 1935.

FILED
10

Hon. G. R. Breidenstein,
Prosecuting Attorney of Clark County,
Kahoka, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of March 6th, 1935, such request being in the following terms:

"I would like to have an opinion from your department upon the following questions.

Section 9883 of the Laws of 1933, page 464, provides that 'the County Court may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184, R. S. Mo. 1929, to the credit of a fund to be known as "County Collectors Fund" '. If the county court requires the Collector to make such deposits, and the bank where such deposits are made should fail, would the collector and his bondsmen be liable for the loss or would the loss fall on the county? Is it compulsory that the court should select such depository and require the collector to make his deposits there, or may the court if it prefers let the collector select his own depository?

The population of this county is between 10,000 and 12,500. The circuit clerk is ex-officio Recorder of Deeds. The fees from this office are sufficient to pay the circuit clerk the salary to which he is entitled by law, but are not sufficient to pay the salary of his deputy in addition. Should not the circuit clerk turn in to the treasurer all fees collected over and above his own salary, and the deputy be paid from the general revenue of the county?"

I

DEPOSIT OF MONEYS BY COUNTY COLLECTOR.

In the absence of a statute directing or authorizing the selection by the County Court of a depositary for funds belonging to the County, the County Collector deposits County funds at his peril. This principle is enunciated in the case of Glaze et al. ex rel. Board of Supervisors v. Shumard et al., 54 S.W.(2d) 726, 728 (1932) as follows:

> "Since it is well settled that a public officer is an insurer of public funds which he has lawfully received, unless the Legislature has provided otherwise, it follows that even though the county court of Harrison county did select or appoint the Bethany Savings Bank as the county depositary and the officer deposited said funds there, nevertheless, if the county court had no authority, power, or jurisdiction to select a depositary for the funds of the drainage district, the depositing of such funds by the county treasurer and ex officio collector, to his account as county treasurer in the Bethany Savings Bank, was at his peril. University City, v. Schall, 275 Mo. 667, 205 S.W. 631; Bragg City Special Road District v. Johnson, 323 Mo. 990, 20 S.W. (2d) 22, 66 A.L.R. 1053; Butler County v. Boatmen's Bank, 143 Mo. 13, 44 S. W. 1047."

R. S. Missouri, 1929, Sections 12184 et seq. provide a scheme for the selection of depositaries of county funds. Section 12186 provides in part as follows:

> "It shall be the duty of the county court, * * to select as the depositaries of all the public funds * * the banking corporations, associations or individual bankers whose bids respectively made for one or more of said parts of said funds shall in the aggregate constitute the largest offer for the payment of interest per annum for said funds; Provided, that the court shall have the right to reject any and all bids."

The proviso from such section as to the rejection of bids has been construed as requiring good faith and due regard for the best interests of the County in rejecting bids. Denny v. Jefferson County, 272 Mo. 436, 199 S.W. 250 (1917). Section 9885 as repealed and re-enacted by Laws of 1933, page 464, provides, as to counties of less than 75,000 inhabitants, that "the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184, Revised Statutes of Missouri for 1929, to the credit of a fund to be known as 'County Collector's Fund;' " Therefore, pursuant to the will of the Legislature, the County Collector in such a County may be required to deposit funds coming into his hands by virtue of his office in depositaries selected and designated by the County Court, and if the Collector deposits such funds pursuant to this mandate, neither he nor the sureties on his official bond would be liable for a loss resulting from the insolvency of a depositary so required. These statutes could hardly be reasonably construed so as to contemplate liability of the Collector or his sureties for a loss caused by the insolvency of a depositary, for such a construction would hold the Collector liable for doing something which the General Assembly has given the County Court the right to force him to do, regardless of his own best judgment.

The use of the word "may" in Section 9885, above quoted, seems to leave the County Court a choice as to whether it will require the Collector to deposit daily his collections in depositaries selected by the County Court under the provisions of Section 12184.

II

METHOD OF PAYING COMPENSATION TO DEPUTY CIRCUIT CLERK

As to the second question of your request, this office is of the opinion that it is answered by an opinion of this Department dated May 7, 1934, to Hon. Birt P. Bryant, Clerk of the Circuit Court of Dunklin County, Kennett, Missouri, copy of such opinion being enclosed.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

SPECIAL ROAD DISTRICT: Entitled to all road and tax money collected in such district.

5-18

May 10, 1935

FILED
10

Mr. Ilyn Bradford,
City Attorney,
Rolla, Missouri.

Dear Sir:

We wish to acknowledge your letter of April 25th, wherein you state as follows:

"A controversy has arisen between the County Court of Phelps County and the Rolla Special Road District (in Phelps County) as to the amount of road tax money which this district is entitled to receive from the 1934 revenue. The City of Rolla, located in the Rolla Special Road District, is vitally interested in this question since it receives 25% of the road tax money collected in this district, and I, as City Attorney of Rolla, and at the request of the Mayor and Board of Alderman, submit the following statement of the matter and respectfully ask you for an Opinion as to the legal rights of the parties involved.

Phelps County has an assessed valuation of more than Ten Million and less than Thirty Million Dollars, and in accordance with Section 9373 of R. S. 1929, the County Court (for the year 1934) levied 50¢ on the $100 valuation for general revenue purposes, including 10¢ for road and bridge purposes authorized under Section 7890 R. S. 1929. Then, in accordance with the County Budget Law, Section 2 Page 341-342 Laws of Mo. 1933, the County Court proceeded by order to appropriate, apportion, and subdivide all the revenue to be received in the General Revenue Fund of Phelps County for the year 1934. And it further ordered that there be levied and collected upon all real estate and personal property assessed in the County of Phelps for the taxes of 1934 as a Special Tax of 10¢ on the $100 valuation, in accordance with the provisions of Section 7891 R. S. 1929.

The fund arising from said tax to be known and designated as the Special Road and Bridge Fund of Phelps County.

The County Court is turning over to the Rolla Special Road District all the revenue collected in such district from the Special Road and Bridge Levy under Section 7891 but refuses to turn over the revenue collected in such district from the 10¢ levy made and authorized by Section 7890, contending that under the Budget Law this is a part of the general revenue fund and that the Special Road District has no right to it.

The question at issue is whether or not, since the enactment of the County Budget Law, the County Court, after making a road and bridge levy under Section 7890, R. S. 1929, is required to turn over to the Special Road District all the revenue derived from such levy? In other words, since the enactment of the Budget Law, does Section 8042 R. S. 1929 and the case of Billings Special Road District v. Christian County, 319 Mo. 963, 5 S. W. (2d) 378, construing it, still apply and entitle the Special Road District to all the road tax money collected in such district, as provided in said section, where levies are made under both Sections 7890 and 7891 R. S. 1929?

In behalf of the City of Rolla, I wish to say that your Opinion on this question will be very greatly appreciated."

Section 7890, R. S. Mo. 1929, provides as follows:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

The above section authorizes the levy of a tax of twenty cents on the one hundred dollars valuation for the "county road

and bridge fund". You state that the county court has levied a tax of ten cents, hence it is within the limitation authorized.

Section 7891, R. S. Mo. 1929, provides as follows:

> "In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: Provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

The above section authorizes the levy of a special tax of twenty-five cents on the one hundred dollars valuation for "the special road and bridge fund". You state that the county court has levied a tax of ten cents, hence it is within the limitation authorized.

Section 8042, R. S. Mo. 1929, provides as follows:

> "In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes, or for road and bridge purposes, by virtue of any existing law or laws, or subsequent law or laws that may be enacted, upon property within such special district, or districts, or where money shall be collected for pool or billiard table licenses, upon business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district, or districts, and also one-half of the amount collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, or districts, and also for one-half the amount so collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district, or districts."

In the case of Billings Special Road Dist. v. Christian County, 5 S. W. (2d) 378, l. c. 381, our court in construing the above section, said:

> "Section 10682 (substantially the same as Section 7890, R. S. Mo. 1929) makes no direction as to the distribution of the money collected under its provisions. However, in State ex rel. v. Barry County, 302 Mo. 279, 258 S. W. 710, it was held that while section 10682 made no provision for distribution of the taxes collected thereunder, yet that, under the provisions of section 10818 (now section 8042, R. S. Mo. 1929), applicable to special road districts, it is required that all taxes for road and bridge purposes collected by virtue of any existing law, or any subsequent law

> thereafter enacted, upon property within a special road district, shall be set aside to the credit of such district to be paid to the treasurer of such district, upon written application of the commissioners of such district. The county court is required, as such taxes are paid and collected, to apportion and set them aside to the credit of the district."

Your inquiry is whether or not, since the enactment of the County Budget Law, the County Court, after making a road and bridge levy under Section 7890, supra, is required to turn over to the Special Road District all the revenue derived from such levy? In other words, since the enactment of the Budget Law, does Section 8042, supra and the case of Billings Special Road District v. Christian County, supra, construing it, still apply and entitle the Special Road District to all the road tax money collected in such district, as provided in said section, where levies are made under both Sections 7890 and 7891, supra?

Section 2, Laws of Missouri 1933, p. 341, of the County Budget Law, provides in part as follows:

> "The court shall classify proposed expenditures in the following order: * * *
>
> Class 3: The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

Our courts have repeatedly held that the primary object of all statutory construction is to ascertain and give effect to the legislative intent. The above section is evidence of the clear intent of the Legislature not to include special road districts within the provisions of the County Budget Law.

Our position is strengthened by the very recent case of Hawkins v. Cox, reported in 66 S. W. (2d) (Mo.) 539, l. c. 540, wherein the Supreme Court of Missouri, citing the case of Billings Special Road District, supra, said:

> "Under these and other statutes referred to, it is settled that this special road district is entitled to whatever taxes are levied and collected on property within its boundaries, whether levied by the road district itself under section 8067 (Mo. St. Ann., Sec. 8067, p. 6858) or by the county court under sections 7890 and 7891, R. S. 1929 (Mo. St. Ann., Secs.

7890, 7891, pp. 6765, 6766). State ex rel. v. Barry County, 302 Mo. 279, 258 S. W. 710; State ex rel. v. Holman, 305 Mo. 195, 264 S. W. 908; Billings Special Road District v. Christian County, 319 Mo. 963, 5 S. W. (2d) 378."

From the foregoing, we are of the opinion that the enactment of the County Budget Act has not changed the effect of Section 8042 and the Billings case, supra. They still apply and entitle the Rolla Special Road District to all the road and tax money collected in such district. An examination of Class 3 of the County Budget Act clearly evidences the intention of the Legislature not to include a special road district within the provisions of such act, and, as we have previously stated, such position is strengthened by the very recent case of Hawkins v. Cox, supra. We are of the opinion that the County Court must turn over to the Rolla Special Road District all revenue collected in such district from the levy made and authorized by Section 7890, supra.

Respectfully submitted,

WILLIAM O. SAWYERS,
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney General

WW:HR

TAXATION: Senate Bill 143 of the 58th General Assembly does not apply to drainage district assessments but only applies to penalty on taxes.

6-8

June 7, 1935.

FILED
10

Hon. G. R. Breidenstein,
Prosecuting Attorney,
Clark, County,
Kahoka, Missouri

Dear Mr. Breidenstein:

Acknowledgment is herewith made of your recent request for an opinion of this office reading as follows:

> "I would like to have the opinion of your department in regard to the following question. Does the recent law 'Senate Bill No. 143', providing for remission of the penalty on 1933 and prior taxes apply to assessments due drainage districts?"

In an opinion dated November 12, 1934, it was the holding of this office that House Bill 124, page 186, Laws of Missouri 1933-34, Extra Session, applied only to penalty on "taxes" and did not apply to drainage district assessments. House Bill 124 of the Extra Session of the 57th General Assembly, which was construed by that opinion, reads as follows:

> "That all penalties and interest on personal and Real Estate Taxes, delinquent for the year 1932 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

On the 29th day of April 1935, Governor Park approved Senate Bill 143 passed by the 58th General Assembly and reading as follows:

> "Section 1. That all penalties and interest on personal and real estate taxes, delinquent for the year 1934 and prior years shall be computed after December 31st, 1934 on the same penalty and interest basis as the taxes delinquent for the year 1934 until paid.
>
> Section 2. As the expeditious collections of such taxes is necessary for the maintenance of the State Institutions and for the support of the Public Schools, an emergency exists within the meaning of Section 57, Article 4 of the Constitution of this State, and this act shall be in force and take effect immediately after its passage by the 58th General Assembly and approval by the Governor."

It is to be noted that this act carried no repealing clause and that therefore House Bill 124 of the 57th General Assembly in Extra Session, is not by express terms repealed. However, it is clear from a reading of these two acts that under one the penalties and interest are to be calculated upon one basis, and under the other act the penalties and interests are to be calculated upon a different basis. Although repeals by implication are not favored, State ex rel. McDowell v. Smith, 67 S. W. (2d) 50, yet, when there is a total repugnancy between the two statutes it will be held that the later statute repealed by implication the earlier statute.

In the case of State ex rel. Wells vs. Walker, 34 S. W. (2d) 124, 129, it is stated:

> "However, repeals by implication occur when there is a total repugnancy between the later and the earlier statutes. Section 1136 was reenacted in 1927 (Acts of 1927, page 131). In order to leave no doubt of the legislative intention at the same session the other act of 1927 (page 129, 130), more comprehensive and more specific, was passed. These two acts, at the same session, without exception or qualification, showed conclusively what was in the legislative minds. The total repugnancy should be conclusive to repeal the objectionable sentences respecting 12426."

So with the enactment of Senate Bill 143, by the 58th General Assembly, it is clear what was in the legislative mind in respect to House Bill 124 of the 57th General Assembly in Extra Session. It must be construed to have been repealed by the later enactment.

Comparing House Bill 124 supra with Senate Bill 143 supra, it is apparent that the subject matter with which these two bills deal is identical, and that the only change made was to include subsequent taxes within the terms of the later law. This being the case, there is no basis for changing the rule laid down in the opinion to the Honorable Charles Young, Treasurer of Livingston County on November 12, 1934.

CONCLUSION.

It is therefore the opinion of this office that Senate Bill 143 of the 58th General Assembly applies only to the penalty on "taxes" and does not provide for the remission of any penalties accrued upon drainage district assessments.

Yours very truly,

HARRY G. WALTNER, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM

LICENSES: Where statute or ordinance fails to provide for collection of license tax, proper method of collection is by an action at law as for debt.

6-14

June 12, 1935.

FILED
10

Mr. Wm. Bradford
Mayor
Belton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"COPY OF ORDINANCE NO. 221

"BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF BELTON AS FOLLOWS:

"That there is hereby assessed and levied a tax of thirty cents each against all poles belonging to the Telephone Companies and Electric Light Companies, and all other companies having poles in the streets and allies of the City of Belton (not otherwise taxed); the count to be made by any suitable person that may be designated by the Mayor with the approval of the Board of Aldermen to make such count and to make oath that the same is a true and accurate count of said poles. And the Council may provide to pay the person so making the count. The aforesaid tax shall be due and payable on the first day of July each year hereafter at the time when other such taxes are collected.

"All ordinances or parts of ordinances in conflict with this ordinance are hereby declared repealed.

"Duly passed by the Board of Aldermen at its regular meeting this 4th day of September, 1922.

"Signed
" W. P. Houston, Mayor
" Roy C. Idol, City Clerk."

"Attorney General:

"Will you please furnish opinion regarding the enforcement of the above ordinance, as some of the parties using our streets for their poles failed to pay for same.

"Kindly address me Wm. Bradford, Mayor, Belton, Missouri."

If the above ordinance is an attempt to levy an ad valorem tax against the property of telephone and electric light companies, it would be clearly unconstitutional. We therefore assume, for the purpose of this opinion, without passing upon the question, that the above ordinance is the valid exercise of the city's right given by Section 7046, R. S. Mo. 1929 to license and regulate certain businesses and occupations. We therefore proceed to answer your question as to the method of collection of said tax when the parties, against whom it is assessed, fail to pay same.

Under the provisions of Section 7001, R. S. Mo. 1929, cities of the fourth class, of which Belton is a member, may provide by ordinance for the levy and collection of all taxes and licenses and provide a penalty for failure to pay same. Said section reads as follows:

"The board of aldermen shall, from time to time, provide by ordinance for the levy and collection of all taxes, licenses, wharfage and other duties not herein enumerated, and for neglect or refusal to pay the same, shall fix such penalties as are now or may hereafter be authorized by law or ordinance."

You failed to state in your letter whether the City of Belton has provided by ordinance for the collection of said tax or provided any penalty for failure to pay same. We therefor assume that it has not. The statutory remedies for the collection of ad valorem taxes are not applicable to license taxes unless expressly made so by statute or ordinance.

In the case of McIninch v. Schall, 141 S. W. loc. cit. 446-447, the Court said:

> "(2) But though a tax, the courts of this state always have drawn distinctions between a strictly occupation or license tax and an ad valorem property tax (State v. Alt, 224 Mo. 493, 123 S. W., loc. cit. 885); and statutory remedies for the collection of ad valorem taxes are not applicable to license taxes unless expressly made applicable in the statutes or ordinances relating to the latter class. We, therefore, dismiss as inapplicable 'general ordinance No. 24' introduced in evidence on the ground that it relates only to the collection of ad valorem taxes."

It is a well-settled principle of law, however, that, where a statute or ordinance fails to provide a method for the collection of a license tax, an ordinary action at law will lie for the collection thereof.

In the case of City of St. Louis v. United Railways Company of St. Louis, 174 S. W., loc. cit. 93, the Supreme Court speaking through Walker, J. said:

> "(13) The defendant, in addition to the foregoing, contends that the levying of the tax under the ordinance does not create a debt; that the ordinance provides an exclusive remedy therein for its enforcement, which remedy is wholly penal, and cannot therefore be enforced in an action for a debt. From the early case of Carondelet v. Picot, 38 Mo. 125, to State ex rel. v. Trust Co., 209 Mo. loc. cit. 490, 108 S. W. 97, it has been held that a tax is not a debt or in the nature of a debt; that it is not founded on contract and operates in invitum; and that, if a remedy is specified for the collection of a tax, it will be held to be exclusive, where no other is provided. This holding, however, should be construed in the light of the modifying rule that, where a statute or ordinance wholly fails to provide a remedy for the enforcement of the payment of taxes, the right arises to institute a civil suit

at law therefor. This doctrine has found appropriate lodgment in many cases in this jurisdiction in which the matter of the collection of taxes has been discussed. In the Picot Case, supra, the Court said in substance: If a tax be imposed and no method provided for its recovery, a resort to legal proceedings becomes a matter of necessity, where the Legislature has failed entirely to indicate a mode or manner of collection.

"In State v. Severance, 55 Mo. 378, this court said, where a statute authorized the taxation of railroads and designated no particular manner in which the towns or cities where the taxes are to be levied might proceed to collect same, a resort might be had to an ordinary action at law to enforce payment. The rule being announced generally that, where a statute gives a right and no remedy, resort may be had to the usual remedy applicable to the case.

"In Phelps v. Brumback, 107 Mo. App. loc. cit. 25, 80 S. W. 680, the court says:

"'If the statute authorizes the imposition of a tax but prescribes a remedy for its collection, the usual 'action' for a debt may be had.'

"In State ex rel. v. Dix, 159 Mo. App. 573, 141 S. W. 445, the Court said:

"'Where the statute or ordinance * * * fails to provide a remedy, an implication arises that the legislative body intended that a civil suit at law would lie for the collection of the tax; but, where an adequate remedy is provided, the implication must be the other way.'"

And further at loc. cit. 94, the Court concluded:

"Regardless, therefore, of whether taxes are debts in the sense of ordinary money obligations growing out of contracts,

> they are in the nature of debts arising out of and necessarily incident to the duty the citizen owes as his portion required to be contributed to the support of that intangible thing called the body politic; and the government, whether it be state or municipal, has the same right to enforce that duty as if it were a debt, and in the same way. State ex rel. v. Trust Co., 209 Mo. 490, 108 S. W. 97; Greeley v. Bank, 98 Mo. 458, 11 S. W. 980; Perry v. Washburn, 20 Cal. loc. cit. 331; People v. Seymour, 16 Cal. 340, 76 Am. Dec. 521; Sav. Bank v. U. S. 19 Wall. 227, 22 L. Ed. 80."

CONCLUSION.

As stated above, we are not passing upon the validity of the ordinance in question but only on the method of collection of a license tax which we assume, for the purpose of this opinion, is constitutional. We therefore rule, in view of the above authorities, that where an ordinance imposes a valid license tax but fails to provide a method of collection therefor or a penalty for the failure to pay same, the proper method of collection is by an ordinary action at law as for debt.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JET/afj

JUSTICES OF THE PEACE--CRIMINAL LAW: A Justice of the Peace in a misdemeanor has no jurisdiction to impose a fine without an information on file. Fine imposed by a Justice of the Peace beyond his jurisdiction does not place the defendant in jeopardy.

June 27, 1935.

FILED
10

Honorable G. R. Breidenstein
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

Your request for an opinion dated June 14, 1935, is as follows:

> "I have an opinion of your office under date of March 19, 1935, to the effect that a Justice of the Peace does not have authority to try a defendant, nor to fine him or commit him to jail without an information having first been previously filed by the Prosecuting Attorney of the County.
>
> "I would like at this time to have your opinion on the following: A man appears at a public gathering in a drunken and intoxicated condition and proceeds to disturb the peace of the gathering by swearing and indecent conversation. Upon becoming sober the next day and realizing his offense he goes before a Justice of the Peace at the suggestion of a deputy sheriff who files a complaint against him. The justice of the peace does not wait for the Prosecuting Attorney to file his Information but the Justice goes ahead and fines the defendant one dollar and costs, remitting the costs. There is an understanding between the defendant, the Justice and the Deputy Sheriff that the costs will not be collected and the defendant pleads guilty to the charge paying the one dollar fine, thinking that the Prosecuting Attorney will be barred from filing

charges against him under the theory that he cannot be punished twice for the same offense. If this view of the law is followed Justice is defeated for the payment of one dollar is not a sufficient punishment for the offense committed.

"I would like to ask if in the opinion of your department the Prosecuting Attorney may go ahead and file his Information charging the defendant with an offense before another Justice and proceed to try the cause, even though the defendant has paid a dollar fine assessed by a justice before whom no Information has been filed. I am of the opinion that he is not barred by such action of the first justice but would like to have the opinion of your department.

"Next I would like to ask what can be done to prevent this justice of the peace from assessing a fine upon a plea of guilty to a complaint where no Information has been filed. Would a "writ of prohibition" lie? If so would it be possible to have this writ issued out of a higher court than the Circuit Court? If the Prosecuting Attorney feels that the Circuit Judge is extremely biased and prejudiced in favor of the Justice of the Peace, could he be disqualified from passing on the application for the writ and another judge act in his stead? If the Circuit Judge upon application refuses to grant the Writ is there an Appeal from his decision?"

It is necessary that an information be filed in the above facts which you present.

In the case of State v. Barrett, 44 S. W. (2d) 76, l. c. 78 the Court said:

> "It is necessary for the information to be filed in order to confer jurisdiction of the court over the person of the defendant.

In the case of State v. Stegall, 318 Mo. 643, l. c. 647; 300 S. W. 714, the Court said:

> "'There being as a rule no presumption in favor of the jurisdiction of a justice, it should appear affirmatively upon the face of the record of his proceedings that he had jurisdiction of the parties and the subject-matter."

Any Justice of the Peace within the township where the offense was committed can entertain original concurrent jurisdiction with the Circuit Court over Informations charging misdemeanors..

In the case of State v. Alford, 142 Mo. App. 412, l. c. 415; 127 S. W. 109, the Court said:

> "We had occasion to pass on this statute in State of Missouri v. Grant Sexton, at the last term of this court, and we there held that in order to give jurisdiction in a misdemeanor prosecuted before a justice of the peace, that the prosecution must be instituted before some justice of the peace in the township where it is claimed the offense was committed. It is a general rule that the justice of the peace has only such jurisdiction as the statute confers upon him, and that the facts giving such jurisdiction must affirmatively appear on the face of the proceeding. * * * * The Legislature has the right to say in what jurisdiction statutory misdemeanors shall be prosecuted, and to make that jurisdiction exclusive."

The only way that a prosecution for a misdemeanor can be legally maintained before a Justice of the Peace is by the filing of an Information by the Prosecuting Attorney, otherwise it is legally maintained by indictment of a Grand Jury returned to the Circuit Court. The Statutory Information is a pleading which the Legislature has provided in addition to the older method of prosecuting on indictment.

Section 3415 R. S. Mo. 1929 provides as follows:

> "Prosecutions before justices of the peace for misdemeanors shall be by information, which shall set forth the offense in plain and concise language, with the name of the person or persons charged therewith: Provided, that if the name of any such person is unknown, such fact may be stated in the information, and he may be charged under any fictitious name; and when any person has actual knowledge that an offense has been committed that may be prosecuted by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the justice of the peace having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a justice of the peace in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with a justice having jurisdiction of the offense, founded upon or accompanied by such complaint."

In the case of State v. Powell 44 Mo. App. 21, l. c. 24, the Court said:

> "When the complaint was filed by Haseltine, the justice had authority to issue a warrant for Powell's arrest (sec. 4332), but he could not be placed on trial, neither could it be said that there was a prosecution against him, until there was an information filed by the proper officer."

In the case of State v. Ransberger, 106 Mo. 135, l. c. 137, the Court said:

> "Judge Ellison, after reviewing the law as to the nature and attributes of an information, and the method of its presentation to the court, adds: 'From these considerations, it would be clear to the legal mind that a common-law information is one that is intrusted solely to the discretion of our state attorney to be given or withheld at his will, unhampered by statutory restraint, and, as the case in some respects presents a constitutional question, it becomes, under our conclusion herein, of great public importance, that the opinion of the supreme court should be taken.' "

It is true that a man cannot be put twice in jeopardy for the same offense, and Article II, Section 23, of the Missouri Constitution provides:

> "That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted fail to render a verdict, the court before which the trial is had may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court, or,

> if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on proper indictment, or according to correct principles of law.

Before a person charged with a crime can be in jeopardy he has to be put on trial on a valid indictment or information, and in State v. Webster, 206 Mo. 558, l. c. 571; 105 S. W. 705 the Court said:

> " 'A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a nolle prosequi entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause.' "

The term "jeopardy" signifies the danger of conviction and punishment for crime under a procedure which the Legislature has provided and and where that danger of conviction is absent in purported Court proceeding, as where a Justice Court exceeding its jurisdiction has made Court orders beyond its constitutional or statutory power, there is a complete absence of any danger of a legal conviction. The Court trying the cause must not only have jurisdiction to try the misdemeanor, but being a Court whose jurisdiction is limited in necessary procedure of trying the cause, said Court cannot exceed its jurisdiction and try the cause under its own self-evolved procedure. As was said in State v. Manning, 68 S. W. 341; 168 Mo. 418, l. c. 427:

> "The term 'jeopardy' signifies the danger of conviction and punishment which the defendant in a criminal prosecution incurs when a valid indictment has been found and a petit jury has been impaneled and sworn to try the case and a true verdict rendered."

50 Corpus Juris, page 672, Section 32 provides in part:

> "The only question involved on an application for a writ of prohibition to restrain a lower court from proceeding with a criminal trial is whether or not the court has jurisdiction to determine the matter before it and of the person of accused."

CONCLUSION.

We are of the opinion that under the facts stated in your request the Trial Justice of the Peace has exceeded his general jurisdiction by going beyond his constitutional and statutory powers. We are of the opinion that the Prosecuting Attorney can enter a "Nolle Prosequi" to the complaint filed in the Justice Court and can start the case anew in any Court having general jurisdiction over said misdemeanor. We are of the opinion that any fine imposed and collected, not supported by the Prosecuting Attorney's Information, would be a void order of the Justice of the Peace, and that a defendant has no constitutional right to claim former jeopardy when legally prosecuted for the crime alleged to have been committed, inasmuch as he has never, as yet, been in jeopardy. Since the Prosecuting Attorney has never filed an Information in the cause, no Court, as yet, has taken legal jurisdiction over the person of this defendant. General jurisdiction to try misdemeanors does not give the Justice of the Peace jurisdiction over the person of this defendant to try him in any other method than by the statutory method.

There can be no question but what "prohibition" will lie to prohibit the Justice of the Peace from making an order fining a defendant in a misdemeanor case where the Justice has no jurisdiction over the person of the defendant. Such a writ is issuable from any superior Court to

any inferior Court. The Supreme Court, the Court of Appeals, or the Circuit Court, in their discretion, could issue such a writ. We will not assume that the Circuit Court is biased and prejudiced, as suggested, in the face of the legal presumption that a public officer will do his duty.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

TAXATION: City can not "farm out" collection of taxes.
State laws prevail over city ordinances.

7-29

July 22, 1935.

FILED
10

Mr. Chas. E. Bras,
Member of City Council,
Slater, Missouri.

Mr. J. O. Shaw,
Slater, Missouri.

Gentlemen:

We are in receipt of your letter enclosing a copy of your city ordinance which is as follows:

> "Be it ordained by the Board of Aldermen of the City of Slater that the Mayor and City Collector be authorized and directed to enter into a contract with the U. S. Credit Finance Company of Sedalia, Missouri, to assist the City Collector in the collection of all delinquent taxes due the City of Slater, Missouri, for 1934 and prior years, in accordance with the statutes of the State of Missouri. Read three times and passed this 6th day of May, 1935.
>
> "This ordinance shall become effective immediately upon its passage."

And a contract between your city and the U. S. Credit Finance Company purporting to be pursuant thereto, said contract being as follows:

> "THIS AGREEMENT entered into this seventh day of May, 1935, Witnesseth:
>
> "In accordance with the action taken by the Board of Aldermen of the City of

Slater, Missouri, at its regular session on the seventh day of May, 1935, directing the Mayor and the City Collector of Slater, Missouri, to enter into a contract with the U. S. Credit Finance Company, a Missouri corporation, the undersigned parties enter into the following stipulations, to-wit:

"That the said U. S. Credit Finance Company be, and hereby is, employed to assist the City Collector in the collection of all delinquent taxes, both real estate and personal, due the City of Slater, Missouri, delinquent on January 1, 1935, all as provided for in the 1933 Session Laws, Revised Statutes of Missouri, and as revised by the Missouri State Legislature in April, 1935. That the said U. S. Credit Finance Company shall use its own system of collecting said delinquent taxes and shall have full power of attorney in the prosecution of its work.

"It is understood and agreed by and between the parties hereto that the face value of all taxes collected, directly or indirectly, exclusive of interest, penalties and costs, shall be paid into the Treasury of the City of Slater. Upon payment to the City of Slater the face amount of the tax paid, and to the City Collector and City Clerk their respective fees, the balance of such tax payment shall be allowed said U. S. Credit Finance Company as full compensation for its services.

"It is understood and agreed by all the parties hereto that the following terms and regulations shall govern in the carrying out of this contract.

"This contract shall remain in full force and effect so long as any real and personal property taxes covered by the terms of this contract remain delinquent and unpaid, not to exceed a period of one year.

"All checks issued in payment of delinquent taxes shall be made out to the City Collector of the City of Slater, Missouri, and all cash

payments shall be made to the City Collector, or to such party as may be designated by the City Collector, of the City of Slater, Missouri.

"The office of the City Collector, of the City of Slater, Missouri, shall be headquarters for the U. S. Credit Finance Company in the prosecution of this work.

"A weekly accounting shall be had between the City Collector, and the U. S. Credit Finance Company. At these accountings all fees rightly due by law to the City Collector and the City Clerk shall be accounted for and paid to the said respective officers, and all commissions and fees rightfully due the said U. S. Credit Finance Company shall be accounted for and paid to the U. S. Credit Finance Company, and the receipt of L. M. Fluhart as president of the U. S. Credit Finance Company for such sums received shall operate as a full and complete release to the City of Slater, Missouri, and to the City Collector, for all collection charges on the part of said U. S. Credit Finance Company on the collections made up to the date of settlement. As to installment payments made on notes said U. S. Credit Finance Company shall receive at the time of the weekly accountings ten (10) per cent, of the amount paid in such installments as a part of the commission due them, the balance of commission to be paid them when the entire note or notes have been paid.

"No suit shall be instituted or filed for the collection of delinquent real or personal property taxes without the authorization of the Board of Aldermen of the City of Slater, Missouri.

"Witness our hands on the day and year first above written.

APPROVED: R. L. Hains, Mayor Frances Eggleston,
City Collector

U. S. Credit Finance Company,
L. M. Fluhart, President

This is a correct copy of the original contract,
Attest:
S. M. Rhoades, Deputy City Clerk."

You also inform us that one of your city ordinances provides that the city collector receives 2½ per cent on all licenses, electric light and water charges and all other taxes collected by him as full compensation for his services, and that Section 7 of Ordinance No. 1550, page 46, provides that the city collector shall collect all fees and costs when due and pay them to the parties to whom due, and as compensation therefor he shall receive 5 per cent on all taxes and interest collected by him and paid into the city treasury.

Stated tersely, your inquiry is this: Has a city of the third class the right to enact an ordinance empowering the mayor and collector to enter into a contract of employment with a collection agency, whereby the latter collects the city taxes in the name of the city collector, the collector receiving his compensation for such collections as though he had collected them, and where the principal of said taxes is paid to the city by the collection agency and the penalties and interest, or either of them, allowed by law on delinquent taxes are retained by the collection agency as its compensation, is such course lawful?

Our information is that the City of Slater is of the third class and we apply insofar as we deem pertinent the law applicable to cities of the third class in this opinion.

Section 6721, R. S. Mo. 1929, provides for the election of certain officers in such cities and that they "may elect a mayor and such other officers as may be necessary to carry this article into effect, who shall hold office until," etc.

Section 6723 provides that the following officers shall be elected: "A mayor, marshal, attorney, police judge, assessor, collector and treasurer."

Section 6728 empowers the mayor to require "as often as he may deem it necessary" any officer of the city to exhibit his accounts and records, and make written report to the council as to any official matter.

Section 6729 declares the methods of removing elective officers.

Section 6730 requires the mayor to enforce the ordinances, etc., and Section 6732 requires him to make reports to the council and among other things to show the estimated receipts from taxes, etc.

Section 6733 empowers the mayor, with the approval of the council, to appoint a street commissioner and "such other officers as he may be authorized by ordinance to appoint."

Section 6743 requires all elected or appointed officers to have certain qualifications. They "must be qualified voters under the laws and Constitution of this state and the ordinances of the city * * * and must be residents of the city."

Section 6744 provides the oath the officers must take before entering upon the discharge of their official duties and that they must execute a bond, etc., and that if such officer fails to take said oath or give said bond, "his office shall be deemed vacant", and that for any breach of the condition of such bond such city, or any person in the name of such city "for the use of such person" may institute suit.

Section 6745 defines an officer to "include any person holding any situation under the city government or any of its departments, with an annual salary, or for a definite term of office."

Section 6747 empowers the city council to "fix the compensation of all the officers and employees of the city; but the salary of an officer shall not be changed during the time for which he was elected or appointed."

Section 6751 says the duties and powers of officers shall be prescribed by ordinance.

Section 6777 prescribes the duties of the city attorney, and Section 6778 provides certain things with reference to the city counselor and city attorney.

Section 6780 provides that on January 1st "of each year all unpaid city taxes shall become delinquent" and real estate taxes are "made a perpetual lien" in favor of the city, and that "the enforcement of all taxes authorized by this article shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes * * * Provided, that all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector."

Section 6781 defines the duties of the city collector:

> "It shall be the duty of the council to require the collector annually, on the

> first meeting of the council in April of each year, or as soon thereafter as may be, to make out, under oath, lists of delinquent taxes remaining due and uncollected for each year, to be known as the 'land and lot delinquent list' and the 'personal delinquent list.' It shall be the duty of the council at the meeting at which said delinquent list shall be returned, or as soon as may be thereafter, to carefully examine the same; and if it shall appear that all property and taxes contained in said lists are properly returned as delinquent, the council shall approve the same and cause a record thereof to be entered on the journal, and cause the amount thereof to be credited to the account of the city collector. The city council shall cause the land and lot delinquent list and the personal delinquent list to be returned to the city collector, who shall be charged therewith, and who shall proceed to collect the same in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal taxes for state and county purposes: Provided, that all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector."

It will be noted that it is the collector's duty to make out the delinquent tax list and is the duty of the council to require him to do so and of the council to examine it and approve it and to show the same on their records and to charge the city collector with it. "The city council shall cause the land and lot delinquent list and the personal delinquent list to be returned to the city collector, who shall be charged therewith, and who shall proceed to collect the same in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal taxes for state and county purposes", etc.

The courts with uniformity refuse to sanction or approve or enforce agreements which are against the public welfare on the ground that they are against public policy. The question to determine is, whether the contract between the City of Slater

and the Collection Agency, whereby the latter takes over the duties of the constituted City Collector and is paid a certain sum therefor, falls within the classification of contracts which are against public policy.

13 C. J. 429 states the law as follows:

> "And if an agreement binds a party to do or not to do anything, the doing or omission of which is manifestly injurious to the public interests, the courts must declare it contrary to public policy and therefore illegal and void."

So an agreement which has for its object the disabling of public agencies from performing their full duties to the public has been voided. Wiggins Ferry Co. v. Chicago, etc. R. Co., 128 Mo. 224; Chouteau v. Union R., etc., 22 Mo. App. 286.

13 C. J. 429:

> "A people can have no higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments. It is therefore a principle of the common law that it will not lend its aid to enforce a contract to do an act which tends to corrupt or contaminate, by improper and sinister influences, the integrity of our social or political institutions. Public officers should act from high consideration of public duty, and hence every agreement whose tendency or object is to sully the purity or mislead the judgments of those to whom the high trust is confided is condemned by the courts. The officer may be an executive, administrative, legislative, or judicial officer. The principle is the same in either case."

A promise to a collector of taxes to pay him a tax in consideration that he will forbear to collect the same in the manner required by law has been held void as contrary to public policy. 13 C. J. 434; Packard v. Tisdale, 50 Me. 376.

In the latter case the court, speaking of the enforcement of a contract regarding taxes, says, l. c. 377:

> "But, in the present case, the foundation of plaintiff's claim rests upon his omission to do his duty. It is the only consideration of the plaintiff's promise. An agreement by a third person to indemnify an officer for neglecting his duty * * * being founded on an illegal consideration, is void. * * * So a bond given to an officer to induce him to do an act which the law requires of him as a part of his duty, is void. * * * The consideration of the defendant's promise was the plaintiff's neglect to perform his duty."

13 C. J., p. 443, Par. 379:

> "A contract is invalid as against public policy the tendency of which is to induce a breach or neglect of official duty."

It is a well recognized rule that cities have only such powers as are expressly or by necessary implication granted by the legislature of the state. The Constitution is the limitation upon the legislative power to grant to cities, and the legislative acts within the constitutional limitations are the limit of power that cities may exercise, and if the legislature in granting certain powers to cities has defined the method of exercise of those powers, then the cities do not have the authority to change or modify such exercise of power.

43 C. J., p. 215, declares the law as follows:

> "Since a municipal corporation is a creature of the state, continuing its existence under the sovereign will and pleasure of the state, possessing such powers and such only as the state confers upon it, subject to addition or diminution of power at the state's supreme discretion, municipal regulations must not directly or indirectly contravene the general law, nor can such regulations be repugnant to the policy of the state as declared in general legislation." State v. Kinsey, 282 S. W. 437; Ex. p. Tarling, 241 S. W. 929; Taft v. Shaw, 284 Mo. 531, 225 S. W.

457; Ex. p. Lerner, 281 Mo. 18, 218 S. W. 331; St. Louis v. Bernard, 249 Mo. 51, 155 S. W. 394, 41 L. R. A. (N. S.) 177, 27 L. R. A. (N. S.) 608.

In 44 C. J., p. 1344, Par. 4457, the law is stated thus:

> "Where charter or statutory provisions designate the officers to collect municipal taxes, such officers are the only persons who can act as collectors."

And at page 1345, Par. 4461, the following:

> "Where, under charter or statute, it is the duty of a particular city officer to collect taxes, a contract made with any other person to collect them has been held ultra vires." See the cases of Ft. Wayne v. Lehr, 88 Ind. 62; Gurley v. New Orleans, 5 So. 659.

In the last above Indiana case on a set of facts about parallel to those under consideration here, the court declined to enforce the contract. In that case there was a large amount of delinquent city taxes and a communication was referred to the committee of the common council on finance, assessments and taxes, this committee being authorized by the city to act in such matter and employ some person to act as deputy collector of said taxes and to make such agreement as to compensation as they saw fit. This committee and the councilmen requested a third party to so act and thereupon the committee and councilmen on the part of the city and the third party entered into a contract by which the third party was to collect the unpaid delinquent taxes and to receive in compensation for his services in that behalf a sum equal to 10 per centum of the amount so collected by him. Pursuant thereto this third party entered upon and performed these services. The city and its council knew that such services were being performed. Under this contract $26,780.00 were collected. The point was raised in the case that the city had no power to contract thus with the third party for the performance of duties enjoined by law upon the city treasurer, to collect delinquent taxes, and pay him fees therefor, to which the city treasurer was entitled, and because such a contract or agreement was ultra vires. The Supreme Court of Indiana in ruling the case stated:

> "In Sections 3085 and 3087, R. S. 1881, it is made the duty of the city treasurer to collect the city taxes,

> delinquent, current and unpaid; and in those and the following sections such treasurer alone is clothed with the power to enforce the collection of such taxes. In the general laws of the state for the incorporation of cities we have been unable to find any provision which would authorize or empower the appellant, or its common council, to appoint, employ, contract, or agree with the appellee for the collection of delinquent or unpaid city taxes, or to pay him for his services in making such collections. The appellant was not authorized by law to make the agreement with the appellee, which is the basis of the first paragraph of his complaint, nor to enter into the contract with him, which is counted upon in the second paragraph. Such agreement or contract was, we think, an unwarranted interference on the part of the common council, or rather of its committee, with the powers and duties expressly conferred by law upon the city treasurer, and was beyond the scope of its powers in the premises. We are of opinion, therefore, that the alleged agreement or contract, on the part of the appellant with the appellee, was ultra vires and void."

Likewise in Missouri it is the duty of the city collector to collect the city taxes. The state law says so and definitely has spoken the course that must be followed by the various officers charged with the duty of collecting the city taxes. The city council of Slater had no authority to go contrary to that state law, and the reasoning in the Indiana case, supra, applies with equal force here.

In 44 C. J., p. 1346, Par. 4463, the following is stated:

> "While the collection of municipal taxes does not follow the method used in collecting state or county taxes where a different method of collecting municipal taxes is provided, the state or county method prevails if the statute so provides, in which case changes made in the state method apply also to the collection of municipal taxes." (Cases cited.)

The Constitution of Missouri, Section 18 of Article II, page 67 of Revised Statutes of Missouri, 1929, provides:

> "That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."

If the course your city has followed were approved, it would lead to no end of inefficiency and neglect by the officials in whom the law intrusts the responsibility and duty of personal action, to merely collect the salary or fee. If this policy were approved, then the various officers from the highest to the lowest could "farm out" their official duties and the will of the people would be ignored and subverted. When the public, whether at popular election or by a board or council, votes for a candidate, the personal qualifications of the candidate are largely the things weighed by the voter. The candidate's views as to the duties of the office sought and his faithful efficiency in carrying out those views if inducted into office are largely determinative in his selection, and the requirement of the Constitution that he lend unto the people his personal services in discharging the duties of his office doubtless is the expression of the result of that background and reason.

The public is entitled not only by the express constitutional and statutory provisions to the faithful personal services of the officer elected, but those rights are also safeguarded by the general and common law, and any agreement the tendency of which in operation, regardless of the righteous intention in the particular instance, is to destroy or impair the faithful discharge of official duties will be avoided by the courts as contrary to public policy and against the public welfare. The public policy of the state is expressed and defined by the Constitution, the statutes, the court decisions, and long established and approved practice, and when a contract counter to such public policy is entered into it is void.

Another objectionable feature of the contract is the provision thereof that no suit shall be filed to collect delinquent taxes without the authorization of the Board of Aldermen of said city. The statutes of Missouri having defined the rights and duties of the collector with reference to the collection of delinquent taxes, of course the city council has no power to require the withholding of tax suits until they consent to the filing of the same. In order for this program to be sustained

it would be necessary to conclude that the city council's rights supersede and have greater authority than the state legislature has, when of course the converse is true.

There are other features we deem objectionable, but we shall not further lengthen this opinion by adverting to them.

If the delinquent city taxes have not been reduced to judgment, the 1935 act passed by the 58th General Assembly, Senate Bill No. 143, approved April 29, 1935, with an emergency clause, eliminates the interest and penalty such as accrued prior to December 31, 1934, on taxes that were delinquent for the year 1934, i. e., on January 1, 1935, regardless of whether the taxes became delinquent on January 1, 1934, or any year prior thereto. A former opinion of this office construing this tax law to have the meaning as herein stated, is enclosed herein. (See opinion dated July 19, 1935, to Hon. Harry C. Salveter, Prosecuting Attorney, Pettis County.) The taxes are paid in full by payment of the original tax and such penalties as would and do accrue on taxes that became delinquent on January 1, 1935, if paid after the 1935 act, supra, became effective, to-wit, on April 29, 1935, and no greater amount is required to pay a given amount of taxes that became delinquent in 1933 or 1932, or any year prior thereto, than is required to pay the taxes that first became delinquent in the year 1935.

CONCLUSION

We are of the opinion that the State of Missouri, exercising its sovereign power, has definitely by the state laws defined the machinery and officers required to act in the collection of the city taxes of Slater, and has definitely prescribed the duties, liabilities and responsibilities of the city collector thereof; that it is the city collector's duty to follow said directions, and that the City of Slater does not and did not have the authority to change or vary from the course so defined by the State which the collector should follow; that to permit the collector to receive emoluments of said office while not doing the collecting as required by the state law would be subversive of the public welfare, and that the employment of such second party Collection Agency and paying said Agency the penalties provided by law above the principal of the taxes is an unjustified expense to the city and would tend toward undermining the efficient and proper administration of the duties of the office of city collector, and that the agreement between the City of

Slater and the Collection Agency is contrary to public policy, is ultra vires, illegal and void.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

TAXATION: Owner entitled to redeem within two years after tax sale. Mortgagee, although purchasing at tax sale, can not prevent same.

7-29

July 25, 1935.

FILED
10

Mr. G. R. Breidenstein,
Kahoka, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "I would like to have the opinion of your department upon the following matter which is now pending with our County Collector of Revenue.
>
> "About nine months ago a mortgage holder bought at a Tax Sale, a piece of land on which he held a mortgage. The owner at that time was the son and only heir of a father who gave the mortgage. This son, the present owner, is now ready to redeem the land from the tax sale and offers the money to our Collector. The purchaser at the tax sale contends that the owner has no right to redeem since he, the purchaser, was a mortgagee and also had an interest in the land. Does the owner have a right to redeem, and should the Collector of Revenue accept his money on the redemption?"

Section 9956a of the Jones-Munger Law, Laws of 1933, page 437, provides the method of redeeming lands from a tax sale and is as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the

> two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

Section 9960c provides that a mortgagee may pay the back taxes and that thereupon the amount of his mortgage is to that extent increased, and the increased total debt shall bear interest at the rate specified in the mortgage.

The mortgagee is amply protected by said sections. He can pay the tax if he so desires and he continues to have the same security for his loan that he had prior to the

proposed sale except that he has his secured debt increased by the amount of said taxes paid by him.

The Jones-Munger Law was not in any sense intended to perform the duties of a foreclosure of a deed of trust. The law is well defined as to the things that are to be done in foreclosing a deed of trust.

The tax sale in no way affects the lien of the deed of trust except that the taxes must be paid.

The holder of the deed of trust has, independent of the tax sale, his right of foreclosure and he must exercise it in the regular way in order to acquire title under it. He can not prostitute the Jones-Munger Law and thereby acquire under its operation the rights that he would be entitled to as purchaser under the foreclosure of his deed of trust.

CONCLUSION

It is our opinion that the owner has the right to redeem the land any time within two years after the sale thereof, and it is the duty of the collector to accept the tender if made within that time.

The fact that the mortgagee purchases the tax certificate at the sale does not preclude the owner from redeeming.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

MISSOURI RELIEF AND RECONSTRUCTION COMMISSION:

Exempt from payment of tonnage inspection fee for drought feeds.

1-29

July 26, 1935.

FILED
10

Mr. J. C. Breshears,
Commissioner,
Department of Agriculture,
Jefferson City, Missouri.

Dear Sir:

We wish to acknowledge your request for an opinion dated July 25, 1935, wherein you state as follows:

> "We have a controversy with the Missouri Relief and Reconstruction Commission or Missouri Rural Rehabilitation Corporation regarding two commercial feeds, to-wit:
>
> "Drough Relief Horse and Mule Feed, and Fodder Molasses Mixed Feed, registered under the provisions of the Missouri Feed Law, Section 12668, Article 23, Revised Statutes of Missouri, 1929, a copy of each registration is herewith attached.
>
> "The point at issue is whether the Missouri Relief and Reconstruction Commission or the Missouri Rural Rehabilitation Corporation should, under Section 12668 Revised Statutes Missouri, 1929, pay to the State of Missouri the tonnage inspection fee of eight cents per ton on the feeds shown in statement of Wallace Crossley, Administrator Missouri Relief and Reconstruction Commission, copy of which is attached hereto.

"Will you kindly furnish us with an immediate opinion as to whether this tax should be paid to the State of Missouri, and, if so, on what part of the feed shown in the statement attached hereto."

Your enclosure from Hon. Wallace Crossley, Missouri Relief Administrator, states in part as follows:

"Recently Mr. Mayes and Mr. Reed talked to Mr. Kleinschmidt regarding the payment of feed inspection tonnage fee on livestock feed sold through the Commission.

"Our accounting department has furnished me with the following figures on mixed feed sold through the Commission's Livestock, Feed and Seed Program.

1. Tons of feed sold for cash ...	17,602
2. Tons of feed sold on relief orders	15,344
Total	32,946

"Missouri produced in 1934, approximately 10 million bushels of corn. Normally this state produces an average of 150 million bushels and feeds 180 million bushels of corn. Last year production of hays, pasturage, and roughages was less than one half the normal. It was this situation that caused the Missouri Relief and Reconstruction Commission to come to the aid of Missouri livestock men.

"The program of the Missouri Relief and Reconstruction Commission insofar as the Missouri farmer was concerned, was planned to minimize the effect of the 1934 drought as far as possible through making

available rye, wheat, and barley, for seeding during the late summer and early fall months of 1934; conserve fodder which would otherwise not have been conserved and distributed to the livestock industry in the state; the conservation and distribution of seed corn; the distribution of blackstrap molasses, in order that Missouri might make the most speedy recover possible, once more favorable conditions have come to the aid of the Missouri's livestock and grain growing business.

"We realize the prime importance of giving assistance to livestock and poultry owners in the state who were unable to provide feed by any other means, as their livestock and poultry represented to them the basis of family needs, or actual subsistence.

* * * * *

"Through instructions from the Federal Emergency Relief Administration, Washington, D. C., we were instructed to turn over all proceeds realized through the sale of drouth relief feed to the Missouri Rural Rehabilitation Corporation. This procedure was necessary due to the fact that the Commission did not have any corporate identity, therefore, could not contract with dealers or handle notes accepted on feed sales.

"The above facts have been outlined briefly in order that you would be advised of our efforts to aid the Missouri Farmers.

"Due to the fact that we are a State Commission dispensing Federal and State Funds on a charitable basis, we do not

feel that we come under the statutory provisions for the payment of a feed tax or inspection fee. We are filing with you our sales figures as above listed, but request that an inspection fee or feed tax be waived by your department."

From our understanding of the enclosure, the Federal Emergency Relief Administration purchases out of the funds granted for relief within the State certain drought feeds to be sold to farmers on relief rolls and who are unable to provide same. Funds used in the purchase and distribution of such feeds are furnished by the United States Government, granted for relief in the state, and are not treated as funds which may be considered to be "state funds" which are deposited in the State Treasury, nor are they disbursed by reason of any legislative appropriation or paid by warrants drawn by the designated state officials.

This department passed upon a similar question in an opinion addressed to Mr. H. R. Talbot of the Missouri Relief & Reconstruction Commission, under date of December 20, 1934, a copy of which we are enclosing, wherein it was held that the Relief Commodities Division of the Emergency Relief Administration was entitled to the same privileges and immunities respecting the Missouri Motor Vehicle Fuel tax as is accorded to any other agency or instrumentality of the United States Government.

The enclosure states that the Federal Emergency Relief Administration, Washington, D. C., has instructed the Missouri Relief & Reconstruction Commission to turn over all proceeds realized through the sale of drought relief feeds to the Missouri Rural Rehabilitation Corporation, a division of the Missouri Relief & Reconstruction Commission, thus making it clearly evident that the Federal Government at all times retains title and control of the funds and power and authority to supervise, direct and disburse.

As was stated in the enclosed opinion, "It is peculiarly inappropriate that the State of Missouri should require and demand any exaction whatsoever upon the privilege of disbursing relief commodities in this State."

From the foregoing we are of the opinion that the Missouri Rural Rehabilitation Corporation, a division of the Missouri Relief & Reconstruction Commission, being an agency or instrumentality of the United States Government, is exempt from the payment of a tonnage inspection fee as provided by Section 12668, R. S. Mo. 1929.

Yours very truly,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

WOS:

MW:HR

LIQUOR LICENSE: Immaterial whether state, county of city license is procured first. The main thing is that each must be procured.

7-29

FILED
10

July 26, 1935.

Mr. P. C. Breit,
Prosecuting Attorney,
Andrew County,
Savannah, Missouri.

Dear Mr. Breit:

This will acknowledge receipt of your letter of recent date which is as follows:

> "Section 22 of the Liquor Control Act provides that "Malt liquors containing alcohol in excess of 3.2 per cent by weight and not in excess of 5 per cent by weight * * * may be sold by the drink at retail for consumption on the premises where sold when the person, partnership or corporation desiring to sell malt liquors by the drink at retail for consumption on the premises where sold shall have been licensed so to do by the incorporate City and County in which it purposes to operate his business and has procured his license so to do from the State Supervisor of Liquor Control". Under this provision would a Supervisor of Liquor Control be authorized to issue a license for the sale of 5 per cent beer by weight on the premises regardless of whether or not the licensee, or applicant, had first obtained licenses from the City and County? In other words, could the Supervisor of Liquor Control authorize the sale of 5 per cent beer at any and every filling station along the public highways in a County which would not provide for a license authorizing such sales or where the County Court was opposed to such sales

and refused to issue or provide for licensing of same?

"If the applicant for a license should first have to secure license from the City and County before he would be entitled to a license from the Supervisor of Liquor Control then it would be necessary for the City and County to provide for license under Section 25 of said Act in order to sell 5 per cent beer according to law.

"Your construction of Section 22 will be appreciated as I have been called upon by the County Court for my opinion in regard to same."

Replying thereto, we do not consider it important whether the licensee procures his license from the Supervisor of Liquor Control first and then from the city or county authorities.

The main thing is that if the licensee seeks to sell the licensed product and the premises are located out in the county, he must procure both the state license and the county license before he can legally sell the licensed product. The same observations apply if the licensed premises are located within the corporate limits of a city. In the latter event he must satisfy each of three bodies, the Supervisor of Liquor Control, the county court, and the city, and procure the license required by each of them in order to legally sell the licensed article.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

TAXATION: Board of Supervisors of Drainage District cannot delegate County Collector to remit penalties.

8-22

August 20, 1935.

FILED
10

Mr. G. R. Breidenstein,
Prosecuting Attorney,
Clark County,
Kahoka, Missouri.

Dear Sir:

We wish to acknowledge your recent request for an opinion reading as follows:

> "I would like to have the opinion of your office in regard to the following question:
>
> "A Drainage District after finding that Senate Bill 143, as passed by the recent legislature, did not apply to special assessments of Drainage Districts so as to provide for the remission of penalties on such assessments past due, votes by its Board of Directors or Supervisors 'that all penalties and interest on all assessments due said Drainage District, delinquent for the year 1934 and prior years shall be computed after December 31st, 1934 on the same penalty and interest basis as the assessments delinquent for the year 1934 until paid.'
>
> "Does this authorize the County Collector or Revenue to receive and receipt for such prior delinquent assessments due Drainage Districts, and remit the penalty and interest as provided by said Drainage District thru its Board of Supervisors?"

The question that first arises is whether, the Legislature having failed to provide for remission of penalties on assessments due, a drainage district can accomplish same by a vote of the supervisors of the district.

Our court in the case of State ex rel. McKittrick v. Bair, 63 S. W. (2d) 64, l. c. 66, in holding that the Legislature has a right to remit penalties imposed by law, said:

> "In this situation, the legislative power to remit the penalties involved here is well settled in principle. In Maryland v. B. & O. R. R. Co., 3 How. 534, 11 L. Ed. 714, it is held that the Legislature has a right to remit penalties imposed by law. 'In this aspect of the case,' the court said at page 552 of 3 How., 11 L. Ed. 714, 'and upon this construction of the act of Assembly, we do not understand that the right of the state to release it is disputed. Certainly the power to do so is too well settled to admit of controversy.'"

Having determined the power of the Legislature to remit penalties, the question arises whether the board may remit penalties without legislative sanction, as we find no authority in our statutes giving supervisors of a drainage district such power.

61 C. J. 1493, in dealing with remission of penalties, says:

> "So, also, the legislature having power to remit penalties may authorize or require local officers or boards to remit penalties, but no such power exists in any board or officer unless conferred by statute.

In the case of Hutton v. McCleskey, (Ark.) 200 S. W. 1032, l. c. 1033, the court in holding that the Arkansas State Tax Commission did not have the power to remit penalties imposed by statute, said:

> "It is too plain for argument that the state tax commission possesses no such power as it attempted to exercise in this instance of relieving delinquent property owners from the penalty imposed by the statute. The powers of the tax commission are limited entirely to the fixing of values, and do not extend to the relief of penalties imposed by statute."

It is true that the above case deals with remission of penalties on "taxes", and that generally speaking "taxes" do not include special benefit assessments. However, we are of the opinion that the principle that no power exists in a board to remit penalties unless conferred by statute applies as well to assessments as it does to taxes.

Having come to the conclusion that the board of supervisors lacks the authority to remit penalties on assessments due the drainage district, it is clear that it can not delegate the county collector to receive and receipt for such delinquent assessments, and remit the penalties.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

WOS:
MW:HR

PUBLIC SERVICE COMMISSION:)
FUNDS;)
APPROPRIATION ACT:)

The 1933 Laws remove all doubt but that fees received by any Commission from any source must be placed in the State Treasury; and can only be withdrawn from the State Treasury by an Appropriation Act

September 4, 1935. 9-18

FILED
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Public Service Commission
State of Missouri
Jefferson City, Missouri

Attention: Mr. James P. Boyd,
General Counsel.

Dear Mr. Boyd:

This is to acknowledge your letter dated September 3, 1935, as follows:

> "The Public Service Commission of Missouri in conference with Honorable Forrest Smith, State Auditor, decided that it desires an opinion from your department upon the question of the right of the Public Service Commission under Senate Bill No. 161, found at page 322 and following pages in Laws of 1935, especially subsection (b) of Section 5268 and that part of subsection (b) found on page 326 which is in the following words:
>
> 'In the event of the establishment of any port or ports of entry or exit the expense of the establishment and maintenance of each such port shall be paid out of the receipts at each port derived from the sale of temporary permits to interstate carriers.'
>
> "In view of the statute passed and in the Laws of 1933, pages 414 and 415, entitled 'State Treasury and Auditing

Departments: Providing for Depositing of All Fees, Funds and moneys in State Treasury with Certain Exceptions,' has the Commission authority under Senate Bill No. 161, as found in the Laws of 1935 above referred to and especially that sentence quoted above, if it establishes ports of entry and exit, to collect the receipts for temporary permits therein mentioned and first pay out of such receipts the expenses of the establishment and maintenance of each such port of entry or exit and if any balance remains of the receipts at such ports of entry or exit to pay the remainder into the State Treasury? Or will the Commission be compelled, under the Laws of 1933 above mentioned, be required to pay all of the fees and receipts at each port of entry or exit, as above referred to in the Laws of 1935, into the State Treasury, there being no provision in the Laws of 1935, Senate Bill No. 161 above referred to, for the payment of the expense of establishing and maintaining such ports and no appropriation made by the Legislature for that purpose other than by the Bill above referred to?

"The Public Service Commission and Mr. Smith as State Auditor would be pleased if you would furnish to this department and to him the opinion of your office as to the proper construction of said act known as Senate Bill No. 161, above referred to, at your earliest possible convenience, for the reason that unless the expenses of the establishment and maintenance of such ports can be taken first from the receipts received at such ports and not paid into the State Treasury, then it would be impossible to establish such ports of entry, in the view of this department; there would be no funds provided for the establishment and maintenance of such ports."

Laws of Missouri, 1935, page 322, was an Act passed by the 58th General Assembly to amend Section 5268, Laws of Missouri, 1931, page 304, and, as amended, pertains to the issuing of temporary permits to interstate "carriers" operating on the highways and provides that "Such temporary permits shall be issued only upon the payment of such fees as may be designated by the Public Service Commission etc." Said section provides further, "The form of and procedure for obtaining such temporary permit shall be prescribed by the Public Service Commission. Such ports of entry or exit may be established by the Commission as in its judgment may be necessary for the proper administration of this act."

As to the establishment of ports of entry and exit the act reads:

> "In the event of the establishment of any port or ports of entry or exit the expense of the establishment and maintenance of each such port shall be paid out of the receipts at each port derived from the sale of temporary permits to interstate carriers."

Your question concerns whether or not moneys received by virtue of the sale of the temporary permits must be deposited in the State Treasury, or if the expense of establishing and maintaining ports of exit or entry may be paid from said moneys before the balance, if any, is turned into the State Treasury.

It is to be noted that the Legislature has not provided in the act that the moneys received from the sale of such temporary permits shall go into the State Treasury. If the Legislature had so provided, the answer to your question would be comparatively easy, in view of the Constitution of this State. Sans such a declaration on the part of the Legislature, inquiry must be had to determine (1) whether or not the money received from the sale of the temporary permits is public revenue or State money, and also (2) if such act violates the provisions of Article IV, Section 43, and Article X, Section 19, of the Constitution of Missouri or (and) the provisions of Laws of Missouri, 1933, pages 414-415.

In order to understand the intent of the Legislature in enacting Laws of Missouri, 1933, pages 414-415, recourse must be had to various decisions of the Supreme Court interpreting the constitutional provisions (supra) relating to state moneys. A reading of the decisions shows that the Supreme Court of Missouri drew the line of demarcation concerning moneys received by various boards or commissions as to whether or not same was public or State revenue.

There seems to be no question but that if the money collected is directed by the Legislature to be deposited in the State Treasury, then such money may not be withdrawn except in pursuance to an appropriation by the Legislature, in view of Section 19, Article X, of the Constitution of Missouri, which provides:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * * *."

In State ex rel. Kessler et al. v. Hackmann, 264 S. W. 366, l. c. 367, the Supreme Court of Missouri said:

> "Relators cite the case of State ex rel. v. Wilder, 199 Mo. 470, 97 S. W. 940, where this court had under consideration funds of the insurance department, to show that the money in the insurance department was not public money in a sense that it was subject to be appropriated for any general purpose. That was a mandamus proceeding seeking to compel the state auditor to issue a warrant in payment of an account incurred by the insurance department. <u>In that case, however, there was an appropriation by act of the Legislature.</u>
>
> "On the other hand, this court has held that a fund, raised by an act for a special purpose, could not be paid out of the state treasury except upon an

> appropriation by an act of the Legislature. State ex rel. Fath et al. v. Henderson, 160 Mo. 190, loc. cit. 214, 60 S. W. 1093; State ex rel. v. Gordon, 236 Mo. 142, loc. cit. 158, 139 S. W. 403."

In the case of State ex rel. Gordon, cited above, there was an appropriation act under consideration, and the moneys collected were required to be paid into the State Treasury. We quote from the dissenting opinion of Valliant, C. J., page 189 (236 Mo.):

> "As to relator's first point I do not deem it necessary to say more than refer to the game law itself, which requires the money collected for hunter's licenses to be paid into the State Treasury, and then refer to section 43, article 4, of the Constitution * * * * *"

Section 43, Article IV, of the Constitution of Missouri, provides in part as follows:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

It is to be noted that the above constitutional provision pertains to "revenue collected and moneys received by the state from any source whatsoever."

The Supreme Court of Missouri in the case of Ex parte Lucas, 160 Mo. 218, held that the act providing that the

members of the Board of Barber Examiners were to receive compensation of $3.00 a day and railroad expenses, to be paid out of any money in the hands of the treasurer of the board, was not in violation of Section 43, Article IV of the Constitution; having the following to say (page 226):

> "The fourth contention is not well founded for the simple reason that section 43 of article 4, applies only to money provided for and received by the State. The money authorized to be collected under this act is not State revenue, but is simply a provision to make the board of examiners self-supporting."

The above case appears to be determinative of your inquiry, as also do the cases of State ex rel. v. Walker, 240 Mo. 708, and State ex rel. v. Board of Regents, 264 S. W. 698.

In the former case the Supreme Court said (l. c. 723-725):

> "Is the statute which authorizes the payment of reasonable expenses incurred in the collection of this inheritance tax out of that fund while yet in the hands of the county collector a violation of section 43, article 4, of the Constitution? That section is in these words: 'All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law.' The language is ample to cover not only all revenue derived from general taxation, but moneys collected by authority of the State from any source whatsoever; it therefore covers moneys derived from the

collateral inheritance tax. It does not apply in a different force or degree to one than to the other. If the literal construction contended for by relator is to be applied to this section, then it means that the General Assembly cannot authorize by statute the payment of fees to any officer or agent out of the money he may collect for the State, but he must pay it all into the treasury, and wait until the General Assembly meets and makes an appropriation to pay him for his services. That has never been the course of dealing between the State and the collectors of its general revenue or of its other taxes. The officers making the collections have always been permitted to retain the fees fixed by statute as their compensation; such was the course of dealing when the present Constitution was adopted, it had been for many years before, and it has been so ever since.

"Relator seems to concede that such has been the practice, but it seeks to draw a distinction between fixed fees and fees that are to be fixed. If we are going to adhere to the letter of this section we must say that it applies to fixed fees as well as fees to be fixed; if we say that it does not apply to fixed fees that have long been allowed, then we depart from the letter and inject an exception by interpretation, and if we make an exception of one for a certain reason we should make an exception of another that comes under the same reason. The convention which framed our Constitution was composed of men who knew what the law on this subject then was and if they had understood that this section was liable to be construed as applying to the payment for services rendered in collecting the

revenue they would doubtless have made some provision to meet that condition, because payment for such services out of the funds before they were paid into the treasury had always been allowed by statute, and also because it would naturally impede or hinder the State in collecting its revenue unless such payments were so allowed.

"The reason for allowing the county collector to retain his commissions is that his services were necessary in collecting the tax, and that reason applies as well to the services of the legal counsel in the collection of the inheritance tax as it does to the services of the collector. We do not say that the one is as necessary as the other, because the services of the collector are indispensable in every instance, whilst the services of an attorney may be necessary in some cases but not in others, therefore the statute has given the State Auditor authority to retain counsel only when in his judgment it is necessary, but when it is thus determined that the services are necessary there is no more reason for allowing the collector to retain his commissions out of the fund collected than there is for the payment of the attorney out of the same fund. It has always been the policy of the State to allow payment out of taxes collected not only to the county collector of general taxes, but to the officer intrusted with the issuance of licenses and the collection of license taxes, and if we should now give to section 43, article 4, the construction contended for by relator we would not only overturn a settled policy, but bring confusion in the collection of the revenues of the State. The General Assembly is forbidden by this

> section to divert from the State treasury the fund arising from the inheritance tax, but it is not a diverting of that fund for the General Assembly to provide for the payment of reasonable compensation for necessary services rendered in its collection.
>
> "The writ of mandamus is denied."

In the latter case the Supreme Court, en Banc, said (l. c. 699):

> "The moving cause for the incorporation of these restrictions in the Constitution was to put an end to an era of extravagance and waste in the use of the revenue, which had prevailed for more than a decade prior thereto--the Constitution of 1865 containing no such limitation as is found in the provision under consideration. This provision, it will be seen from its terms, which are wisely chosen as a limitation upon power, is restricted to 'revenue collected and money received by the state from any source whatsoever.' By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority

> being the Legislature. With this limitation--and the Constitution itself is but an instrument of limitations--it should be strictly construed. Thus construed, the spirit which prompted the adoption of the provision is fully recognized and its purpose is promoted. Unless, therefore, it can be successfully contended, in harmony with well-recognized rules of interpretation, that the board of regents of the college is the state, and that moneys received by it other than from appropriations is state money, the constitutional provision will afford no support to the relator's contention."

From the above cases it is thus seen that prior to 1933 the Supreme Court of Missouri, in interpreting the above constitutional provisions, promulgated two lines of decision: First, that if the act of the Legislature provided that the money was to be paid into the State Treasury, then it took an appropriation act to withdraw it; and second, that if it was not state revenue but solely derived for the purpose of maintaining or supporting a board or commission, and absent legislative act providing that the money should go into the State Treasury, then the money would not have to be placed into the State Treasury, consequently no appropriation act was necessary to the expenditure of the money.

It will be noted that Section 5268, supra (concerning the establishment of ports of exit and entry) does not provide that the money derived from the sale of temporary permits to interstate "carriers" shall go into the State Treasury, and specifically provides that the expense of the establishment and maintenance of each such port shall be paid out of the receipts of each port. However, we believe that now Section 1, Laws of Missouri, 1933, pages 414-415, is conclusive and controlling because it was enacted after the decisions of the Supreme Court were rendered, and we are of the opinion it was the intention of the Legislature to remove the exceptions and limitations placed on the constitutional provision,

pertaining to the placing of moneys into or withdrawing from the State Treasury, by the courts. Said section provides as follows:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. * * * * *"

It is thus seen that the section above quoted from is broader and more comprehensive than the constitutional provisions because it requires all fees received by any commission from whatsoever source to be placed in the State Treasury.

The Public Service Commission is a commission established by act of the Legislature. The Legislature designated as "fees" the amount of money received from the sale of temporary permits. We quote from Section 5268, supra, the following:

> "Such temporary permits shall be issued only upon the payment of such fees as may be designated by the Public Service Commission * * *"

Therefore, it follows that the money received by virtue of the sale of the temporary permits are fees and that the fees are received by a commission, namely, the

Public Service Commission, by virtue of a rule or regulation, and applying the provisions of Laws of Missouri, 1933, page 414, supra, it is seen that all fees from whatsoever source received by any commission, shall, at stated intervals, be placed in the State Treasury and subject to appropriation by the General Assembly.

We are of the conclusion that the cases above cited have no application to the deciding of the question presented because the Act of the 1933 Legislature, requiring all fees received to be placed in the State Treasury, was not on the statute books at the time said cases were decided.

We conclude, and it is our opinion, that Section 1, Laws of Missouri, 1933, page 414, is decisive of the question presented and that all fees received by virtue of the sale of temporary permits to interstate "carriers" must be placed in the State Treasury and that such may not be withdrawn therefrom except in pursuance to an appropriation by the Legislature. It follows that the expense of maintaining and establishing these ports cannot be paid out of the receipts derived from the sale of the temporary permits until after the money is placed in the State Treasury.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

JLH:EG

ICE CREAM: Proof necessary to require manufacturer for sale at retail to take out supplementary permit

10-5

October 2, 1935

FILED
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Honorable J. C. Breshears
Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "Under Article 5, Chapter 93, Sections 13068 and 13076, inclusive, as amended 1933 and 1935, would tax returns made to the County Assessor by an ice cream manufacturer, listing one or more retail outlets be sufficient proof of ownership to require such manufacturer to pay supplementary retail ice cream permit fee for the sale of his ice cream at retail in such store or stores?"

Section 13071, Laws of Missouri 1933, page 254, requires every manufacturer of ice cream for sale either at wholesale or retail to obtain a permit and pay the prescribed fee for the privilege of conducting his business. Said Section reads as follows:

> "Each manufacturer of ice cream in cities or towns in this state which now have or may hereafter have a population of five thousand or over who manufacture ice cream for sale at wholesale shall pay an annual fee of one hundred dollars for a permit to conduct his business, and each manufacturer of ice cream in cities or towns in this state which now or may hereafter have a

population of five thousand or over who manufacture ice cream for sale at retail shall pay an annual fee of five dollars for a permit to conduct his business. Each manufacturer of ice cream in cities or towns of less than five thousand and more than two thousand population and in any suburban or rural part of the state of Missouri who manufacture ice cream for sale at wholesale shall pay an annual fee of forty dollars and in cities or towns of a population of two thousand and less twenty dollars for a permit to conduct his business and each manufacturer of ice cream in cities or towns of less than five thousand population and in any suburban or rural part of the state of Missouri who manufacture ice cream for sale at retail shall pay an annual fee of three dollars for a permit to conduct his business; such fees shall be paid into the state treasury, to the credit of the general revenue fund of the state. For the purpose of this article, the term 'wholesale manufacture' shall include every manufacturer of ice cream who sells at wholesale for resale, and the term 'retail manufacture' shall include every manufacturer who manufactures and sells ice cream at retail: Provided, that nothing in this article contained shall be so construed as to require a permit to authorize persons or committees not otherwise engaged in the manufacture of ice cream, to manufacture and make ice cream for their own use or for the purpose of sale at picnics, church socials, or other entertainments of like character. All manufacturers of ice cream shall be subject to inspection by the commissioner of agriculture or his inspectors during all reasonable hours, or any other officers under any law now or hereafter in force in this state."

Section 13071a, Laws of Missouri 1935, page 265, provides that a manufacturer of ice cream for sale at retail is only permitted by the permit provided in section 13071 supra, to sell ice cream at retail at the one place described in the application, provided that a manufacturer of ice cream for

sale at retail who operates two or more places of business where ice cream is sold at retail shall secure a supplementary permit for each additional place where such ice cream is sold at retail. The fee for said supplementary permit to be at the same schedule and amount as permits for retail manufacturers as specified in section 13071, supra. Section 13071a reads as follows:

> "A 'retail manufacturer,' as defined, shall only be authorized and permitted, by the permit heretofore provided, to sell ice cream at retail at the one place only, located at the address designated in the application. Provided, that a manufacturer of ice cream for sale at retail operating two or more places of business where ice cream is retailed of his (its) own manufacture, shall secure a 'supplementary permit' for each and every additional place where such manufactured ice cream is sold at retail, and the fee to be charged for such 'supplementary permit' (permits) to be at the same schedule and amount as permits for 'retail manufacturers' as specified in Section 13071, Laws of Missouri, 1933, page 254."

Your exact question as we understand it is whether the tax returns made to the county assessor by the manufacturer for sale at retail, listing one or more retail outlets, is sufficient proof of ownership to require such manufacturer to pay the supplementary fee required for each additional place where his ice cream is retailed. Section 9756 R. S. Mo. 1929, provides the manner of making assessments and what the tax lists shall contain. Said section reads, in part, as follows:

> "He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and

> the person listing the property shall enter a true and correct statement of such property in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor."

Section 9746 R. S. Mo. 1929 provides that every person owning or holding property on the first day of June, shall be liable for taxes thereon for the ensuing year.

In the case of Wilcoxson v. Darr 139 Mo. l. c. 671, the court said:

> "I. The admission of the certified copy of the garnishee's tax list given in Jasper county is assigned as error. The ground of the complaint is that our statute nowhere makes an office copy of this assessment list evidence. Section 7534 requires the assessment list to be signed and sworn to. It requires the taxpayer to subscribe to an oath that the list so sworn to contains a true account and statement of . . . . . 'notes unsecured by mortgages or deeds of trust and notes secured by mortgages or deeds of trust.' This list is required to be filed in the office of the county clerk. It is an original file in his office. That the original would be evidence, there can be no doubt. Boyer v. Tucker, 70 Mo. 457. It would certainly have been competent for the jury in an investigation in which the very existence of a debt is the issue, to have known that the person who claimed to owe the debt had sworn in a proceeding required by law, that he had no such debt or had evaded the fact by a sworn list, omitting said debt."

In the case of O'Malley v. Construction Company 255 Mo. l. c. 391, it was said:

> "Further, ownership having been found once to exist, the general rule is it is presumed to continue until a change

therein is affirmatively shown."

From the foregoing, it is our opinion that the fact a manufacturer of ice cream for sale at retail makes a sworn statement in his tax list that he owns certain retail outlets, would justify you in finding that such manufacturer was the owner of the retail outlets on the first day of June preceding the year for which such property was assessed, and, having established that fact, such ownership would be presumed to continue until a change of ownership is affirmatively shown.

We call your attention, however, to the fact that the supplementary permit or permits required of a manufacturer of ice cream for sale at retail is a permit for the privilege of operating additional places of business where ice cream is retailed by its own manufacturer. To operate a place of business ordinarily means to control and manage such business. It is conceivable that a manufacturer might own retail outlets and yet not operate such places of business. The question of whether or not they do operate additional retail outlets is a question of fact to be determined in each individual case from all the facts and circumstances. Evidence of ownership in our opinion would be evidence tending to show that they did operate such places of business, and, we think, you would be justified in requiring manufacturers of ice cream at retail who own two or more retail outlets, to either take out the required supplementary permits or to furnish you with satisfactory proof that they do not operate such places of business.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

U. S. SEED LAW: Various questions relating to enforcement.

11-21

November 18, 1935.

FILED
10

Honorable J. C. Breshears,
Commissioner, Department of Agriculture,
Jefferson City, Missouri.

Dear Sir:

We wish to acknowledge your letter of recent date requesting an opinion wherein you state as follows:

> "Because of the attitude of some County Prosecuting Attorneys, and our lack of legal interpretation, we pray you for your opinion on the following, relating to the 'uniform seed law' in Article 16 of Chapter 87, R. S. Missouri, 1929:
>
> "(a) On finding or on obtaining proof of the sale or offering for sale of unlabeled field seed, does the Commissioner or his agent have the right and power to swear out a complaint against the alleged offender, without holding a hearing?
>
> "(b) What is the meaning of the word 'formal complaint', in the concluding sentence of Section 12611?
>
> "(c) Has a Prosecuting Attorney the right and jurisdiction to file a complaint on his own initiative against any person that he considers has disobeyed the seed law by his (a) filing on his own official complaint or (b) on the sworn complaint of any citizen?
>
> "(d) Or must a hearing be held by the Commissioner or his agent before any Prosecuting Attorney or citizen can file a complaint in court under this law?

"(e) Is an analysis required under this law, if and when the complaint is based on a non-labeling or other reason in which a result of analysis is not involved?

"(f) Is a wholesale seedsman selling recleaned field seeds to another wholesale seedsman required to label any and all such lots of field seeds?"

(a)

Section 12610 of Article 16, Chapter 87, R. S. Mo. 1929, defines what constitutes a violation under the "uniform seed" law as follows:

"It shall be unlawful for any person, firm or corporation to sell, offer or expose for sale within this state any agricultural seeds or mixtures of agricultural seeds, as defined in this article, for seeding purposes within this state without complying with the requirements of this article, or to falsely mark or label any agricultural seeds, or to interfere in any way with the said board or its agents in the discharge of the duties herein named."

Section 12611, R. S. Mo. 1929, provides for prosecutions of violations of the "uniform seed" law as follows:

"Every violation of the provisions of this article shall be deemed a misdemeanor punishable by a fine not exceeding one hundred dollars, and if the said board shall find, upon examination, analysis or test, that any person, firm or corporation has violated any of the provisions of this article, the board may institute proceedings in a court of competent jurisdiction to have such person, firm or corporation convicted therefor, or the said board, in its discretion, may report the results of

such examination to the attorney-general, together with sworn statement of the analyst, duly acknowledged, and such other evidence of said violation as said board shall deem necessary: Provided, however, that no prosecution under this article shall be instituted except in the manner following: When the said board or its agents find that the article has been violated, they shall give notice to the person or firm in whose hands the seed was found, designating a time and place for a hearing before an agent, officer or member of said board. This hearing shall be private, and the person or firm involved shall have the right to introduce evidence, either in person, by agent or attorney. If, after said hearing, or without such hearing, in case said person fails or refuses to appear, the said board decides that evidence warrants prosecution, the board shall proceed as herein provided. It shall be the duty of the attorney-general, or in his discretion he may act through the prosecuting attorney of the county or the city attorney of the city in which said violation occurred, to institute proceedings at once against the person or persons, firms or corporations charged with such violation: Provided further, that the prosecuting attorney of any county or the city attorney of any city in which formal complaint arises may file proceedings under this article."

We direct your attention to that part of the above section which provides:

" * * * that no prosecution under this article shall be instituted except in the manner following: When the said board or its agents find that the article has been violated, they shall give notice to the person or firm in whose hands the seed was found, designating a time and

> place for a hearing before an agent, officer or member of said board. This hearing shall be private * * *."

From the foregoing, we are of the opinion that neither the commissioner nor his agent has the right or power to swear out a complaint against the alleged offender without first holding a hearing.

(b)

We are of the opinion that the term "formal complaint" as used in the above section means a formal allegation or charge against the party made or presented to the appropriate officer, in this instance the prosecuting attorney, that the provisions of Article 16 of Chapter 87, R. S. Mo. 1929, have been violated.

(c) and (d)

Section 3415, R. S. Mo. 1929, makes the following statement with reference to the power of a prosecuting attorney to proceed on his own initiative against a person or on the complaint of a citizen where a misdemeanor is charged:

> "When any person has actual knowledge that any offense has been committed that may be prosecuted by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the justice of the peace having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a justice of the peace in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with a justice having jurisdiction of the offense, founded upon or accompanied by such complaint."

We are of the opinion that Section 3415, supra, is authority for the statement that it is not necessary that a hearing be held by the commissioner or his agent before any prosecuting attorney can file a complaint in court under this law. A prosecuting attorney may upon his own initiative, based on his knowledge, information and belief that an offense has been committed, file an information against the offending parties. A citizen having actual knowledge may file a formal complaint charging the commission of an offense. However, as stated in (a), supra, a complaint by the commissioner or his agent must be based upon a hearing and determination of the guilt or innocence of the parties charged with an offense.

(e)

Our courts have from an early date declared that no statute shall be construed in such manner as to be against reason. This rule of construction is expressed in the case of State v. McKay, 52 S. W. (2d) 229, l. c. 230, 227 Mo. App. 327, thus:

> "A statute or ordinance will not be given a construction which will make it unreasonable or which will result in an absurdity."

To hold that an analysis is required under the law when the complaint is based on an offense in which a result of analysis is not involved would be unreasonable and result in an absurdity. We are of the opinion that under such circumstances an analysis is not necessary.

(f)

Section 12606, R. S. Mo. 1929, sets out the exemptions under the provisions of this article in the following language:

> "Agricultural seeds or mixtures of same shall be exempt from the provisions of this article:
>
> "(a) When possessed, exposed for sale or sold for food purposes only.

"(b) When sold to merchants to be recleaned before being sold or exposed for sale for seeding purposes.

"(c) When in store for the purpose of recleaning or not possessed, sold or offered for sale for seeding purposes within the state.

"(d) Agricultural seeds grown and sold by the grower thereof on his own premises: Provided, however, that said grower shall be responsible under this article for any representation he shall make in the sale of such agricultural seeds; and further provided, that if such agricultural seeds shall be advertised for sale or be delivered through a common carrier, then the grower as a seller shall be deemed to be a vendor, and said seed and seller shall be subject to all the requirements of this article: Provided, that nothing in this subsection (d) shall be interpreted as exempting any such grower from full liability in case of the sale of agricultural seeds containing Canada thistles."

In the case of Warrington v. Bobb, (Mo.) 56 S. W. (2d) 835, l. c. 837, the court in holding that in the construction of a statute the object which the Legislature sought to attain, and the evil which it sought to remedy, may always be considered in ascertaining its intent and purpose, said:

"Of course our prime duty is to give effect to the legislative intent as expressed in the statute, and to that end there are many considerations to guide us. For instance, the object which the Legislature sought to attain by a statute, and the evil which it sought to remedy, may always be considered to ascertain its intent and purpose (Straughan v. Meyers, 268 Mo. 580, 187 S. W. 1159; Ross v. Ry. Co., 111 Mo. 18, 19 S. W. 541); the court may consider the expediency of the law in as-

certaining the legislative intent (State ex rel. v. Regan, 317 Mo. 1216, 298 S. W. 747, 55 A. L. R. 773) * * *."

Section 12606, supra, makes no specific exemption as to wholesalers. However, it is evident from an examination of the provisions of Article 16 providing for a "uniform seed" law that it was the intention of the Legislature to protect its citizens from falsely marked or labeled agricultural seeds. Such protection, we believe, is for the ultimate consumer or planter, and hence we are of the opinion that if a wholesale seedsman sells recleaned seeds to another wholesale seedsman, he is not required to label such lots of field seeds.

Very truly yours,

COVELL R. HEWITT,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

ROADS AND BRIDGES - Qualifications necessary for men employed by commissioners of special road districts incorporated under Article 9, Chapter 42, R. S. Mo. 1929.

2-4

January 25, 1935

FILED

Hon. Percy M. Brown,
Circuit Clerk, Saline County,
Marshall, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of January 3, 1935, such request being in the following terms:

> "May I have an opinion concerning the following question: 'Do provisions of Section 7870 as to eligibility of road overseers apply to men working under commissioners of Special Road District under Art. 9 of Chapter 42, R. S. Mo., 1929?' "

R. S. Missouri, 1929, Section 7870, dealing with the appointment, qualification and compensation of road overseers under Article 3 of Chapter 42 of such statutes, provides, as to the eligibility of persons for such office, as follows:

> "No person shall be eligible to the office of road overseer, except he be a citizen of the road district for which he may be appointed, or of an incorporated town or village within the bounds of such district and be a practical road builder, or possessed of technical or scientific knowledge of such work (shall be over twenty-one and under sixty years of age and moreover be able to read and write)."

It is our opinion that this provision which we have quoted from Section 7870 applies only to road overseers appointed under such section, and could have no application to men working under commissioners of special road districts or-

ganized under Article 9 of such Chapter 42, such men not holding the office of road overseer, the fact that these men might do work substantially like that done by road overseers appointed under Section 7870 being immaterial.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

PENAL INSTITUTIONS: Mandamus imposing sentence in criminal cause. Sentence to run concurrently since the Supreme Court did not direct otherwise.

February 2, 1935.

FILED

Honorable George W. Bryant
Chairman Pardon and Parole Board
Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Bryant:

We acknowledge your request for an opinion dated January 15th, which request is as follows:

> "We have two mandates from the Supreme Court relative to the above named inmate.
>
> "It seems this man was tried in St. Louis County for kidnapping, and given five years. He was tried in St. Louis City for carrying concealed weapons and given two years. The mandates from the Supreme Court confirm these sentences. The mandate for the five year term was signed by J. D. Allen, February 18, 1932. The mandate for the two year term was signed by J. D. Allen, March 6, 1933. There is nothing in these mandates to show whether the sentences run concurrently or consecutively.
>
> "Will you kindly send me an opinion as to whether these sentences should run concurrently or consecutively?"

The mandates out of the Supreme Court to which you refer in your letter contains the following finding: "Doth consider and adjudge the judgment aforesaid, in form aforesaid, by the said trial court rendered, be in all things affirmed, and stand in full force and effect." Again the mandates direct the

warden as follows: "There to be imprisoned for the period of _____years, the same being the sentence passed by the said trial court aforesaid."

Thus we see that the mandates by their very terms affirm the judgments of the two different trial courts in all things and direct imprisonment as per the sentences passed by the two trial courts. The mandates simply give force to the judgments previously rendered and hence we must consider the form and substance of said judgments before we can intelligently answer your query.

By the trial court records on file in the Supreme Court I find that John Pepe was sentenced on June 21, 1930, by the Circuit Court of St. Louis County to the "State penitentiary at Jefferson City, Missouri, for a term of five years on the charge of kidnapping." In said records I further find that John Pepe was sentenced on January 15, 1932, by the Circuit Court of St. Louis City "for his offense of carrying concealed weapon and in pursuance of the verdict heretofore rendered against him, be imprisoned in the penitentiary of the State for a term of two years." Nothing in either trial courts' records indicate when sentence is to commence by the judgments and sentences rendered.

Section 1063 R. S. Mo. 1929, provides in part as follows:

> "The Supreme court, St. Louis court of appeals and Kansas City court of appeals, in appeals or writs of error, shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law;* * * * ."

The mandate of the Supreme Court follows statutory authorization, and by its very terms the warden must execute the mandate as per the terms of

two sentences of two different trial courts in two different circuits relating to two different crimes. By the terms of said judgments and sentences the prisoner is committed to the penitentiary to do time certain. You ask whether these sentences should run concurrently or consecutively.

Section 648 R. S. Mo. 1929, provides the limitations in Missouri upon imprisonment of any person:

> "No person's body shall be imprisoned or restrained unless by authority of law."

In Meininger v. Breuer, 304 Mo. 381, at 389 the Court discussed concurrent and cumulative sentences, and, although the facts of said case are not identical with the facts in the case presented, the propositions of law therein stated are applicable in all cases where a problem of cumulative or concurrent sentences is presented. The Court said at l. c. 391:

> "The law then, as now, was settled beyond dispute, that in the absence of a statute to the contrary, sentences were not cumulative, even where they might be made so, unless the sentencing court expressly made them so by directing that the subsequent one should commence at a future time determined or determinable with certainty. In the Meyers sentences no sort of effort was made by the trial court to render the sentences cumulative."

There are statutes in Missouri which direct the trial court to render cumulative sentences under certain circumstances, as for instance Section 4456 R. S. Mo. 1929, which reads as follows:

> "When any person shall be convicted of two or more offenses, before sen-

> tence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction."

Providing for cumulative punishment, there is also Section 12969, R. S. Mo. 1929, which provides:

> "The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law, and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held: Provided, that if such convict shall be sentenced to death, such sentence shall be executed without regard to the sentence under which said convict may be held in the penitentiary."

Section 3715 R. S. Mo. 1929, provides the essentials of a formal judgment upon a conviction for a felony and is as follows:

> "Whenever a judgment upon a conviction shall be rendered in any court, the clerk of such court shall enter such

> judgment fully on the minutes stating briefly the offense for which such conviction shall have been had, and the court shall inspect such entries and conform them to the facts; but the omission of this duty, either by the clerk or judge, shall in nowise affect or impair the validity of the judgment."

Both judgments rendered, although coming from different Circuit Courts at different times, are in substantial conformity to the statutory requirements. It cannot be said that the judgment of either Circuit Court, is rendered beyond the jurisdiction of either court, nor is either sentence uncertain as to time or place of punishment, and as said before, both meet with statutory requirements as to form and style. Nor can it be said that the punishment in either instance does not conform to the statutory punishment provided for said felonies. In affirming said judgments the Supreme Court has already passed favorably on the form and substance of the judgments and sentences of the trial courts.

In 16 Corpus Juris, page 1372, Section 3228 the law is stated thus, and Missouri cases are used as authority:

> "When not otherwise directed by statute, or by the sentence of the court, as a general rule the term of imprisonment for which defendant is sentenced begins with the first day of actual incarceration in the prison, unless actual imprisonment is prevented by some cause other than the fault or wrong of defendant. * * * *."

Although some states by legislative act have so provided, we have no statute in Missouri expressly providing in criminal cases that the judgment and sentence of the court shall set out specifically the date from which imprisonment shall be computed. In Missouri

a judgment and sentence of a court of competent jurisdiction is legal when it is in good form and conforms to the statutory punishment, which was done by both Circuit Courts in the problem presented.

CONCLUSION.

It is our opinion that the mandates of the Supreme Court must be executed by the warden as per the judgments and sentences of the Trial Court, and that the prisoner under said mandate must comply with the conditions set out in same. In affirming the judgments and sentences rendered by the Trial Courts the Supreme Court held same sufficient in form and substance in their opinions in said cases.

Since neither of said judgments or sentences fixes the date when imprisonment shall begin, and since the start of said sentences was stayed by reason of appeals to the Supreme Court, this stay of execution continued until the date that the Supreme Court passed on said appeals. It is our opinion that sentence in the kidnapping case started on the first day of incarceration in the penitentiary under Supreme Court mandate for said offense, and that since he was already confined in the penitentiary at the time that the appeal for carrying a weapon was disposed of by mandate of Supreme Court, it is our opinion that sentence in that case starts from January 15, 1932, the date that the Court issued the mandate to the warden in said cause. It is our further opinion that in so far as such two judgments and sentences overlap as to time of incarceration, they are to run concurrently with each other. Such a confinement is by "authority of law."

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

SECRETARY OF STATE - Depositories of motor vehicles required to give bond; not entitled to deduct amount of F. D. I. in fixing amount of bond.

February 13, 1935

2-20

FILED

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion upon the following state of facts:

> "Since the enactment of a Federal statute providing for the incorporation of Federal Deposit Insurance Incorporation and further providing for membership therein by state banks and national banks and other member banks, the question has arisen as to whether a member bank carrying that Federal Insurance could be taken by the Motor Vehicle Department of the Secretary of State's office as having complied with the provisions of Section 7784.
>
> "This Section provides for the deposit of fees for the registration of motor vehicles, etc. to be deposited by the Secretary of State in a bank at the location of a branch office and such depositories shall be required by the Secretary of State to give a good and sufficient bond or other legal security in an amount equal or exceeding any sum deposited. In other words, the bank's contention is that since it carries the F. D. I. as a protection to depositors that it should not be required to execute the bond or furnish security to the Secretary of State to an amount up to the Five Thousand Dollars.

"There is apparently no way by which the Secretary of State may know that the depository selected, which at the time of its selection was a member bank in F. D. I. Incorporation, has continued to carry that protection for the benefit of its depositors. There are other pitfalls which would intervene between the bank and its depositors and the Secretary of State not having a bond as this statute requires or other security, leave the State without protection to these funds.

"We would be glad to have your opinion on the subject and especially whether the F. D. I. could be taken for an amount up to Five Thousand Dollars without bond or other security and if it could, what it should furnish to the department as evidence of that fact and how it would keep the department informed as to its continuing existence. 'Other legal security' is rather broad in its meaning. It could, of course, include a deposit of bonds or securities put up as collateral. As I understand, the banks merely desire to write a letter or make an oral statement that they do carry the Federal Insurance."

Section 7784, Revised Statutes of Missouri, 1929, provides inpart as follows:

"All fees for the registration of motor vehicles, trailers, chauffeurs, operators, certificates of title and motorcycles provided for herein shall be collected by the secretary of state and deposited in a bank where the branch office collecting same is located. Such depositories shall be required by the secretary of state to give a good and sufficient bond or other legal security in an amount equaling or exceeding any sum that may be deposited therein. * "

#3 - Honorable Dwight H. Brown

Prior to the amendment of the above statute in 1927, Laws Mo. 1927, p. 308, the secretary of state was without authority to deposit such funds in local banks where the collector was located, and the depositing of such funds by the Secretary of State was illegal and created in the bank receiving such deposit a trust fund in favor of the State of Missouri. State ex rel. Gentry v. Page, Bank of St. Louis County et al, 14 S. W. (2d) 597.

The 1927 amendment provided that the money should be deposited in a bank where the branch office collecting same is located. This is the only authority for the secretary of state to make such a deposit, and in making that deposit he must comply with all the terms of Section 7784, which requires a bond. No exception is made as to the amount of additional security carried by the bank, such as F. D. I., and therefore a bank becoming a depository of such state funds must give the bond required by the statute in an amount equal to or exceeding any sum that may be deposited therein.

It is, therefore, the opinion of this office that the secretary of state must receive a bond in compliance with Section 7784, and that the amount of F. D. I. protection for the bank is not a factor in the acceptance of this bond.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

FUNERAL CONTRACT: Issuance and performance of death benefit contract as violation of R. S. Missouri, 1929, Articles 9 and 10.

March 12, 1935.

FILED
11

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of February 14, 1935, such request being in the following terms:

"This Department is receiving inquiries from various parts of Missouri concerning a type of death benefit contract which is being used by undertakers. Please find contract of J. Fred and Emma C. Terhune of Savannah, and one of Orr and Company of St. Vernon, attached hereto.

Briefly, the contract provides that the holder of the contract (who must be in good health at the time the contract is signed) must pay $1 membership fee and 50¢ per month. In return for these payments, the undertaker will furnish a complete funeral, including casket, embalming, robe, dress, grave marker, hearse and services of funeral director, up to $100.00.

It is possible that this form of death benefit may come within the jurisdiction of the Insurance Department of Missouri. Sec. 5909 expressly prohibits any association of individuals, and any corporation transacting in this state any insurance busine s without being authorized to do so by the Superintendent of Insurance. There are certain exceptions, however, such as an association 'having a lodge system with ritualistic form of work', which does not apply to our present problem. Sec. 5014-5023 covers associations for the purpose of furnishing funeral or burial benefits for their members, and Sec. 5018 provides penalty of fine and imprisonment for anyone who shall furnish or attempt to furnish any burial or funeral benefit without first complying with the provisions of this article. It would appear that these contracts in question are in direct conflict with Sec. 5018.

It has also been suggested that these contracts perhaps come within the scope of Sec. 4986.

I have been asked whether these contracts are within the scope of the Missouri Securities Act, Sec. 7724 (e)., and if not within its scope, what sections of the statutes cover. Your ruling is respectfully requested."

The two specimen contracts sent with your letter are substantially identical, and we therefore set out one of them, which is as follows:

"MEMBERSHIP CONTRACT

-with-

ORR AND COMPANY

Of Mt.Vernon,Missouri

Phones 53-22 and 53-222 — All collections made at Office of Orr & Co.

THIS IS TO CERTIFY THAT_____ having paid the membership fee of $1.00 is a member of the Orr & Co. Undertaking Co. Mortuary Contract, and is entitled to all benefits and privileges set forth in the articles of agreement, as follows.

In consideration of $1.00, above mentioned, the Orr & Co. Mortuary burial contract upon the death of_____ or the death of any member of his or her family consisting of the following named persons (who must be in good health at the time of signing the same)_____

_____

Agree to furnish a complete funeral, consisting of the following articles: CASKET, EMBALMING (when desired), ROBE, DRESS, GRAVE MARKER, HEARSE, and SERVICES OF FUNERAL DIRECTOR, within fifty miles of Mt. Vernon, Missouri.

The Orr & Co. Mortuary Contract is a plan for the sole purpose of taking care of its members at a reasonable expense of burial.

The holders of these Contracts shall be required to pay an assessment of fifty cents the first of each month. This is to take care of the deaths which may occur from month to month. Said assessment will not be oftener than once each month. This Contract will be

null and void if the fifty cents is not paid by the tenth of each month.

This Contract will be null and void if the applicant is not in good health at the time of the application for membership.

In the case of death all members must receive services from Orr & Co. Undertaking Co., Funeral Directors of Mt. Vernon, Mo.

The owners of this contract will not be responsible for the burial expense to any other Undertakers, unless Orr & Co. Mortuary are first informed of death of said member and said firm of Orr & Co. Mortuary make arrangements for another Undertaker to furnish said funeral merchandise.

Funeral merchandise used in this plan is on display at the Undertaking Room of Orr & Co. Mortuary subject to inspection at any time. A credit of $100.00 will be allowed any member who may wish a more expensive funeral than that furnished by the contract.

The value of the said Contract is as follows: All members over ten years old $100.00; Children under ten years old $50.00. There is no age limit, except a child must be at least one month old before he or she can become a member. It is further agreed that a child born into the family may become a member at the age of one month, by parents registering name with Secretary.

Should the death of a member occur at a point impossible for the firm of Orr & Co. Undertaking Co. to care for, then the Contract holder will be entitled to a casket, outside box and robe equal in value to $100.00 which will be sent to the place where member is dead.

In witness whereof the Orr & Co. Mortuary Funeral Contract has caused this instrument to be executed by its President and Attested by its Secretary.

Name and Address of Contract Holder:

_____

_____

_____

_____
President.

_____
Secretary.

As we understand your letter, your chief interest is in knowing if this contract as executed and performed, violates any law of this State, and if so, under what law could proceedings be brought on account of it.

R. S. Missouri, 1929, Section 5018, which is contained within Chapter 32 of such statutes relating to corporations, and within Article 10 of such chapter which relates to benevolent, religious, scientific, fraternal-beneficial, educational and miscellaneous associations, is as follows:

> "Any person, who, for himself, or as the agent for any firm, company, corporation, society or association, shall furnish, or attempt to furnish, any burial or funeral benefit without first complying with the provisions of this article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not less than three months nor more than six months, or by both such fine and imprisonment."

On its face this statute would clearly apply to the benefits furnished under the contract under consideration, unless Section 5019 withdraws it from the application of Section 5018. Section 5019 provides as follows:

> "This article shall not be so construed so as to apply to life insurance companies, associations or societies authorized to do business under the provisions of chapter 37, R. S. 1929, nor to any society which pays sick or disability benefits exclusively to its members; nor to any society which limits its membership to a particular class of persons, or to the members of a designated person, firm or corporation; nor to any society composed exclusively of the employes of any department of any municipal, county or state government, or to the employes of any department of the national government."

These exceptions under Section 5019 do not include the contract in question. It is necessary to consider, in determining the applicability of Section 5018, if the company issuing this contract is a life insurance company, association or society under the meaning of the insurance laws of this State, because the exception is only applicable to companies, associations or societies <u>authorized</u> to do business under the insurance laws, and we gather from your letter

that the State has not given its sanction to the issuance of the contracts in question by the issuance of a permit or charter under any statute of this State.

We have found no cases interpreting the provisions of Sections 5018 and 5019.

R. S. Missouri, 1929, Chapter 32, Article 9, relates to Co-operative Companies. Section 4986, contained in such article, defines the companies to which the article is applicable, and on its face this statute would lend itself to the construction that to do business by executing and performing contracts of the type under consideration would bring the company or firm doing such business within the provisions of such Section 4986. Although companies under this article are under the jurisdiction of the supervisor of building and loan associations (Sections 4987, 4991 and 4993), the courts in construing this article have not confined its application to companies or firms doing business related to a building and loan business, but have held it to be applicable to devices to sell or dispose of diamonds (State ex rel. Hickman v. Preferred Tontine Mercantile Co., 184 Mo. 160, 82 S.W. 1027 (1904)), and suits of clothes (State ex rel Cantley v. Meyer Tailoring Co., 25 S.W. (2nd) 98 (1929)).

As to whether or not this contract is a security within the meaning of the Missouri Securities Act (R.S. Missouri, 1929, Section 7724 (c)) we refer you to our opinion to you dated July 24, 1934, dealing with the "Guardian Foundation". As we pointed out in that opinion, there is no authority in this State on whether or not a funeral benefit contract is a security within the meaning of the statutes, and the cases in other states construing similar statutes are not in sufficient agreement to make it possible for us to say that this type of contract is or is not a security, and in view of the fact that there are two statutes of this State which seem with a reasonable degree of certainty to be applicable to the business in question, it would seem to us inadvisable to attempt to invoke a third statute the applicability of which is in doubt.

In conclusion, it is our opinion that engaging in the business of issuing and performing contracts in the form submitted with your letter and set out above, without obtaining any authority from the State of Missouri for the same, is a violation of the laws of this State, and that proceedings to enforce liability for such acts could appropriately be brought under either Article 9 or Article 10 of R.S. Missouri, 1929.

Very truly yours,

APPROVED:

EDWARD H. MILLER
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

BLIND vs.)
PAUPERS:)

Blind Pension discussed; duty of husband to use pension in support of his wife and family.

3-32

March 19, 1935.

FILED
//

Miss Lucile Bruner
Assistant Social Director
Missouri Relief and Reconstruction
Commission
412 E. High Street
Jefferson City, Missouri

Dear Miss Bruner:

This is to acknowledge your memorandum as follows:

"Mrs. Mary E. Ryder advises us that the blind pension is not a relief measure, but rather, a gratuity paid to the blind person in lieu of his sight, and as such, can not be considered as a family income.

In determining eligibility for relief from FERA funds, we are governed by rules and regulations, as follows:

A. 'Relief shall be given as provided in this act to all needy unemployed persons and/or their dependents. Those whose employment or available resources are inadequate to provide the necessities of life for themselves and/or their dependents are included.'

B. 'The amount of relief to be given must be based on the following:

'(1) An estimate of the weekly needs of the individual or family including an allowance for food sufficient to maintain physical well-being.

'(2) An estimate of the weekly income of the family, including wages or other cash income, produce of farm or garden, and all other resources.

'(3) The relief granted should be sufficient to provide the estimated weekly needs to the extent that the family is unable to do so from its own resources.'

C. 'To carry out the purposes of the Federal Emergency Relief Act of 1933 the investigation of all applications for direct and/or work relief is required. The minimum investigation shall include a prompt visit to the home; inquiry as to real property, bank accounts, and other financial resources of the family; an interview with at least one recent employer; and determination of the ability and agreement of family, relatives, friends, and churches and other organizations to assist; also the liability under public welfare laws of the several States, of members of a family, or relatives, to assume such support in order to prevent such member becoming a public charge.'

In making an investigation it is mandatory that the social worker take into consideration all available resources of the family. The blind pension always has been considered as a definite financial asset and we have asked that that income go to maintaining the household, the same as a soldiers' pension or disability allowance. Where this income is adequate to meet the needs of the family we have not certified such family for additional relief. If, however, the blind pension allowance is not adequate to meet the family's budgetary requirements, the difference between the total amount of the

budget and the amount of the blind pension is allowed.

With limited relief funds it would work a definite hardship on relief agencies if we were not able to utilize this blind pension income for family needs. Since, according to the Federal Regulations, income under public welfare laws is a consideration, we would like to continue with authority to count that as a resource in the family."

The question presented concerns whether or not a blind pension may be used as a resource in determining the income of a family, the family being defined as "a unit or group living together under one roof."

Chapter 51, Article 1, R. S. Mo. 1929, pertains to "Pensions to deserving blind." Section 8893 of said article and chapter provides that one to receive a pension must possess certain qualifications, namely: (1) Over twenty-one years of age; (2) of good moral character; (3) resident of the State of Missouri; (4) lack of income and property qualifications, and (5) not being maintained in public, private or endowed institutions, etc. It is well to keep in mind this provision in Section 8893, supra, relative to income and property qualifications:

"Provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of six hundred ($600.00) dollars or more per annum from any source whatever, or who owns property, or has an interest in property to the value of five thousand ($5,000.00) dollars or more, or who lives with a sighted husband or wife who has an income or is the recipient of six hundred ($600.00) dollars or more per annum from any source whatever or has property or an interest in property to

> the value of five thousand ($5,000.00) dollars or more, or who has a parent or parents, resident in this state who upon the investigation of the commission may be found to be able to provide for the reasonable support of such applicant; "

It is thus seen that one could have an income of $559.00 a year, or an interest in property of $4999.00, and possessing the other qualifications, still be eligible to a pension. We direct your attention to this fact to show that while a blind pension is ordinarily used for the support of a person, yet, under certain facts and circumstances, it would not be so used.

Corpus Juris, Vol. 48, page 786, paragraph 2, says the following:

> "Pensions, it is said, are mainly designed to assist the pensioner in providing for his daily wants. A pension is not a matter of contract, and is not founded upon any legal liability. No man has a legal vested right to a pension; it is a mere bounty or gratuity given by the government * * and 'springing from the appreciation and graciousness of the sovereigh.' It may be bestowed on such persons and upon such terms as the lawmaking body of the government prescribes. * * * And although existing pension laws may entitle one to a pension, the government may, at its pleasure, at any time, change the amount thereof or revoke or destroy it altogether."

Article IV, Section 47, Constitution of Missouri, provides in part as follows:

> "That the General Assembly of the State of Missouri shall cause an annual tax of not less than one-half of one cent nor more than three cents on the one hundred

> dollars valuation of the taxable property of the State to be levied for the purpose of providing a fund to be devoted in the manner provided by law to the pensioning of the deserving blind."

In State ex rel. Palmer v. Thompson, 297 S. W. 62, l. c. 63, the Supreme Court of Missouri, en Banc, said:

> "The entire matter of pensions for the deserving blind was thereby left to the General Assembly."

From the above we conclude that the blind pension is a gratuity and is given to a person physically handicapped by loss of eyesight for his use and support.

The question then presents itself as to whether or not a blind person would have to share this pension with any other person or persons. The answer to this question depends upon the status (husband) of the person. In other words, if there is an obligation on the person to support another, then it could be said that if his pension was more than enough to support him then he would have to use part of it in the support of dependant or dependants.

In Howard County v. Enevoldsen, 224 N. W. 280, l. c. 282, the Supreme Court of Nebraska said the following:

> "In Inhabitants of Poland v. Inhabitants of Wilton, 15 Me. 363, it was held that where a father was able to support himself , but was unable to support his wife and children, he was a poor person or pauper within the meaning of the law."

This brings us to a consideration of the duty of a father (husband) to support his wife and children.

Corpus Juris, Vol. 30, page 516, in part reads as follows:

> "It is the duty of a husband to support and maintain his wife and family. There

> is not only a moral obligation resting on the husband to support his wife, but also a duty imposed by law."

And further, page 518,

> "As between husband and wife the primary obligation to provide for the support of the wife rests on the husband. The duty of a husband to support his wife and family is paramount to that of paying his debts."

In Missouri there is a criminal statute that provides in part as follows (Section 4026, R. S. Mo. 1929):

> "If any man, shall, without good cause, * * * or shall fail, neglect or refuse to maintain and provide for such wife; * * * or refuse to provide the necessary food, clothing or lodging for his or her child or children born in or out of wedlock, under the age of sixteen years, * * *, he or she shall, upon conviction, be punished * * * * * *."

However, ahusband cannot do the impossible, that is, if he is a poor person and does not have the means he cannot provide the necessaries for his wife and children. However, if he does have the means and fails to do so, then he would be liable.

Broadus v. Broadus, 221 S. W. 804.

In Jennings v. City of St. Louis et al., 58 S. W. (2d) 979, the Supreme Court of Missouri, en Banc, l. c. 981, said the following:

> "The good of society demands that when a person is without means, and unable, on account of some bodily or mental

> infirmity, or other unavoidable cause, to earn a livelihood,' he is entitled to be supported at the expense of the public. 'It is immaterial how the alleged pauper is brought into need, as it is the fact of the situation and not the method of producing it that is important.' 'So the fact that a person's want is the result of gross intemperance does not prevent him from securing relief as a pauper.' 'An able-bodied man, who can, if he chooses obtain employment which will enable him to maintain himself and family, but refuses to accept employment, is not entitled to public relief, though relief may be properly extended to the wives and children of such men.' 21 R. C. L. 705, 706. It necessarily follows that an able-bodied man, who is unable to obtain employment on account of the economic conditions existing at the time, and who is without means of support, is entitled to public relief."

Article 4, Chapter 90, Section 12950, R. S. Mo. 1929, provides as follows:

> "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Thus, if a person is poor he is to be relieved, maintained and supported by the county in which he resides.

As to a husband being liable to pay for the necessaries of his wife, we quote from the Supreme Court of South Dakota in the case of Haakon County v. Staley, 243 N. W. 671, l. c. 672:

> "The support alleged to have been furnished by the first cause of action consisted of 'necessaries.' The husband's

> liability for necessaries is not changed by the fact that he is in the penitentiary. Ahern v. Easterby, 42 Conn. 546; Moran v. Montz, 175 Mo. App. 360, 162 S. W. 323."

In Moss v. Moss, 1 P. (2d) 916, the Supreme Court of Washington, l. c. 918, said:

> "The duty of a parent to provide support for an adult son who is unable to earn his livelihood because of bodily infirmity or by reason of mental disability is statutory. No legal liability existed at the common law."

In Missouri we find no statute that provides that the parent shall support an adult child or that a child shall support a parent. However, certain States, namely, Nebraska, Washington, Michigan and others, have statutes providing that if a parent is a pauper that the child financially able must support same. In other words, those states cast the burden upon relatives to support and look after those not able to provide for themselves, the same as the common law places the burden upon the husband to support his wife and minor dependent children.

CONCLUSION.

From the above we conclude and it is our opinion, (1) that the blind pension is a gratuity not founded on contract and is to be used in the supplying of the daily wants of the pensioner, (2) that if the pensioner has a lawful wife, then he is under liability to her support insofar as he is able, (3) that if the pensioner has minor dependent children, then he is liable for their support to the extent only as far as he is able, (4) that the blind pension fund, then, would only be considered a resource in the case where a blind pensioner had the duty and obligation imposed upon

him to support other people, and this duty and obligation only goes to the extent of his ability, in other words, so that he does not deprive himself and place himself on the charity or alms roll.

We are returning herewith your file.

Yours very truly.

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG
Encs.

INHERITANCE TAX: Method of paying the tax.

4-26

April 24, 1935.

FILED
11

Hon. T. E. Broderick,
Judge of Probate Court,
Pemiscot County,
Caruthersville, Mo.

Dear Sir:

This department is in receipt of your letter of April 18 requesting an opinion as to the following state of facts:

> "A question has arisen here as to the proper manner of paying inheritance tax.
>
> Should the entire amount of assessed tax be sent direct to the State Treasurer and should he then send the two and one-half per cent due the Probate Judge, or should these two payments be made separate to the administrator or the heirs - that is, should the two and one-half per cent due the Probate Judge be paid directly to him and the balance of ninety-seven and one-half per cent be remitted to the State Treasurer, or should the whole amount be sent to the State Treasurer and he then remit the 2½ per cent to the Probate Judge of the county in which the proceedings have been had. * * * "

Section 580, R.S. Mo. 1929 provides in part as follows:

> "Every sum of money retained by any executor, administrator, or trustee or paid into his hands for any taxes on any property or derived from any source whatever for the

payment of any such taxes shall be paid by him within thirty days thereafter into the state treasury except two and one-half per cent of such tax, which he shall pay to the probate judge for his fees. * * * * *"

CONCLUSION

In view of the foregoing, by the plain terms of the statute itself, there is no question but that the executor or administrator paying the inheritance tax due under Article 21, Chapter 1, R.S. Mo. 1929 as amended, should send the fee due the Probate Court direct to said court, and send the balance due the State of Missouri direct to the State Treasurer.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

RECONSTRUCTION FINANCE CORPORATION: Said Corporation and its subsidiaries are instrumentalities of U.S. government and State of Mo. has no power to impose taxes thereon

4-26

April 26, 1935.

FILED
11

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of April 25, 1935 requesting an opinion as to the following state of facts:

> "The Reconstruction Finance Corporation is desirous of domesticating a Maryland corporation created by it and the stock in which is the property of the Federal Government through R.F.C., and representation has been made to this office that the Attorney General of the United States has asked that the corporation be domesticated but that the State of Missouri collect none of the fees ordinarily levied, pointing out Federal ownership of the corporation.
>
> The question is simply whether or not I shall collect the ordinary fees."

While the facts as stated in your letter do not so disclose, we assume that the Maryland corporation is a subsidiary corporation of the Reconstruction Finance Corporation and incorporated with the same general purposes.

The Reconstruction Finance Corporation was created as a part of the Emergency Relief and Construction Act of 1932.

Section 602, Title 15, U.S.C.A. provides:

> "The corporation shall have capital stock of $500,000,000, subscribed by the United States of America, payment for which shall be subject to call in whole or in part by the board of directors of the corporation."

While the purposes of the corporation are many and varied, generally it may be said that the corporation was formed for the convenient and expeditious transaction of government business and as a part of the Emergency Relief and Construction Act. In other words, the corporation is employed as an agency for the exercise of the constitutional powers of the United States, and it would seem clear that no tax or burden of any kind or description may be imposed upon said corporation by the State of Missouri.

In the case of King County, Wash. v. United States Shipping Board Emergency Fleet Corporation, 282 Fed. 950, the Court held that shipyard property of the United States Shipping Board Emergency Fleet Corporation was exempt from taxation by the State of Washington even though the legal title was in the corporation, a private corporation since the government caused the corporation to be formed, held all of its stock, furnished all of its capital, and owned the entire beneficial interest in its property. The Court said (l.c. 953-954):

> "Clearly, in the matter of expending this public money, under the direction of Congress and the President, in the purchase of property for governmental purposes, and in taking and holding the legal title thereto, the corporation was acting as a naked trustee, and the entire beneficial interest was in the government. And what does it matter that the Fleet Corporation may, in a measure, have had the status of an ordinary corporation? Let us assume that it was purely a private concern, and originally had none of the attributes of a public agency, and then let us suppose that by Congress and the President, with its consent, public funds were placed in its custody, to be expended by it in the acquisition of shipyards for government uses, and it was authorized to take and hold the legal title thereto; would it be contended that such property continued to be

> subject to state taxation merely because the legal title was held by a private corporation having no real interest? The taxable character of property is to be referred to the status of the real, rather than of the nominal, owner. Private property is not exempt from taxation because the government holds the legal title thereto, and by parity of reasoning neither is public property taxable because the naked legal title is in a private person. Carroll v. Safford, 3 How. 444, 11 L. Ed. 671; Witherspoon v. Duncan, 4 Wall. 210, 18 L. Ed. 339.
>
> "In principle the case is not unlike those cases where, for convenience, a state has created corporate bodies to hold property for and manage public educational and charitable institutions, and other governmental projects, and attempts have been made to tax property so held."

In the case of Clallam County v. United States, 68 L. Ed. 328, Mr. Justice Holmes held that a state cannot tax the property of a corporation organized by the Federal Government to produce material for war purposes, the property of which is conveyed to it by, or bought with money of, the United States, and used solely for the purposes of its creation.

This case is particularly in point here for the reason that the Spruce Production Corporation (the corporation involved) was a corporation created by the United States as an instrumentality for carrying on the World War, while the Reconstruction Finance Corporation was created by the United States as an instrumentality in its conflict with domestic conditions affecting the peace and welfare of our people. Mr. Justice Holmes said (l.c. 331-332):

> "The incorporation and formal erection of a new personality was only for the convenience of the United States, to carry out its ends. It is unnecessary to consider whether the fact that the United States owned all the stock

and furnished all the property to the corporation, taken by itself, would be enough to bring the case within the policy of the rule that exempts property of the United States. Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U.S. 151, 29 L. Ed. 845, 6 Sup. Ct. Rep. 670. It may be that if the United States saw fit to avail itself of machinery furnished by the state, it would not escape the tax on that ground alone. But when we add the facts that we have recited, we think it too plain for further argument that the tax could not be imposed."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the Reconstruction Finance Corporation and its subsidiaries are instrumentalities of the United States Government, and that the State of Missouri is without power to impose any tax or burden whatsoever on said corporations. It follows, therefore, that the fees ordinarily levied on corporations by your department should not be so levied in the instant case.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

FEES--CORONER'S INQUEST: Fees claimed in Coroner's Statutory Statement of costs of inquest as costs against the County must be audited by the County Court and the Auditors should disallow inquest fees claimed but not provided for by Statute.

April 30, 1935.

5-7

FILED
11

Honorable John B. Brooks
Presiding Judge
County Court of Grundy County
Trenton, Missouri

Dear Sir:

Your letter requesting an opinion from Honorable Forrest Smith, State Auditor, was referred to this office, and reads as follows:

"You will find enclosed a bill of costs for a Coroner's inquest held in Grundy County, Missouri.

"We are sending it to you for an audit before allowing the same. We offer the following explanations that may help in the audit;

"Dr. Kimberlin is a physician and surgeon.

"There is but one subpoena for witnesses on file in the Circuit Clerk's office (all names on one.)

"One summons for jury on file.

"No post-mortem examination was held.

"Should the Sheriff's bill be paid with no order from theCoroner on record for his services?

"Should the Coroner be paid $15.00 per day for his services as charged on bill?

"We will appreciate a complete audit and will furnish any further information at our command.

> "Also please find enclosed bill presented to the County Court by Miss Agnes Mae Wilson, retiring Prosecuting Attorney of Grundy County, Missouri. The first two items are allowed, should the remainder of the bill be allowed?
>
> "What we want to know about these bills is what is legal and right for us to pay so that our books will audit properly."

We also acknowledge receipt of the enclosures referred to in your letter. We are returning said enclosures herewith. Our opinion follows:

46 Corpus Juris, page 1014, Section 233, provides as follows:

> "The person rightfully holding an office is entitled to the compensation attached thereto; this right does not rest upon contract, and the principles of law governing contractual relations and obligations in ordinary cases are not applicable. Public officers have no claim for official services rendered except where, and to the extent that, compensation is provided by law, and, when no compensation is so provided, the rendition of such services is deemed to be gratuitous.* * * *"

Section 11632 R. S. Mo. 1929, provides certain conditions precedent to payment of costs by a County Court for expenses incurred at a coroner's inquest. Said Section provides:

> "The coroner or other officer holding an inquest, as provided for by this chapter, shall present to the county court a certified statement of all the costs and expenses of said inquest, including his own fees, and fees of jurors, witnesses, constables and others

> entitled to fees for which the county is liable; and the county court shall audit and allow the same, and shall make a certified copy of the same, without delay, and deliver such copy to the county treasurer, which copy shall be deemed a sufficient warrant or order on the treasurer for the payment of the fees therein specified to each person entitled to such fees. The county treasurer shall pay to each person on demand, or to his legal representatives, the fees to which he is thus entitled, and shall take the proper receipt therefor, and produce the same in his settlements with the county court as vouchers for the money so paid out by him."

In construing the provisions of the above section our Supreme Court said in Carmack v. Dade County, 127 Mo. 527, l. c. 529; 30 S. W. 162:

> "By section 2462, Revised Statutes, 1889, it is made the duty of the officer holding the inquest to present to the county court of the county in which the inquest is held a certified statement of all the costs and expenses of said inquest, including his own fees, the fees of jurors, witnesses, constables and others entitled to fees for which the county is liable. The certificate of the coroner in this case was in evidence, was <u>prima facie</u> evidence that the services were rendered for which fees were charged as therein stated, and in the absence of proof to the contrary, was all that was necessary to justify the finding and judgment of the court. The judgment is affirmed."

Our Supreme Court construed together sections 11802 and 11632, supra, in the case of Houts v. McCluney 102 Mo. 13, l. c. 16; 14 S. W. 766, and said:

> "In the first place, no costs are allowed by the common law. They are, with us, creatures of the statute. They must be paid in the amounts and in the manner specified in the statute. Sections 5156 and 5613 are clear and unambiguous. They make the county liable for the fees allowed the coroner, jurors, witnesses and the constable in all inquests where the coroner has reasonable cause to believe that the person, over whose body the inquest is held, came to his death by violence or casualty."

It is the constable's duty to attend the coroner at inquests.

Section 11612 R. S. Mo. 1929 provides:

> "Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty, being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

Section 11613 R. S. Mo. 1929 provides:

> "Every such constable to whom such warrant shall be directed shall forthwith execute the same, and shall repair to the place where the dead body is, at the time mentioned, and make return of the warrant, with his proceedings thereon, to the coroner who granted the same."

Section 11614 R. S. Mo. 1929, provides:

> "Every constable failing to execute such warrant or to return the same shall forfeit and pay the sum of eight dollars."

The constable's fees are allowable under the provisions of Section 11777, which provide:

> "Constables shall be allowed fees for their services as follows:
>
> "For serving a summons, rule, notice or order of a justice of the peace in any case.....$0.60
>
> "For serving warrant in any criminal case, for each defendant. 1.00
>
> "For summoning each jury before a justice of the peace. . 1.00
>
> "For taking a criminal to jail . 1.00
>
> "And for every mile traveled in taking a criminal to jail and returning therefrom, provided the distance so traveled be more than five miles, the sum of, per mile. 10
>
> "For serving each execution . .. 1.00
>
> "For taking every bond required by law to be taken. 50
>
> "For subpoenaing a witness 50
>
> "For serving a writ of attachment. 1.00
>
> "For each mile actually traveled in serving any process . .. .10

"For each day or part thereof required in erecting the booths, taking them down, and attending any election in his township, when required to do so by the judges of election, per day. $3.00

"For serving a writ of restitution 1.00

"For every return on non est on a writ, original or judicial. 25

"For return of nulla bona 25

"For issuing garnishee summons on execution. 35

"For receiving and keeping property taken on execution or attachment, or under the order of the justice, such compensation as may be awarded by the justice making such order or from whom the process issued. For collecting after suit brought, and paying over to the plaintiff for all sums collected on executions or other process, where property has been levied on, three per cent. and one and one-half per cent. where money is paid to the constable on summons, execution or other process, without levy, or to the person entitled thereto, his agent or attorney, to be paid by the debtor: Provided, however, that in all townships having more than seventy-five thousand inhabitants the constable shall receive the same fees and compensation as are allowed by law to sheriffs and marshals of such counties."

Fees allowable to jurors at a coroner's inquest are set out in Section 11797 R. S. Mo. 1929, which provide in part:

"Jurors shall be allowed fees for their services as follows:

"For each juror attending a view inquest or execution of a writ of ad quod damnum, per day. $1.00
* * * * * * * * * * * * * * * * * * * *"

Fees allowable to witnesses at a coroner's inquest are set out in Section 11798, R. S. Mo. 1929, which is in part as follows:

"Witnesses shall be allowed fees for their services as follows: For attending any court of record, reference, arbitrators, commissioner, clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, $1.50. For like attendance out of the county where witness resides, each day, $2.00. For traveling each mile in going to and returning from the place of trial, .05.* * * *"

In the case of Hagener v. Pulitzer Publishing Company, 172 Mo. App. 436, l. c. 451; 158 S. W. 54, the Appellate Court said:

"Preliminary to an inquiry whether it was privileged, it is important to say whether it was plaintiff's official duty as the sheriff of the county to attend the coroner's inquest. We conclude it was not. The statute makes it the duty of the constable of the township to attend the coroner at an inquest."

Section 12109 R. S. Mo. 1929, provides as follows:

"If a claim against a county be for work and labor done, or material furnished in good faith by the claimant, under contract with the

> county authorities, or with any agent of the county lawfully authorized, the claimant, if he shall have fulfilled his contract, shall be entitled to recover the just value of such work, labor and material, though such authorities or agent may not, in making such contract, have pursued the form of proceedings prescribed by law."

CONCLUSION.

It is the opinion of this office that all persons or officers attending a coroner's inquest must be able to point to the Statute allowing them fees for services at said inwuest before said inquest fees can be said to support a legal demand against the County. As was said in the Houts case, supra, costs in a coroner's inquest are "creatures of Statute".

The certified statement of the coroner, which you submitted with your request, is required by virtue of 11632, supra. This Section also requires that it is the duty of the County Court to audit said statement, and after auditing the same against illegal and unearned fees it becomes the court's duty to certify a copy of the correct audited statement to the County Treasurer who is then to pay the allowed claims.

It is our further opinion that the coroner's statement of legal inquest costs does not prove itself. Said statement to be properly audited must be checked against the different statutes allowing fees to coroners, jurors, witnesses, constables and others entitled to fees for which the county is liable.

In auditing the coroner's statement against the fee statutes, set out supra, it is our opinion that the following corrections should be made by the County Court in the coroner's statement now before us for consideration, viz:

If there were twenty-eight subpoenas issued by the coroner, he would be entitled to the $7.00 claim which he presents. If twenty-eight persons were subpoenaed on

one subpoena, then the $7.00 claim should be corrected to read $0.25. You state in your letter that only one subpoena was issued. The coroner is entitled to $0.25 per subpoena, and not $0.25 per person subpoenaed under provisions of Section 11802, supra.

The claim of $105.00 for seven days service at $15.00 per day should be corrected by a disallowance, as there is no provision in the Statute allowing a per diem for services of the coroner at an inquest. The coroner's services for which he can charge are listed in the Statutes.

We find the other claims of the coroner for fees to be statutory and allowable, if the services were performed. The total of $119.25 should be corrected to total only statutory fees payable by County Treasurer after the Court's audit, and even then the fees should not be allowed unless the statutory service was rendered.

In auditing the Constable's fees, presented in the coroner's statement, it is our opinion that the following corrections should be made by the County Court, viz:

The charge of $3.00 for summoning jury of inquest is not allowable under the provisions of Section 11777, supra, and should be corrected by a disallowance. It is true that Sections 11612, 11613, and 11614 make it the duty of the coroner to summons the jury and attend the coroner's inquest, but where no fee for the service is provided, it is a gratuitous service required by law, and the cases so hold.

The constable's charge of $18.00 for attending an inquest for six days should be corrected by a disallowance. There is no provision in the Statute allowing a per diem to the constable for this service. It is just another one of those gratuitous services required by law.

We find the other fees claimed by the coroner, to the use of the constable, to be statutory and allowable if the service was performed. The total claim of $35.00 should be corrected to total only statutory fees payable by County Treasurer after an audit, and even then the fees should not be allowed unless the service was performed.

We find the fees claimed by the coroner, to the use of each juryman, in accord with Section 11797, supra. If the services were rendered the jurors' fees should be allowed.

We find the fees claimed by the coroner, to the use of witnesses, to be only $1.00 per day. Section 11798, supra, provides that said witness fees should be $1.50 per day. This claim should be changed allowing each witness $0.50 more per day after which the total witness fees which now reads $36.00 should be changed to correspond to the corrected total.

The fees which the coroner has claimed to the use of The Rex Studio, C. U. Alexander, Sheriff Edwin D. Lloyd, C. C.Frane and O. R.Rooks are not statutory inquest fees, and should not be allowed by the Court in auditing fees chargeable to this inquest. These services are extraneous to services for which inquest fees have been provided for by Statute. As claims against the County they should be audited as other claims against the County are audited by the County Court, but not as the statement of the coroner presenting legal claim due from a coroner's inquest.

The grand total now showing total fees and expenses to be $359.15 should be changed to include the correct total of only fees allowed by the Court's audit.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

INHERITANCE TAX: When there is insufficient prope[illegible]estate, only proceedings necessary is for Probate Court to make [illegible]er that estate is not subject to tax, unless existence of other pro[illegible]erty or erroneous appraisement be shown.

June 21, 1935.

FILED

Hon. T.E. Broderick,
Judge of Probate Court,
Pemiscot County,
Caruthersville, Mo.

Dear Sir:

This department is in receipt of your letter of recent date requesting an opinion as to the following state of facts:

> "When an order is issued by the Probate Court 'Refusing Letters of Administration' for insufficiency of property and there is real estate involved, how should the report on 'Transfer and Inheritance Tax' be handled?"

Section 585, R.S. Mo. 1929 provides in part as follows:

> "* * * Such court or the judge thereof in vacation shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the said court or judge, that such estate is not subject to the tax provided for in this law, such finding and opinion shall be entered of record in said court, and thereupon the provisions of section 583 shall become inoperative as to the

holders of funds or other property thereof, and there shall be no further proceedings relating to such tax, unless upon the application of interested parties the existence of other property or an erroneous appraisment be shown. * * *"

CONCLUSION

In view of the foregoing, it is the opinion of this department that if there be insufficient property in an estate so as to exempt said estate from the inheritance tax laws of the State of Missouri, then the Probate Court may make an order that such estate is not subject to the tax and no further proceedings relating to the tax need be taken unless upon an application of interested parties, the existence of other property or an erroneous appraisement be shown.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH

NAMES: +
EMBLEMS: --

Colorable imitations of the name "Better Business Bureau" cannot be registered under Article II, of Chapter,136, R. S. Mo. 1929.

6-29

June 28, 1935.

FILED

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "Confirming conversation of this date, will you please furnish us with an opinion on applications for registrations of emblems, etc., submitted by the Better Business Bureau of St. Louis, with particular reference to the purposes set forth in the applications."

Appended to your letter is the original letter of F. E. Williams, Attorney, at St. Louis, Missouri, which reads as follows:

> "Enclosed you will find applications, in duplicate, for the registration of emblems, insignia and names under Article II, Chapter 136, Revised Statutes of Missouri, 1929, together with a check for $6.00 to cover your fees for registration.
>
> "The applications for registration cover the following:
>
> Better Business Bureau;
> Better Business Men's Bureau;
> Better Business Association;
> Better Business Men's Association;
> Better Business League; and
> Better Business Men's League."

Also find attached six applications of the Better Business Bureau, of St. Louis, Missouri, to register emblems, insignia and name under Article II, Chapter 136, R. S. Mo. 1929. There is also attached a cashier's check of F. E. Williams, in the amount of six dollars.

We note from the above letter that Mr. Williams desires to register connotations and derivations from the incorporated name of "Better Business Bureau" of St. Louis, Missouri, under Article II, Chapter 136, of Revised Statutes of Missouri, 1929, and in particular under Section 14340 of Article II, of Chapter 136, supra. Said section provides as follows:

> "Every person, society, association or corporation, assuming, adopting or using the name of a military, ex-military, patriotic, benevolent, humane, fraternal or charitable organization incorporated or organized under the laws of this or any other state or of the United States and members whereof may wear or exhibit the recognized or established badge, button, emblem, decoration, insignia or charm thereof, or any emblem, insignia or charm representing a component part of the said recognized or established badge, button, emblem, decoration, insignia or charm, shall write out the name of such military, ex-military, patriotic, benevolent, humane, fraternal or charitable organization, together with a description of such recognized and established badge, button, emblem, decoration, insignia or charm, and the component parts of such badge, button, emblem, decoration, insignia or charm, and sign and acknowledge the same before some officer competent to take acknowledgment of deeds, and file the same, together with a facsimile of said badge, button, emblem, decoration, insignia or charm, shall write out the name of such military, ex-military, patriotic, benevolent, humane, fraternal or charitable organization, together with a description of such recognized and established badge, button, emblem, decoration, insignia or charm, and the component parts of such badge, button, emblem, decoration, insignia or charm, and sign and

> acknowledge the same before some officer competent to take acknowledgment of deeds, and file the same, together with a facsimile of said badge, button, emblem, decoration, insignia or charm, and the component parts of said badge, button, emblem, decoration, insignia or charm, for registration in the office of the secretary of state; said secretary shall deliver to such person, society, association or corporation so filing the same and entitled thereto under this article, a duly attested certificate of the filing of the same, for which he shall receive a fee of one dollar; such certificate shall, in all suits and prosecutions under this article, be sufficient proof of the adoption of such badge, button, emblem, decoration, insignia or charm, and the component parts thereof, and of the right of such person, society, association or corporation to adopt the same."

It is evident from a careful perusal of the above statute that the Legislature intended to protect every person, society, association or corporation from other organizations assuming, adopting and using the name or emblem of such person, society, association or corporation that had appropriated and used such names or emblems. It is our opinion that the Legislature, when enacting the above section of the statute was mindful of the fact to use the words of the Court in 270 Fed. loc. cit. 731, "the mere incorporation of an organization under a particular name does not add anything to its right to use the name as against another organization **** already using the same or similar name." You will further note that if certain requirements of the above section of the statutes are met that any person, society, association or corporation will receive a certificate as provided for and that in all suits and prosecutions under Article II, Chapter 136, supra, will be sufficient proof of adoption of such emblems and of the right to adopt same.

Section 14338 of R. S. Mo. 1929, prohibits the misuse of names of certain societies, and reads as follows:

> "No person, society, association or corporation shall assume, adopt or use the name of a military, ex-military, patriotic, benevolent, humane

> fraternal or charitable organization incorporated or organized under the laws of this or any other state or of the United States, or a name so nearly resembling the name of such incorporated organization as to be a colorable imitation thereof, or calculated to deceive any person with respect to such corporation. In all cases where two or more such societies, associations, corporations or organizations claim the right to the same name or names substantially similar as above provided, the organization which was first organized and used the name and first became incorporated or organized under the laws of the United States or of any state in the union, shall be entitled in this state to the prior and exclusive use of such name, and the rights of such societies , associations, corporations or organizations and of their individual members shall be fixed and determined accordingly."

It is the opinion of this department that an attempt is made by the Better Business Bureau of St. Louis to register under the provisions of Article II, Chapter 136, supra, what might be, every colorable imitation of their original incorporated name. A careful reading of the six applications heretofore mentioned and submitted along with your request for an opinion clearly bears this out.

We are of the opinion that the above mentioned sections of the statutes did not contemplate the registration of every colorable imitation, connotation or derivation of an organization's incorporated name, but that to register under its provisions the original incorporated name or emblem of a military, ex-military, patriotic, benevolent, fraternal, humane, or charitable organization used in connection therewith would be sufficient.

We conclude that the names submitted cannot be registered

nor may the corporate name be registered inasmuch as such non-profit association's name is not the name of any military, ex-military, patriotic, benevolent, fraternal, humane, or charitable organization within the meaning of Article II, of Chapter 136, supra.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

PRINTING: State Contract - Eleemosynary Printing for Old Age Pension under State Printing contract.

July 11, 1935

FILED
11

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter, which is as follows:

> "Hon. W. Ed Jameson, Chairman of the Eleemosynary Board, has taken up with the Commissioners of Public Printing, the question of buying the printing requirements in connection with the administration of the Old Age Pension act under the state's printing contract.
>
> "While it would seem that this question has been answered in your opinion bearing date of May 17, 1934, in which you hold that requirements for the Blind Commission come under the contract, we are referring this matter to you for legal advice.
>
> "Are the Commissioners of Printing to take care of the requirements in connection with the administration of Old Age Pensions under the contract?"

A. Section 13799, R. S. Mo. 1929, contains, among other things, these provisions:

> "All work to be executed for the executive departments shall be ordered through the commissioners of public printing, and a requisition shall be obtained in advance signed by the head of the department ordering such work, and said requisition shall be approved by the commissioners of public printing in the same manner as that provided in section 13802 of this law respecting the examination of accounts. The executive departments shall in this and other sections of this chapter be construed to mean both the heads of said departments and the subordinate branches thereof, the boards, commissions, bureaus and officers appointed by the heads of said departments, except the boards of educational and eleemosynary institutions of the state."

The exception of "the boards of educational and eleemosynary institutions of the State," gives rise to the question under consideration.

The Supreme Court has said:

> "The evident purpose of this statute (Public Printing Act) is to promote the economical administration of that branch of the public service to which it has reference." (State v. Hackmann, 282 S.W. 1007, 1009.)

Certainly the Legislature was as much concerned in promoting the economical administration of the eleemosynary institutions as of the service rendered through other executive departments and their subordinate branches. But at the time of the enactment of said Section 13799, each of the several eleemosynary institutions of the State had a separate board which conducted its administration from the place where the institution was located. It was evidently thought by the Legislature that the small amount of printing required by each of the institutions

could be procured locally without jeopardizing needful economies. The situation just suggested, which no longer exists, no doubt caused the Legislature to except the boards of the eleemosynary institutions from the provisions of the Public Printing Act, and that, I think, should be kept in mind on construing the statute.

B. By the Act of 1921 (Laws Mo. 1921, page 380), the separate boards of the State Eleemosynary Institutions were abolished and those institutions were put under the care, management and control of one board of managers consisting of six persons. The act was carried forward in the revision of 1929 as Article I, of Chapter 40. Section 8560 found in that Article, defines the State Eleemosynary Institutions as follows:

> "The state hospital No. 1, at Fulton, the state hospital No. 2, at St. Joseph, the state hospital No. 3, at Nevada, the state hospital No. 4, at Farmington, the Missouri state sanatorium, at Mount Vernon, and the Missouri state school, at Marshall, are hereby declared to be state eleemosynary institutions of the state of Missouri within the meaning of the provisions of this article."

The statute by specifically enumerating certain state institutions as the Eleemosynary Institutions of the State necessarily excludes the idea that any other institution in the State may be classed or recognized as a State Eleemosynary Institution. And it is only while engaged in the care, management and control of the institutions so specifically named that the individuals comprising the Board of Managers act as the Board of Managers of the State Eleemosynary Institutions. These same individuals administer the Blind Pension Law, but while so doing they act as the Commission for the Blind (see opinion of Attorney General with reference to printing for the Commission for the Blind, rendered May 17, 1934, at the request of the Secretary of State.)

C. The title to the Old Age Assistance Act recites that the Act, among other things, is "to create the

Board of Managers of the Eleemosynary Institutions as a State Board, to administer this Act and to fix the compensation, powers and duties thereof."

Section 1 of the Act provides:

"When used herein, the term 'State Board' shall mean the Board of Managers of the Eleemosynary Institutions."

Section 2 provides:

"The State Board shall administer the provisions of this Act and may appoint such clerical and office assistance, and such deputies as may be appropriated for by the General Assembly. Each member of the State Board shall receive not to exceed $50.00 per month for his services as such in addition to all other compensation provided by law."

Section 6 provides:

"Old Age Assistance may be granted only to an applicant who, * * * is not at the date of making application or of receiving aid an inmate of any prison, jail, insane asylum or any other public reform or correctional institution."

From the foregoing, and other provisions of the Act, the following is to be noted:

1. When the six individuals entrusted with the care, management and control of the Eleemosynary Institutions of the State are so engaged, they are the Board of Managers of the Eleemosynary Institutions; when they are administering the Old Age Assistance they are the "State Board".

2. The powers and duties of the State Board are separate, distinct and wholly disassociated from those of the Board of Managers of the Eleemosynary Institutions.

3. No inmate of any eleemosynary institution is eligible for old age assistance; the Act does not contemplate the segregation of persons entitled to or receiving such relief in any institution whatsoever.

4. The members of the Board of Managers of the Eleemosynary Institutions receive a specified separate compensation for their services as members of the State Board.

In other words, the Legislature created from the personnel of the Board of Managers of the Eleemosynary Institutions a new board to be known as the State Board, with powers and duties in no way related to the care, management and control of the Eleemosynary Institutions of the State. This new board is very clearly not within the exception of Section 13799, namely: "except the boards of educational and eleemosynary institutions of the state."

In an opinion heretofore rendered by this office of date of May 17, 1934, to the Secretary of State with reference to the duties of the State Printing Commission, who did the printing for the Missouri Commission for the Blind, the following was stated:

> "It will be observed that the duties and powers of the Commission were in nowise changed by the enactment of 1933. By Section 8888, as re-enacted, the name 'Missouri Commission for the Blind' is retained. Instead of the members of the Commission being appointed by the Governor, with the consent of the Senate, the appointments are made by the Legislature so that so long as there are members of the Board of Managers of the State Eleemosynary Institutions there will also be members serving as the Missouri Commission for the Blind. The same persons occupying two entirely

and unrelated offices with separate and distinct duties to be performed as to each office.

"The situation here is very similar to Section 18 of Article X of the Constitution of the State of Missouri, which provides that there shall be a State Board of Equalization in this state consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General. As to whether or not such state officers were ex-officio members of the State Board of Equalization, the Supreme Court of this State, in State ex rel. McGrath v. Walker, 97 Mo. 162, 163, said:

> 'It will thus be seen from the provisions of the constitution just noted, that the state officers mentioned in section 24, supra, are not ex-officio members of the state board of equalization, that is, their membership of that board is not the result of their holding certain state offices; but is the result of their appointment to such board by an independent and distinct provision of the constitution. 1 Burrill Law Dict., title ex-officio. But for such independent provision they would not have been members of such board.'

C. State Eleemosynary Institutions

Section 8560, Revised Statutes of Missouri for 1929, reads:

> 'The state hospital No. 1, at Fulton, the state hospital No. 2, at St. Jo-

> seph, the state hospital No. 3 at Nevada, the state hospital No. 4 at Farmington, the Missouri state sanitorium at Mount Vernon, and the Missouri state school at Marshall, are hereby declared to be state eleemosynary institutions of the state of Missouri within the meaning of the provisions of this article.'
>
> By specifically defining certain state institutions to be eleemosynary institutions, it necessarily follows that there are no other institutions in this state that may be classed or recognized as State Eleemosynary Institutions. An eleemosynary institution is generally defined as an institution, either public or private, devoted or dedicated to extending charity or giving alms.
>
> Words and Phrases, Vol. 3, p. 2343
> Words and Phrases, 3d Vol. (3d Series), p. 164."

And it was there held that the State Printing Commission was the authorized agency through whom the printing for the Blind Commission should be handled.

The act creating the Board charged with the duty of administering the old age pensions, creates a Board. The Board is named by the Legislature. It is a separate board from the eleemosynary board, and although the individual members who serve on this Board are the same individuals who sit on the eleemosynary board, the Board itself is distinct and separate from the eleemosynary board, and the State Printing Commission is not governed with respect to the printing required for the old age pension board by the restrictions or exceptions that pertain to the printing on behalf of the eleemosynary board.

#8 - Honorable Dwight H. Brown

CONCLUSION

Our opinion is that the printing that may be required by the old age pension board should be procured under the direction and supervision of the State Printing Commission.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

DW:FE

PENITENTIARY: Inmates confined in Boonville Reformatory cannot be transferred out of said Institution to Algoa upon reaching seventeen years of age.

July 22, 1935

FILED
11

Hon. George D. Bryant
Chairman Pardon and Parole Board
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter, as follows:

"The Penal Board of the Missouri State Penal Institutions desires information relative to a transfer of boys from the Missouri Training School for Boys at Boonville to the Intermediate Reformatory at Algoa.

The question is: does the Penal Board, with the approval of the Governor, have authority to transfer boys who are at the Missouri Training School for Boys and who have reached the age of seventeen years, to the Intermediate Reformatory at Algoa."

Article II of Chapter 44, R. S. Missouri 1929, and amendments, Laws of 1933, page 331, pertain to the Missouri Training School for Boys. Section 8345 Laws of Missouri 1933 provides as follows:

"The institution heretofore known as the "Missouri Reformatory," located at Boonville, Missouri, shall continue to be maintained and shall hereafter

> be designated as the 'Missouri Training School for Boys;' and wherever the words 'Missouri Reformatory' or the words 'Missouri Reform School for Boys,' or 'Missouri Training School for Boys' occur in the statutes they shall be held to mean and refer to the 'Missouri Training School for Boys' located at Boonville, Missouri.

Article VI, Chapter 44, relates to the Intermediate Reformatory at Algoa for young men. Section 8466 of said Article and Chapter provides as follows:

> "An intermediate reformatory for young men, who for the first time have been convicted of a felony as hereinafter designated, is hereby established."

It is thus seen that in Missouri there are two reformatories, namely, the Missouri Training School for Boys at Boonville, Missouri, and the Intermediate Reformatory at Algoa. Your question relates to the Missouri Training School for Boys located at Boonville,Missouri. Nothing is found in the statutes that permits the Governor or the Penal Board of the Department of Penal Institutions to transfer inmates incarcerated in the Missouri Training School for Boys at Boonville, to the Intermediate Reformatory at Algoa when such inmates become seventeen years of age. However, provision is made for the transferring of inmates confined in the Intermediate Reformatory at Algoa to the penitentiary. See our opinion dated August 16, 1934 to Hon. J. M. Sanders, Warden, a copy of which is hereto attached.

From the above, it is our opinion that an inmate confined in the Missouri Training School for Boys at Boonville, Missouri, upon reaching seventeen years of

age cannot be transferred to the Intermediate Reformatory at Algoa.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JLH:LC

Inclosure

TRADE-MARKS: Protection afforded trade-marks registered under state registration act.

8.30

August 29, 1935.

FILED
11

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion under date of August 6, wherein you state as follows:

> "This morning we have the following communication from Non-Allergic Products, St. Louis, Missouri:
>
> "'In May 1933 we made application to you through Mr. Ralph Kalish, Attorney of this city for registration of the Trade Mark "NON-ALLERGIC" to be applied to toilet articles and cosmetics. We received official notice from you dated May 11, 1933 of the registration of this trade-mark. Will you please inform us as to just what this registration means. Does it give us the exclusive right to use the name? Another firm in the East is applying for this same trade mark in Washington, D. C. and we would like to know where we stand in the matter. Find stamped return envelope enclosed. May we hear from you by return mail.'
>
> "We note Sec. 14329 R. S. Mo. states '....no trade-mark duly registered in the office of the commissioner of patents of the United States shall be registered under this section by any person other than the owner thereof.' We would like

to know, however, what protection is afforded a firm in a case such as above quoted, where the trade-mark is duly registered in the State of Missouri, but not registered in the U. S. Patent Office, and the trade-mark then applied for by another firm from the commissioner of patents. We are unable to find in our file of opinions from your office, where this point has been covered."

Section 14329, R. S. Mo. 1929, in setting out who may adopt a trade-mark, provides as follows:

"If any mechanic, manufacturer, association or union of workingmen, or other persons shall wish to adopt any particular name, term, design or device as his or their trade-mark to designate, make known or distinguish any article or goods, wares or merchandise by him or them manufactured or prepared, or any union of workingmen desire to designate or make known the place in which union labor is employed, he or they may write out a description of such name, term, design or device, describing the same accurately, and sign and acknowledge the same before some officer competent to take acknowledgment of deeds, and file same, together with a facsimile of the same, term, design or device for registration, in the office of the secretary of state; said secretary shall deliver to said mechanic, manufacturer, association or union of workingmen, or other persons so filing the same, a duly attested certificate of the filing of the same, for which he shall receive a fee of one dollar; such certificate shall, in all suits and prosecutions under this article, be sufficient proof of the adoption of such label, trade-mark or form of advertisement, and of the right of such mechanic, manufacturer, association or union of workingmen or (other) persons to adopt the same.

> No label, trade-mark or form of advertisement shall be registered that in any way resembles or would probably be mistaken for a label or trade-mark already registered; and no trade-mark duly registered in the office of the commissioner of patents of the United States shall be registered under this section by (any) person other than the owner thereof."

Assuming that a firm has its trade-mark duly registered in the State of Missouri, but not in the United States Patent Office, and a firm in some other state appropriates same to its use without having same registered in the United States Patent Office, what protection would the laws of the State of Missouri afford the owner of the trade-mark registered in this state?

In 63 C. J. 471, in discussing the extraterritorial effect of a trade-mark registered under a state statute, states as follows:

> "A state registration act has no extraterritorial effect, and so rights under state registration are not infringed by acts wholly done without the state."

In Rehbein v. Weaver et al., 133 Fed. 607, the court in holding that a suit can not be maintained in the Federal Court to enforce rights under a statute relating to trademarks, and providing for their registration, where the transactions complained of accrued outside of such state, said:

> "This is a proceeding to enforce in this district (Circuit Court, N. D. Illinois) complainant's rights under the Missouri statute. In Black on Interpretation of Laws, edition of 1896, it is stated that 'it is not within the competency of the legislative power, upon grounds of public policy, to create personal liabilities, and impose them on persons and property out of the jurisdiction of the state, and on account of transactions occurring beyond its territorial limits.' The

> bill seeks two remedies: (1) To restrain infringement of the Missouri registered trade-mark; (2) to restrain unfair competition. The record utterly fails to show a condition of facts which would warrant the relief prayed in the second case above set out. * * * As to the registered trade-mark, there is no jurisdiction in this court to enforce the Missouri law in regard to registration of trade-marks in the case of transactions occurring outside that state." (Case cited in McIlhenny Co. v. Bulliard, 33 Fed. (2d) 978, l. c. 980, to the same effect.)

From the foregoing we are of the opinion that no protection is afforded an owner of a trade-mark duly registered under the laws of this state, where the infringement of the trade-mark is without the State of Missouri, since our state registration act has no extraterritorial effect.

Assuming again that a firm has its trade-mark duly registered in the State of Missouri, but not in the United States Patent Office, and another firm applies for the same trade-mark in the latter office, has it granted, and attempts to use the same in the State of Missouri, what protection will the laws of Missouri afford the owner of the mark registered in this state?

Section 81 of Chapter 3 of the Laws of the United States of America, as amended April 11, 1930, which is substantially the same as the Trade-mark Act of 1905, sets out the general provisions for the registration of a trade-mark in the United States Patent Office as follows:

> "The owner of a trade-mark used in commerce with foreign nations, or among the several States, or with Indian tribes, provided such owner shall be domiciled within the territory of the Unites States, or resides in or is located in any foreign country which, by treaty, convention, or law, affords similar privileges to the citizens of the United States, may

> obtain registration for such trade-mark by complying with the following requirements: First, by filing in the Patent Office an application therefor, in writing, addressed to the Commissioner of Patents, signed by the applicant, specifying his name, domicile, location, and citizenship; the class of merchandise and the particular description of goods comprised in such class to which the trade-mark is appropriated; a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade mark has been used; a description of the trade-mark itself shall be included, if desired by the applicant or required by the commissioner, provided such description is of a character to meet the approval of the commissioner. With this statement shall be filed a drawing of the trade-mark, signed by the applicant or his attorney, and such number of specimens of the trade-mark as actually used as may be required by the Commissioner of Patents. Second, by paying into the Treasury of the United States the sum of $10, and otherwise complying with the requirements of this subdivision of this chapter and such regulations as may be prescribed by the Commissioner of Patents."

The court in the case of United States Printing & Lithograph Co. v. Griggs, Cooper & Co., (1929) 49 Sup. Ct. 267, 279 U. S. 156, l. c. 158, 73 L. Ed. 650, reversing (1928) 162 N. E. 425, 119 Ohio St. 151, which affirmed (1926) 161 N. E. 789, 28 Ohio App. 1, in construing the above section said:

> "The Act of 1905 goes a little farther and gives remedies against reproduction, etc., of the registered trade mark 'in commerce among the several states' as well as in commerce with foreign nations, etc., Sec. 16, supra. A remedy for such infringement was given in Thaddeus Davids Co. v. Davids

> Manufacturing Co., 233 U. S. 461, see also American Steel Foundries v. Robertson, 262 U. S. 209. Baldwin Co. v. Robertson, 265 U. S. 168. But neither authority nor the plain words of the Act allow a remedy upon it for infringing a trade mark registered under it, within the limits of a State and not affecting the commerce named."

Again, in holding that Congress has no power to enact a law affecting trade-marks or property rights in marks, except such as are used in interstate commerce, the court in the case of Macaulay v. Malt-Diastase Co., 4 Fed. (2d) 944, l. c. 945, 55 App. D. C. 277, said:

> "Registration is merely a method of recording, devised by Congress, for the protection of the public and the owners of trade-marks, and Congress can only exercise this authority over trade-marks used on goods sold in interstate commerce. It has not power to enact a registration law that will affect marks, or property rights in marks, used only in intrastate commerce. Trade-Mark Cases, supra."

From the foregoing we are of the opinion that if a firm has its trade-mark duly registered in the State of Missouri, our law will afford it protection from all intrastate infringements of its trade-mark, since Congress has no power to enact a law affecting trade-marks or property rights in marks, except such as are used in interstate commerce.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

SOLDIERS' BONUS: Widow of soldier is entitled to Soldiers' Bonus on presumption of soldier's death, and presumption of death is not available until after seven years has elapsed from the date that soldier was last heard of.

September 19, 1935. 9-20

FILED
11

Honorable H. W. Brown
Adjutant General
Jefferson City, Missouri

Dear Sir:

Your request for an opinion dated September 5, 1935, is as follows:

> "The widow of a veteran has filed claim for Missouri Soldiers' Bonus which has been approved for payment. Payment has not been made due to the fact that, although this veteran disappeared from his home October 8, 1920, and has never been heard of since, a record from the War Department, Washington, D. C. shows that this same veteran enlisted under another name and deserted the service Sept. 30, 1929. The War Department has no record of this man since he deserted in 1929.
>
> "On June 13, 1928, this veteran was declared to be legally dead by the Court in the County where he formerly resided. His widow was appointed administratrix of his estate on June 13, 1928.
>
> "This office desires to know, in view of the above facts, whether this claim can be paid to the widow of this veteran now."

Article IV, Section 44b, Missouri Constitution, provides:

> "In addition to the exceptions made and created in sections 44 and 44a, the General Assembly shall have power,

for the purpose of paying to each bona fide resident of the State of Missouri who served honorably in the military or naval forces of the United States of America at any time between the sixth day of April, nineteen hundred and seventeen, and the eleventh day of November, nineteen hundred and eighteen, a bonus of ten dollars for each and every month or major fraction of a month, that such resident was in active service, to contract or to authorize the contracting of a debt or liability on behalf of the state, and to issue bonds or other evidences of indebtedness thereof not exceeding in the aggregate, fifteen millions of dollars; such bonds or other evidence of indebtedness to bear interest at a rate not exceeding five per cent, per annum, payable semi-annually and maturing not later than twenty years from the date they bear. The said bonds and the interest that will accrue thereon shall be paid out of a fund to be provided by the levy and collection of a direct annual tax upon all taxable property in the state. It shall be the duty of the state auditor, annually, on or before the first day of July, to determine the rate of taxation necessary to raise the amount of money needed for that year to pay the principal and interest maturing in the next succeeding year, taking into consideration available funds, delinquencies and the cost of collection. The auditor shall annually certify the rate of taxation so determined to the clerk of the county court of each county and to the assessor of other officer in the city of St. Louis whose duty it may be to make up and certify the tax books wherein are extended the state taxes. It will be the duty of said clerks and the said assessor or other proper officer in the city of St. Louis to extend upon the tax books the taxes to be collected and certify

> the same to the collector of the revenue of their respective counties, and the city of St. Louis who shall collect such taxes at the same time and in the same manner and by the same means as are now or may hereafter be provided by law for the collection of state and county taxes, and pay the same into the state treasury. The legislature shall enact such laws as may be necessary to carry into effect this amendment. The wife or husband, child, mother or father, in the order named and none other, of any deceased resident who served honorably in the military or naval forces, as provided in this section, shall be paid the sum or allowance that such deceased resident would be entitled to receive hereunder if such deceased resident had lived: Provided, that no one person entitled to receive the bonus herein provided shall receive an amount exceeding two hundred and fifty dollars; and, provided, that no person shall be entitled to receive the bonus herein provided who, being in the military or naval service of the United States of America subsequent to the sixth day of April, nineteen hundred and seventeen, refused on conscientious, political or other grounds to subject himself to military discipline or to render unqualified service; and provided further, that no person shall be entitled to receive the bonus herein provided who was not a bona fide resident of the state of Missouri at least during the twelve months prior to the sixth day of April, nineteen hundred and seventeen, or who has received a state bonus from any other state in the Union."

Pursuant to this constitutional amendment the Legislature has provided in Section, 9, Laws of 1935, page 362 as follows:

It shall be the duty of the adjutant-general to determine as expeditiously as possible the persons who are entitled to the payments under this act and to make such payments in the manner herein preseribed. Applications for such payments shall be filed with the adjutant-general on or before December 31, 1936, and at such place or places as the adjutant-general may designatea and upon blanks furnished by the adjutant-general: Provided further, the adjutant-general shall have the power to adopt all proper rules and regulations not inconsistent herewith to carry into effect the provisions of this act; and provided further, that all officers of the state or any county and any city or town therein are hereby directed to furnish free of charge, in writing, any information that the records in his office may disclose relative to the identity, place and period of residence and the war service of any soldier claiming a payment under this act, whenever such information is required by the adjutant-general of any person making an application for such bonus or any part thereof; and any application for bonus heretofore filed and rejected may be filed before the adjutant-general and by him again heard; and if it appears that the rejection of the claim was erroneous, the rejection may be set aside, and the claim allowed and paid; and provided further that no department of the state government shall employ any clerks for the purpose of carrying out the provisions of this act, except the adjutant-general shall employ an examiner of soldier bonus claims and one stenographer for the handling of claims."

Money payable to the wife or husband, child, mother or father, of any deceased resident who served honorably

in the military or naval forces, must be paid in the constitutional order named and none other. In determining this order of payment the constitutional provision requires that the Adjutant General first determine that the bonus money in his hands is the service-right of a constitutionaly qualified soldier, and to pay to him only so long as he be alive. But, if he be dead then to pay this service-right, this bonus money, in the constitutional order and to the persons named in the Constitution. The constitutional payee changes on the death of the person prior in order. The Constitution provides for a succession of payees. The question arises in your request: When is the death of a person, prior in order, to be presumed when there is no proof of actual death?

It is true that an administrator can be appointed under the Missouri law, by the Judge having jurisdiction of his estate, to administer the estate of one absent and unheard of for seven years. Section 265 R. S. Mo. 1929 so provides.

The fact that this soldier's estate has been administered upon under the provision of Section 265, R. S. Mo. 1929, gives the administrator no claim to bonus money because by the very provisions of the Constitution this bonus money is payable to constitutional successors, persons in being, and not payable to any estate. To consider bonus money payable into any estate is an affront on the Constitution providing for the soldier's bonus.

Section 1709, R. S. Mo. 1929, provides for the presumption of death applicable in the case in question. This Section provides:

> "If any person who shall have resided in this state go from and do not return to this state for seven successive years, he shall be presumed to be dead in any case wherein his death shall come in question, unless proof be made that he was alive within that time."

In the case of Carter v. Life Insurance Company, 158 Mo. App. 368, l. c. 373; 138 S. W. 49, the Appellate Court had under consideration the above statute and they said:

> "But the presumption of death, which is the one on which the statute operates, only arises when these facts are present; first, residence

> of the person in this state; second, departure of that person from this state; third, the continued absence of that person from this state for seven successive years, no proof being made that he was alive within that time."

It is the opinion of this office that the widow of the soldier in question is next in succession to receive the Missouri bonus on the death of her soldier husband. It is our opinion that in the case before the Adjutant General, wherein she claims his death, the presumption of death will begin from the time that substantial proof shows him to have last been known to be alive. The facts show that he, in another state, deserted the army on September 30, 1929, showing conclusively that he was alive on that date. It follows, that after seven years from September 30, 1929, which would be after September 30, 1936, the widow can legally assert the statutory presumption of death, in support of her claim of his death, entitling her to the Missouri bonus. Until that time nothing short of his actual death will make her the constitutional successor to his bonus money. The fact that his estate was administered upon has nothing to do with the claim for bonus money, because this bonus money is not a part of his estate.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

SALES TAX: Job printing, lithographing, etc., done by printers and newspapers subject to the sales tax.

September 27, 1935.

10-21

FILED
11

Honorable Frank P. Briggs,
State Senator, Ninth District,
Macon, Missouri.

Dear Senator:

Sometime ago this department received a letter requesting an opinion as to the status of job printing and the liability of same for the sales tax as contained in House Bill No. 198. Your letter is as follows:

> "I note that in Auditor Forrest Smith's book on sales tax, pages 56 and 57 he includes printing.
>
> "I am asking for an official opinion from you as to whether or not printing is, in fact, included in the list of manufactured articles to be taxed.
>
> "If you will note, the legislature included printing committee substitute for House Bill No. 198 along with book binding, engraving, lithographing etc., lines 35, 36 and 37, Section 4 page 6 of the perfected bill.
>
> "I note that the state auditor has failed to include lithographers in the new tax, has also recognized book binding as a service and has generally construed that this particular section (1) was repealed by the adoption of the Clark amendment which did not mention printing in any way.
>
> "You, of course, know that I am interested in printing and this opinion is asked for my own information as well as for information of other printers in the state."

Under the original act the question of job printing, lithographing, etc., was a mooted question due to the fact that practically all of the charge was due to the skill and labor necessary to make the finished product. Conceding that the same situation with respect to printing now exists, however the new act which became effective August 27th is broader in its scope.

In a recent decision under the Illinois act, Burgess Co. v. Ames, 359 Ill. 1. c. 429, the court discusses the liability of blue-printers, photostaters and commercial photographers in the following language:

> "The raw material with which blue-printers and photostaters work is sensitized paper of such a chemical character as to be destroyed for any further use when exposed to light. It is alleged in the bill and admitted by the motion to dismiss that they have no property right in the sketch, drawing or other document which is brought to them to be reproduced or copied. By the use of their apparatus and the destruction of sensitized paper they produce for each individual customer the required copies of the customer's own property. It is the contention of the department that the paper, with the reproduction on it, is the subject of sale; but this can hardly be true under the act we are considering, because the paper is destroyed when the exposure is made, and it has no further use or value to anyone other than the person interested in that particular reproduction. We can perceive no logical difference between the paper upon which a photostatic copy of something is made or a blue-print produced, and that paper which a lawyer uses for writing a will or deed, a doctor for writing a prescription, or an abstracter for showing a chain of title. The paper is a mere incident; the skilled service is that which is required.
>
> "There is even less room for argument as to the case of commercial photographers. As above pointed out, they exercise an

> art whereby photographs are produced which are calculated to be of such quality and have such characteristics as to make them desirable for advertising or commercial purposes. The photographer hires the model rather than being paid by the person sitting for the photograph. Having produced a picture of artistic merit he then grants a license to the advertiser, retaining title to the picture itself and giving only the right to reproduce. This transaction confers upon the customer of the commercial photographer an intangible right, and while it is a property right it is nothing more than a license, and is clearly not a transfer of tangible personal property within the meaning of the Retailers' Occupation Tax act."

It is noted that commercial photographers were exempted for the reason that the title to the property was never actually transferred, but only a license granted.

As stated above, the new act is broader in its scope in the definition of "gross receipts". Laws of Missouri 1935, page 414:

> "(d) 'Gross receipts' means the total amount of the sale price of the sales at retail including any services that are a part of such sales made by the businesses herein referred to, capable of being valued in money, whether received in money or otherwise; provided, however, that 'gross receipts' shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. For the purposes of this Act, the total amount of the sale price above mentioned shall be deemed to be the amount received. It shall also include the lease or rental consideration where the right to continuous possession or use of any article of tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if

> outright sale were made; in such cases the same shall be taxable as if outright sale were made and considered as a sale of such article and the tax shall be computed and paid by the lessee upon the rentals paid."

Therefore, while under the Illinois act that form of printing may be exempt, yet by the definition of "gross receipts" under the Missouri act, we think the same is within the terms of the act because the recipient of the forms of printing mentioned above has the continuous right of possession or use of the article under a lease or contract, "and such transfer of possession would be taxable if outright sale were made" and "paid by the lessee upon the rentals paid. "

Referring to the usual job printing which the ordinary printing or newspaper office conducts, we think the situation very similar to the photographer. The State of Kentucky has an act very similar to that of Missouri and the Supreme Court of that state in deciding the question of whether a photographic studio was subject to the tax, said in the case of Cusick et al. v. Commonwealth et al., 84 S. W. (2d) 14:

> "Briefly stated, the facts pleaded are: Plaintiffs are operating and conducting a photographic studio in the city of Louisville, and are engaged in drawing, painting, enlarging, and making pictures, and in operating their said business of art studio they are not engaged in business as merchants, or otherwise selling or vending tangible personal property. Their work consists entirely of labor, and their said business is one of personal service requiring science, skill, and talent in drawing, painting, and enlarging pictures, and the small amount of material, such as chemicals, paints, oils, crayons, etc., going into the making or drawing of the picture is expressly exempted from taxation under the provisions of the Gross Sales Tax Law.
>
> "In addition to the facts pleaded, we have the following argument: The cost of a picture portrait or drawing is not the pasteboard or canvass on which it is painted or drawn, but is the art, skill,

and talent of the artist. It is a creation of art made under contract for a particular party. It is not kept for sale, cannot be sold, and never becomes merchandise within the meaning of the act. Though the argument is strongly pressed, we are inclined to the view that photographs fall within the provisions of the law. The tax is imposed on every merchant engaged in the sale of tangible personal property, and a merchant is 'a person regularly engaged in the vending of tangible personal property.' A photograph is personal property, and being corporeal in character, it cannot be doubted that it is tangible personal property. Not only so, but the act is not confined to personal property kept for sale. It is true that the term 'store' is defined 'as a building, room, or place in or at which tangible personal property is kept for sale,' but it is also defined as a place 'or from or at which such property is sold.' That being true, it is not necessary that the tangible personal property be kept for sale, but sufficient that it be actually sold. Coming to the argument that a photographer is engaged in selling service, and that service is not taxable, it must not be overlooked that the chief value of many articles consists in the cost of the service and skill by which they are produced, rather than the cost of materials out of which they are made. Moreover, the situation is not the same as if the patron took an article to another to be repaired and paid only for the service rendered. One who desires a photograph of himself or his family does not contract simply for service. He desires the finished article, and that is what he buys and what the photographer sells. It is true that the photograph is of a particular person, and that the market is limited, but that is more or less true in every case where clothing or other articles are made to order for a particular person, or a particular purpose, and are not regularly kept on hand."

CONCLUSION

We are of the opinion that by the terms of the act and by the decisions quoted, supra, job printing, lithographing, etc., are subject to the tax of one per cent as contained in House Bill No. 198.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:HR

CORPORATIONS:)
) Unconstitutionality of Act, pages 337-343
BRIDGE INCORPORATION:) Laws of Missouri, 1935: Senate Bill No. 119.

10-5

October 5, 1935.

FILED

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Attention: Wm. F. Goodman,
Corporation Attorney.

Dear Sir:

This is to acknowledge receipt of your letter of October 3, 1935, in which you request the opinion of this Department; your letter being as follows:

> "Application has been made to this Department by Messrs. J. L. Jones of Saline County, Tyre W. Burton of Howard County, and H. R. Turley of Saline County, for a certificate of incorporation as State Highway Toll Trustees under the provisions of Senate Bill #119, approved by the Governor on the 19th day of April, 1935, Laws of Missouri, 1935, pages 337-343 inclusive.
>
> "We respectfully request your official opinion as to the legality of said Act, and the procedure the Department should take in the premise."

Your first question is as to the legality of Senate Bill No. 119, found in Laws of Missouri, 1935, at pages 337-343, inclusive. Second, you inquire as to what procedure should be taken by your Department with reference

to the application of Messrs. J. L. Jones, Tyre W. Burton and H. R. Turley, for a certificate of incorporation as State Highway Toll Trustees under the provisions of the above Act.

It is our opinion that the Act is unconstitutional and void in that (1) it permits the creation of a public corporation by the voluntary act of not less than three, nor more than five, freeholders and qualified electors of this State,and does not require any legislative or judicial proceedings, but only the legislative action of the Secretary of State; (2) that the act attempts to create from taxation bridge and road properties constructed or acquired by the trustees for the benefit of the State of Missouri or for the benefit of any county or other political or civil subdivision of the State of Missouri; and (3) the Act is unconstitutional in that it attempts to exempt from taxation the bonds which it authorizes the trustees to issue, and, likewise, the income from such bonds.

As sustaining our position on the first point, we quote from the following cases:

There is a similarity between the Constitution of the State of Maine and the Constitution of the State of Missouri as to the distribution of the powers of government into three distinct departments, the legislative, executive and judicial, and in the case of State of Maine v. Butler, 105 Me. 91, l. c. 96, the Supreme Court of that State said the following:

> "The people of Maine, in organizing their government as a State, vested the legislative power of the government in a body 'to be styled the Legislature of Maine,' (Art. IV. Par. 1. Sec. 1.) and did not confer any such power on any other person or body, and did not authorize the legislature to do so. It follows that the legislature alone can exercise the legislative power and alone is responsible for its wise exercise,

and hence can transfer neither any of the power nor any of the responsibility to any other department or person. Says Judge Cooley in his Constitutional Limitations (6th Ed.) p. 137: 'One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.' The proposition needs no other citation of authority, and we do not find it any where doubted.

"Further, the people in their constitution expressly divided the powers of the government into three departments, the legislative, executive and judicial, and declared that 'no person or persons belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.' Art. III, Secs. 1, 2. Hence not only is the legislature not authorized to transfer any of its legislative power and responsibility, but it is expressly forbidden to transfer any part of them to a person or persons exercising either executive or judicial functions."

And we quote from the well-considered case of State of missouri, ex rel. Russell Field et al, Board of Police Commissioners of Kansas City, Missouri, Relators, vs. Smith et al., 49 S. W. (2d) 74, 329 Mo., l. c. 1026, as follows:

> "'One of the settled maxims in constitutional law is, that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws may be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.' (1 Cooley on Cons. Limitation, 224.)
>
> "'The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations, to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.' (Bailey v. Van Pelt, 78 Fla. 337.)
>
> "'The Legislature may, without violating any rule or principle of the Constitution, confer upon an administrative

board or officer a large measure of discretion, provided the exercise thereof is guided and controlled by rules prescribed therefor.' (People v. Products Co., 195 Cal. 548; see also Ex parte Cavanaugh, 313 Mo. 375, 280 S. W. 15; St. Louis v. Ice & Fuel Co., 317 Mo. 907, 296 S. W. 993; Merchants Exchange v. Knott, 212 Mo. 616, 111 S. W. 565, and cases cited.)"

From the above and foregoing it is our conclusion that the Act is unconstitutional, and, therefore, you should refuse to issue the certificate of incorporation as State Highway Toll Trustees to the above named applicants.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

CRH:EG

MOTOR VEHICLES: Passenger cars manufactured, assembled and sold after January 1, 1936, must be equipped with "safety glass."
Trucks need not be equipped with "safety glass" if passengers are not carried for hire.

October 26, 1935. 10-29

FILED
11

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

This is to acknowledge your letter dated October 21, 1935, as follows:

> "We are enclosing a copy of House Bill 176 pertaining to safety glass in motor vehicles. We quote a letter which was received this morning asking for an interpretation of the law as to whether or not it applies to trucks:
>
> > 'According to House Bill #176 recently passed, the State of Missouri requires safety glass in all vehicles sold on and after January 1st, 1936.
> >
> > 'From our interpretation of the intent of this law, it applies only to passenger cars and buses, and not to trucks.
> >
> > 'Will you kindly confirm the above, or give us your interpretation of this law?'
>
> "Please give us your opinion on this as we are having quite a number of inquiries."

House Bill No. 176, referred to in your letter, is found in Laws of Missouri, 1935, pages 295 to 297, and said Act, Section 2, provides as follows:

> "It shall be unlawful after January first, nineteen hundred and thirty-six, to sell in the State of Missouri, any motor vehicle, manufactured or assembled after said date, and designed for the purpose of carrying passengers, unless such vehicle be equipped in all doors, windows, rear windows and windshields with safety glass."

A reading of the above section shows that any motor vehicle designed for the purpose of carrying passengers must be equipped with "safety glass." A passenger automobile is designed (manufactured) primarily for the purpose of carrying passengers, while a truck is designed (manufactured) for the purpose of carrying property.

Section 7759, R. S. Mo. 1929, defines "motor vehicle" as follows:

> "'Motor vehicle.' Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors."

Webster's New International Dictionary defines "design" --- "To produce a scheme or plan for the making of anything."

If the manufacturer of an authomobile primarily designed a vehicle for the purpose of carrying passengers, then that vehicle would have to have the "safety glass." If a motor vehicle was primarily designed for the purpose of carrying freight or property, then it would not have to have "safety glass." However, any vehicle (truck, bus or passenger car) used for the purpose of carrying passengers for hire must be equipped with "safety glass."

Section 1 of said Act provides as follows:

> "It shall be unlawful after January first, nineteen hundred and thirty-six, to operate on any public highway or street, in this state, a motor vehicle registered in the State of Missouri, manufactured or assembled after said date, designed or used for the purpose of carrying passengers for hire, or designed or used for the purpose of carrying school children, unless such vehicle be equipped in all doors, windows and windshields with safety glass."

For a definition of the word "passenger" we invite your attention to State v. Rector, 40 S. W. (2d) 639.

From the above it is our opinion that a motor vehicle designed for the purpose of carrying freight or property, such as a truck, would not have to be equipped with "safety glass."

Section 4 of the Act, which provides in part as follows:

> "The Secretary of State * * * * * shall not issue a license for any motor vehicle unless such motor vehicle is equipped as provided in the act, with such approved types of safety glass.",

would be authority on the part of the Secretary of State to require a statement from every person seeking to register a motor vehicle that same was equipped with "safety glass," and if not so equipped, then an affidavit that said vehicle was not designed for the purpose of carrying passengers, or that said vehicle was not designed or would be used for the purpose of carrying passengers for hire.

The requiring of a statement or affidavit, as above suggested, is all that is necessary on the part of your Department to comply with the provisions of Section 4, supra.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

TRADE-MARKS: Must be affixed to a vendible commodity and does not apply to services.

11-7

November 6, 1935.

FILED
11

Honorable Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This department wishes to acknowledge your letter of November 1, wherein you state as follows:

> "On October 26 we registered the trade-mark Liberty Radio Shop for J. S. Tarrants of Liberty, Missouri, covering radio service. Mr. Tarrants turned his registration papers over to Alan F. Wherritt of Liberty, Mo., and received the enclosed letter from him, in which Mr. Wherritt states he is of the opinion that Section 14329 of the Statutes does not apply to service only.
>
> "We would like to have an opinion from you on this point. Mr. Tarrants has a competitor who is using the same name, and he is anxious to protect himself. We are enclosing our office copy of the trade-mark application for your information. Please return it with your reply."

Section 14329, R. S. Mo. 1929, provides who may adopt a trade mark, and how:

> "If any mechanic, manufacturer, association or union of workingmen, or other persons shall wish to adopt any particular name, term, design or device as his or

> their trade-mark to designate, make known or distinguish any article or goods, wares or merchandise by him or them manufactured or prepared, or any union of workingmen desire to designate or make known the place in which union labor is employed, he or they may write out a description of such name, term, design or device, describing the same accurately, and sign and acknowledge the same before some officer competent to take acknowledgment of deeds, and file same, together with a facsimile of the same, term, design or device for registration, in the office of the secretary of state; said secretary shall deliver to said mechanic, manufacturer, association or union of workingmen, or other persons so filing the same, a duly attested certificate of the filing of the same, for which he shall receive a fee of one dollar; such certificate shall, in all suits and prosecutions under this article, be sufficient proof of the adoption of such label, trade-mark or form of advertisement, and of the right of such mechanic, manufacturer, association or union of workingmen or (other) persons to adopt the same. No label, trade-mark or form of advertisement shall be registered that in any way resembles or would probably be mistaken for a label or trade-mark already registered; and no trade-mark duly registered in the office of the commissioner of patents of the United States shall be registered under this section by (any) person other than the owner thereof."

28 American & English Encyclopedia of Law (Second Edition), page 352, in holding that a trade-mark must be attached to the goods, states as follows:

> "It is essential to the validity of a trade-mark as such that there shall be some actual physical connection between the goods and the mark, so that the mark goes with the goods into the

> market. Words, marks, or symbols used in advertisements, circulars, and other similar ways, but not actually affixed to the goods, are not valid technical trade-marks. It is sufficient if the mark is affixed, either upon the goods themselves or upon the box or wrapper containing them, or is in some other way physically attached to the goods."

In the very early case of St. Louis Piano Mfg. Co. v. Merkel, 1 Mo. App. 305, l. c. 309, the court in holding that a trade-mark which is not in some manner put upon or affixed to the article indicated by it is almost a contradiction in terms, said:

> "From the best examination we are able to make of the subject, we are led to the conclusion that, so far as an article of merchandise is concerned, it can only be said to be distinguished by a trade-mark when that mark is connected with, annexed to, or stamped, printed, carved, or engraved upon the article as the same is offered for sale. The purchaser must be told that the particular thing he proposes to buy is of this or that character, by something connected with the thing itself. He must not be referred to some circular or advertisement for this assurance, nor can he receive it from the representations, by word of mouth, of the manufacturer or salesman. The impossibility of putting any restrictions upon the last may be a sufficient reason for not making the attempt; but the other branch of the proposition seems to be equally settled by judicial opinion. 'A symbol does not become a trade-mark until it is actually stamped upon, or otherwise affixed to, the goods to be sold,' is the language of Browne, in his treatise on Trade-Marks, section 311. This remark seems abundantly justified by the decisions of the courts which have adjudicated respecting trade-marks, besides being in harmony with what any

one of ordinary understanding would infer from the name itself.

"In 2 Brewster, 303 (Am. Trade-Mark Cases, 486-489), Judge Ludlow's attention was drawn to this point. Rowly v. Houghton. This conclusion was in conformity with a former decision that 'no right can be absolute in a name, as a name merely. It is only when that name is printed or stamped upon a particular label or jar, and thus becomes identified with a particular style and quality of goods, that it becomes a trade-mark.'

"In 54 Illinois, 439 (456, 457, for the passage cited), this point underwent a careful and accurate examination. The case was that of Candee, Swan & Co. v. Deere & Co. Mr. Justice Breese quotes the definition of the term trade-mark from Upton, and announces, as a conclusion which has his concurrence, that it is 'a symbol, or emblem, or mark which a tradesman puts upon, or wraps, or attaches in some way to the goods he manufactures; * * * the name, symbol, figure, letter, form, or device adopted or used by a manufacturer or merchant, in order to designate the goods he manufactures or sells, * * * to the end that they may be known in the market as his.'

"Without quoting more largely from this decision, we content ourselves with saying that we adopt the result of it, as far as the present question is concerned. We think that a trade-mark must be annexed to the article offered for sale; and that, if not so annexed, the article cannot be said to have a trade-mark."

In the case of Oakes v. Candy Co., 48 S. W. 467, 146 Mo. 391, l. c. 398, the court states as follows:

"A trade-mark which is not in some manner attached or affixed or stamped

> on the article indicated by it involves a contradiction in itself, the idea of some distinctive brand or mark being inherent in the expression itself.
>
> "An article can only be said to be distinguished by a trade-mark when that mark is connected with, annexed to or stamped, printed, carved or engraved upon the article as it is offered for sale. St. Louis Piano Co. v. Merkel, 1 Mo. App. 305; Browne on Trade-Marks, sec. 311; Rowley v. Houghton, 2 Brewster, 303; Candee Swan & Co. v. Deere & Co., 54 Ill. 439; Lawrence Mfg. Co. v. Tenn. Mfg. Co., 138 U. S. 537."

Again in the case of Grocers Journal Co. v. Midland Pub. Co., 105 S. W. 310, 127 Mo. App. 356, l. c. 366, the court states:

> "And indeed it is the law that there is not and can be no exclusive ownership of the words or symbol which constitute a trademark apart from the use or application of such words or symbol to a vendible commodity and in order for one person to have that proprietary interest which is always incident to technical trademark, sufficient to support an action looking to the protection of this property right, the mark must be stamped or otherwise affixed to a vendible commodity or thing actually in the market for a sufficient length of time at least to have obtained currency, acceptance and reputation under and associated with the mark which points or otherwise identifies its origin, ownership, or manufacture. (McAndrews v. Bassett, 4 De Gex, J. & S. 380; Browne on Trademarks (2 Ed.), secs. 129, 130, 301, 302; McMahan Phar. Co. v. Denver Chem. Co., 51 Fed. 302."

63 C. J. 314 sets out what goods are subject to trade-mark and states as follows:

> "Strictly speaking, trade-marks are applicable only to articles of traffic, that is, such articles as are bought and sold in the market. Sometimes the term is loosely applied to names and marks used in a business, but not in connection with articles of traffic. This use of the term is inaccurate and probably means no more than that such names and marks will be protected under the doctrine of unfair competition. A valid technical trade-mark may be acquired for use in connection with any lawful vendible commodity, and it is immaterial whether such article be natural or artificial, so long as it is the subject of barter and sale in the market."

We wish it to be understood that we are only passing on the specific question raised, viz., whether Section 14329, supra, applies to services, and hence for the basis of this opinion it is not necessary, nor have we gone into the question of whether the use of the name or mark "Liberty Radio Shop" used in a business offering radio services will be protected under the doctrine of unfair competition.

CONCLUSION

From the foregoing cases and authorities and upon an examination of Section 14329, supra, we are of the opinion that the latter does not apply to services. A trade-mark owes its existence to the fact that it is actually affixed

to a vendible commodity, and it is apparent that, radio service being in its nature intangible, a trade-mark can not be actually stamped upon or otherwise affixed to it.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

WOS:

MW:HR

PENAL BOARD--CRIMINAL COURTS--JUDGMENT: Penal Board has no authority to accept prisoners committed to Industrial Home for Negro Girls at Tipton, Missouri, contrary to law.

November 6, 1935. 11-7

FILED
11

Honorable George D. Bryant
Chairman Pardon and Parole Board
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"On the first day of August, 1935, at the July 1935 term of the Dunklin County Circuit Court, the above named negress, who was but fourteen years of age, entered a plea of guilty to a charge of second degree murder. The Court sentenced this girl to a term of twelve years imprisonment, commuting the sentence to confinement in the Industrial Home for Negro Girls at Tipton, Missouri.

"The sentence provides that she shall remain in the Industrial Home for Girls until she arrives at the age of twenty one years and she shall then be transferred to the State Penitentiary to serve the remainder of her sentence.

"She has been delivered to and received at the Industrial Home for Negro Girls.

"Question: Has the Penal Board authority under our Statutes to accept this negro girl at the Industrial Home for Negro Girls under her plea of guilty to a charge of second degree murder?"

The facts in your case show that a fourteen year old negress was informed against under the general criminal law in the Circuit Court of Dunklin County for the crime of murder in the second degree, and upon her plea of guilty sentenced to a term of twelve years imprisonment, a part of the confinement to be in the Industrial Home for Negro Girls at Tipton, Missouri. We assume the procedure followed by the Court was in accordance with Ex parte Bass, 40 S. W. (2d) 457.

Section 8379 R. S. Mo. 1929, pertains to the State Industrial Home for Negro Girls and specifically designates who may be committed to the institution. We quote said section.

> "All commitments to the industrial home for negro girls of negro girls over the age of ten and under the age of eighteen shall be made by the juvenile division of the circuit court. Every negro girl over the age of ten years and under the age of twenty-one years, who shall be convicted of any offense not punishable with imprisonment for life, or whose associations are immoral or criminal, or bad and vicious, or who is incorrigible to such an extent that she cannot be controlled by her parents or guardian or in whose custody she may be, may be sentenced to said industrial home until she shall reach the age of twenty-one years, if the court or magistrate before whom such conviction shall be had deems the girl so convicted a fit subject to be committed to said home, and the age of the girl so committed to be indorsed on the commitment."

One of the underscored provisions of the above section shows that only negro girls over the age of ten years and under the age of eighteen years shall be committed when the commitment is made by the juvenile division of the Circuit Court. In this case the negress was not committed by the juvenile division of the Circuit Court, but by the Circuit Court, consequently that pro-

vision is not authority for her commitment. The second provision then recites that "every negro girl over the age of ten years and under the age of twenty-one years who shall be convicted of any offense not punishable by imprisonment for life." It is to be noted that a negro girl between those ages could be committed to Tipton by order of the Circuit Court if the offense was not punishable by life imprisonment. In the instant case the negress was convicted of a crime punishable with life imprisonment. The penalty of second degree murder is found in section 3984 R.S. Mo. 1929, which provides a punishment of not less than ten years nor more than life imprisonment. Consequently when the Circuit Court accepted a plea of guilty on the part of the negress to a second degree murder charge, and said punishment could have been life imprisonment, the Court did not have authority under Section 8379, supra, to commit said negress to the Negro Industrial Home at Tipton, Missouri. It is to be further noted that said section only gives the Court jurisdiction to sentence a prisoner to the home until said prisoner reaches the age of twenty-one years. In this case the sentence is divided, part to run until she reaches the age of twenty-one in the Tipton Home, the balance of the term to be served in the Penitentiary.

16 Corpus Juris, page 1305, Section 3081 provides:

> "While it is the better practice, in pronouncing sentence on one convicted of crime, to specify the place of imprisonment, a sentence is not void because it does not specify the particular prison in which accused shall be incarcerated, where the statute designates the prison. A sentence which provides that defendant shall be confined in some place other than that designated in the statute is void,* * * *."

CONCLUSION.

We are of the opinion that the Penal Board has no authority to accept this negro girl at the Indus-

trial Home for Negro Girls under the facts stated in your letter. There is no statutory authority for the commitment which was issued, hence it is void on its face.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

ELECTION CONTESTS: Judgment of Circuit Court constitutes certificate of election, and if deposited with bond, regular in every way, with Secretary of State, the Governor may issue the Commission.

12-11

December 9, 1935.

FILED
11

Honorable Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of November 29 wherein you request the opinion of this office in regard to the Circuit Clerk of Green County. Your letter is as follows:

> "We received today the bond of James S. Johnson of Springfield, Mo. in the amount of $35,000, which states that he has been adjudged by judgment of the Circuit Court elected to the office of Clerk of the Circuit Court of Greene County. No official notification of his election has been received, and no commission has been issued to him by the Governor. This is the case of a contested election and Jack W. McKee has been serving as circuit clerk.
>
> "Please advise what constitutes official notification in a case of this kind."

From the attached certified copy of the judgment of the Circuit Court of Greene County it appears that a contest in the office of Circuit Clerk of said county was recently completed and the contestant, James S. Johnson was awarded the office. The judgment was evidently in conformity with Section 10340, R.S. Mo. 1929, which is as follows:

You mention having received a bond in the amount of $35,000. We assume this is in conformity with Section 11668, R.S. Mo. 1929, which provides:

> "The certificate of the election of any clerk, signed by the presiding judge of the county court, and the bond of every clerk, shall be deposited in the office of the secretary of state, with the approval of the court or judges indorsed thereon."

Section 11669, R.S. Mo. 1929 relates to the taking of the oath and the certificate of election, and is as follows:

> "The certificate of his election shall be delivered by the presiding judge of the county court to each clerk elected, which, with the oath of office indorsed thereon, shall be recorded in the office of the recorder of the county, before any other duty of his office is discharged."

The bond should be recorded in the office of the Recorder of Deeds as provided in Section 11671, which provides:

> "All bonds of clerks and recorders of deeds shall be recorded in the recorder's office in their respective counties, and then deposited in the office of the secretary of state."

The only section relating to the issuance of a commission by the Governor is Section 11664, R.S. Mo. 1929, which provides:

> "At the general election in the year eighteen hundred and eighty-two, and every four years thereafter, except as hereinafter provided, the clerks of all courts of record, except of the Supreme Court, the St. Louis Court of Appeals, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St.Louis, who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next

ensuing their election, and shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

CONCLUSION

It appears, as stated in the beginning of this opinion, that James S. Johnson contested the election of Jack W. McKee. McKee was holding the office at the time the contest was instituted, and by virtue of the terms of Section 10340, R.S. Mo. 1929, was entitled to exercise the duties of the office until the contest was decided. It was the judgment and decree of the Court that Mr. McKee deliver to Mr. Johnson all books, records, etc. pertaining to the office of Circuit Clerk of Greene County, and that Mr. Johnson, upon taking the required oath and filing bond, take charge of the office. The statutes are silent as to the procedure in the event of a contested election and the contestant is successful as it relates to the issuing of a commission.

We are of the opinion that the certified copy of the judgment of the court hereto attached constitutes the certificate of election of Mr. Johnson, as contemplated by Sec. 11668, supra, along with the bond, which shall be deposited in your office. We have not examined the bond, but call your attention to the fact that it should be recorded in the office of the Recorder of Deeds before being deposited in your office in conformity with Sec. 11671, supra. If the bond does not show that it has been recorded, we would suggest that your office refuse to accept the same for deposit; however, if the bond is regular, it is the opinion of this department that the Governor may issue a commission for the remainder of the term to Mr. Johnson, as provided in Section 11664, supra.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH

PUBLIC OFFICERS - Ex County Clerk is responsible to State of Mo. for loss of funds derived by sale of fishing and hunting licenses held by drug store proprietor when store was burglarized.

March 6, 1935.

3-12

FILED
12

Hon. Wilbur C. Buford, Commissioner,
Game and Fish Department,
Jefferson City, Missouri.

Attention: Mr. Montie Glover,
Chief Clerk.

Dear Sir:

This Department is in receipt of your letter of March 2 requesting an opinion based on the following facts:

> "Mr. Fred Tanner, manager of Tanner's Drug Store, being an agent for selling hunting and fishing licenses for Ex-county Clerk C.A. Dirckx of Cole County, Mo. states that on the night of June 22nd, 1934 his store was robbed and that $119.50 in money was stolen which he had received from the sale of hunting and fishing licenses.
>
> Mr. C.A. Dirckx and Mr. Fred Tanner are asking to account for said money by an affidavit. The licenses representing this money, no doubt, were used by the parties to whom they were issued, and if accounted for by an affidavit, this department will receive no revenue for same."

The situation you outline in your letter has also been brought to the attention of this office by Mr. Dirckx and Mr. Tanner in person. It would appear to be one of those unfortunate circumstances for which no one is responsible, but destined to work a hardship on the parties involved.

It is well settled law that public officers entrusted with public money must keep such funds safely, being an insurer thereof liable for losses occurring even without their fault. In the case of City of Fayette v. Silvey, 290 S.W. 1019, a situation arose wherein the City Collector of Fayette, Mo. sustained a loss of city funds in the Farmers and Merchants Bank of Fayette.

The Court, holding the collector responsible for the funds, said (l.c. 1021):

> "We cannot agree with defendants in this view. The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is an insurer of public funds lawfully in his possession. Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Thomssen v. County, 63 Neb. 777, 89 N.W. 389, 57 L.R.A. 303. He is therefore liable for losses which occur even without his fault. Shelton v. State, supra. This standard of liability is bottomed on public policy. University City v. Schall, 275 Mo. 667, 205 S.W. 631.
>
> In the last case cited, our Supreme Court, speaking through Blair, P.J., applied this general rule to a city treasurer, into whose hands the general funds of the city had passed, finding that the mayor and aldermen had directed the funds placed to the credit of the city treasurer in a certain trust company, which later failed. The treasurer died, and the suit was instituted against the administrator of his estate. The estate was held liable under the general bond, notwithstanding the fact that the funds had been so deposited in the trust company at the direction of the board of aldermen.
>
> We think the rule is equally applicable to the case at bar. In the cited case the officer involved was the city treasurer, and in the instant case the city collector. In both cases the officer was charged with the safekeeping of the city's funds. Defendants here argue that the funds involved were derived from the collection of water and light bills, and therefore do not come within the meaning of the rule that the collector is responsible for the safe-keeping of the funds, not being derived from the collection of taxes or from other sources contemplated by the ordinance fixing the

duties of the city collector. We think this position also without merit. It is not disputed that the bond herein is one conditioned generally for the faithful performance of duties required by law. The general rule in this respect is stated in paragraph 199, p. 522, 15 C.J., as follows:

> 'A bond conditioned generally for the performance of all the duties of the office required by law covers duties which the officer is required to perform ex officio, and the sureties are liable for a default in the performance thereof, even though the ex-officio duties were added after the bond was given.'

See State v. Adams, 172 Mo. 1, 72 S.W. 655; People v. Lyons, 168 Ill. App. 396, section 8451, R.S. 1919.

Frequently public officers are held as bailees, and again they are said to hold public funds as trustees, and to be clothed with the legal duties and liabilities attaching thereto. The weight of authority, however, seems to be that a public officer, unlike a trustee or agent, is not merely a bailee or custodian of the money in his hands; he is called on to account according to a much more rigorous standard of responsibility. State ex rel. v. Powell, 67 Mo. 395, 29 Am. Rep. 512."

The section relating to the authority of a county clerk in delegating agents for the collection of license fees for hunting licenses is Section 8263, R.S. Mo. 1929, which is as follows:

> "It shall be lawful for the county clerks of the various counties and the license collector of the City of St. Louis to appoint agents within their respective counties and city who shall have the authority to issue licenses for the county clerk and the city collector. The county

clerks and the license collector of the City of St. Louis shall be held responsible and liable for the acts of their agents. Said agents shall have such authority solely at the pleasure of the county clerk or the said license collector. Said agents shall make a report and an accounting on the last day of every month, shall be subject to a final accounting and shall be amenable to the same laws referring to the issuance of licenses as are the county clerks and the license collector of the city of St. Louis. Game and fish licenses shall not be sold for more than the values set out in the statutes. Violation of this section shall be deemed a misdemeanor."

CONCLUSION

In view of the above statute and the pointed decision hereinabove quoted, it is the opinion of this department that Mr. Dierckx as ex-county clerk is responsible to the State of Missouri for the $119.50 which was lost in the burglary of Mr. Tanner's Drug Store, regardless of the fact that the same was unavoidable and was not in any wise due to any carelessness, dishonesty or misappropriation of funds on the part of Mr. Dierckx.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

TAXATION AND REVENUE: Certificates must be sold at public sale under Senate Bill 94 and not at private sale.

3-22

March 21, 1935.

FILED
12

Hon. N. Elmer Butler
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

Acknowledgment is made of your request for an opinion of this office dated March 13, 1935, wherein you request the following information:

> "On land that has been advertised for sale for delinquent taxes and the taxes dating back to 1928, but the suit was commenced prior to December 31st 1934, publication made and put up for sale at a regular term of Court, no bid was received. Will this be carried on the tax books as delinquent until three successive attempts are made provided no bid amounts to as much as the taxes and costs.
>
> After the land has been offered to the highest bidder and no bid made can the collector sell at a private sale to a bidder for as much as the tax and costs?"

I.

SUITS FOR DELINQUENT TAXES MAY BE DISMISSED AND TAXES COLLECTED UNDER SENATE BILL 94.

Delinquent State and County taxes are to be collected under the provisions of Senate Bill 94, page 425, Laws of Missouri 1933. However, under the provisions of Section 9962b, page 444, it is distinctly provided that suits which had theretofore been instituted for the collection of delinquent taxes could, in the discretion of the county collector, be dismissed and the delinquent taxes collected by virtue of the provisions of the new law. The parts of this section so providing read as follows:

"* * * as to suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

Accordingly there is no question as to the authority to dismiss the suit and to advertise and sell the land under the provisions of the new law.

II.

LAND MUST BE OFFERED THREE CONSECUTIVE TIMES IF INSUFFICIENT BID IS RECEIVED.

All taxes which are to be collected under the new law, Senate Bill 94, are in the same classification insofar as procedure respecting them is concerned. The fact that suit had been instituted in no way varies the procedure for the collection of such taxes in the event it is determined that collection should be made under the provisions of the new law. Sections 9953 and 9953a, page 432, set out the procedure in the event bids sufficient to pay the taxes, interest and costs are not received. These sections are as follows:

"Section 9953. If at the first offering of sale of any tract of land or lot under the provisions of this act no person shall bid therefor a sum equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note a recital thereof in his record containing the list of delinquent lands and lots, and said tracts of land or lots shall be again offered for sale, at the next sale of delinquent lands and lots as in this act provided, if such lands or lots be at such time delinquent. If at the second offering for sale no person shall bid therefor a sum equal to the then delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall

note such fact upon his record of the sale, and the county collector shall enter a recital of such fact in his record book containing the list of delinquent lands and lots."

"Section 9953a. Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is required by purchasers of other lands at such delinquent tax sales."

It therefore appears that in the event sufficient sum is not bid at the first offering to pay the taxes, interest, penalty and costs, the land shall be again offered for sale at the resale "as in this act provided" and if at a second offering an insufficient bid is received, then it shall be offered at the next regular tax sale at which third and last sale the certificate shall be sold for such sum as can be obtained irrespective of the amount of penalties, interest and costs. It is to be noted that no provision whatsoever for private sale is made but on the contrary a complete uniform system has been set up whereby the certificate shall ultimately be sold.

It is to be noted that under Section 9957a, page 438, a certain formof deed has been set out for execution by the collector in the event the lands are not redeemed. This deed sets forth that the lands had been sold at public auction at the Court House Door. Therefore, it would appear that no proper deed could be given to the property unless this procedure had been complied with and the land actually sold by virtue thereof. It is evident that private sales were not contemplated by the framers of this law.

This problem has heretofore beennbefore the Supreme Court in the case of Bender v. Dungan, 99 Mo. 126. In this case the law provided that lands remaining unsold and unredeemed in 1875 should be offered for sale at the regular sale of that year and if not

then sold should be offered to the highest bidder, and if no bid obtained at such last sale the forfeiture, or liability for taxes, should be cancelled. It appeared that no second offer of the land involved was made but that subsequently such land had been sold at private sale. The Court in holding such private sale illegal and void stated, l. c. 130:

> "Again, section 236 (Laws, 1872, p. 131) provides, among other things, that, at the regular sale in the year 1875, lands which had been previously forfeited, and then remained unsold and unredeemdd, should, after being offered for the amount due thereon and not sold, be then and there immediately offered and sold to the highest bidder, but not for a greater sum thannwas due thereon including costs, etc., and that the former forfeitures of such property, as would not sell, should be cancelled. The land in suit had been, as we have seen, forfeited for the amounts due for the taxes of the years 1873 and 1874, and, if not sold at the regular sale in 1875 should have been cancelled at that time, so that this private sale of the land thereafter in October, 1876, received in the deed, was, we think, illegal and void.

CONCLUSION.

It is the opinion of this office that lands or certificates thereon which have been offered for sale once without a sufficient bid being made cannot then be offered and sold at private sale even though the amount of tax, penalties and interest be offered at such sale.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HGW:MM

LS: Sending school must pay entire tuition of pupil, receiving credit up to $50.00 if the State has the money.

5-18

May 17, 1935.

FILED
13

Carl T. Buehler, Ph. G.
President Board of Education
108 So. Maple Street
Eldon, Missouri

Dear Mr. Buehler:

This is to acknowledge your letter dated May, 14th, 1935, as follows:

> "If the per pupil cost in our high school is $65.00 for the year which the non-resident pupil attends, and the state pays us only $15.00 instead of the promised $50.00, how much are we allowed to charge the sending district?"

On August 28th, 1934, this Department rendered an opinion to Mr. G. C. Jones, Laclede County, which answers the question asked in your letter. Copy hereto attached.

We invite your attention to this found on page 6 of said opinion as follows:

> "Thus, the court has said that the sending district must pay the tuition of its pupils attending a high school and the fifty dollar deduction to be paid by the State is state aid to such sending district. In other words, the aid is one to the sending district and not to the receiving high school. Thus it follows that the sending school district is liable to the receiving

school district for all of the tuition of the pupils from its (sending district) school to the receiving high school. If the state pays $50.00 or any part thereof, it is applied as a credit to the sending district's obligation of tuition payment. In other words, the sending district is primarily liable for all of the tuition (per-pupil cost) due the receiving high school district, and if the state has the money it will pay the first $50.00 of the per pupil cost on this obligation of the sending district. But, the state does not give anything to the sending district, but pays it direct to the receiving high school, thus making the payment of the state's part a matter of bookkeeping only and the effect of same being an aid by the state to the sending district. However, if the state only has enough money to pay a part of the $50.00, then only the part the state pays is credited on the tuition."

It is our opinion that the sending district is liable for the full $65.00 and if the State pays $15.00 of said amount it leaves a balance that the sending district is obligated to the receiving district, namely, $50.00. In other words, the sending district is liable to the receiving district for the full $65.00, but if the State pays $15.00 of that amount, then, the sending district's obligation is diminished to that extent so that the balance (or the amount such would owe) would be $50.00.

Yours very truly,

APPROVED:

James L. HornBostel
Assistant Attorney-General

ROY McKITTRICK
Attorney-General

JLH:EG
Enc.

COMMON SCHOOL DISTRICTS: Authority to erect additional school building out of building fund.

July 11, 1935.

FILED
12

Hon. N. Elmer Butler
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

We wish to acknowledge your letter of recent date wherein you state as follows:

> "Please give me opinion on the following:
>
> "Is it legal for the board of directors of a common school district to use the building fund to erect an additional school building in a different place in the district, from the old building at the center of the district?
>
> "Perhaps, my request would be more easily understood if I should give you the circumstances.
>
> "The common school, in question, has had enrollment enough for two teachers and for the next year they will have enough for three. Is it permissible for the board to use the building fund to erect an additional school house in another part of the district for the third teacher?"

Section 9284, R. S. Mo. 1929, deals with laws applicable to common schools and provides in part as follows:

> "The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority

of the votes cast: ****

"* * * * * * * * * * * * * * * * * *

"Eleventh -- To change the location of schoolhouse site when the same for any cause is deemed necessary: Provided, that in every case a majority vote of the voters who are resident taxpayers of said district shall be necessary to remove a site nearer the center of said district; but in all cases to remove a site farther from the center of said district, it shall require two-thirds of the legal voters who are resident taxpayers of such school district voting at such election. (R. S. 1919, Section 11210)."

The above section relates to procedure necessary to change the location of a school house and places the power specifically in "the qualified voters assembled at the annual meeting." However, in enumerating the powers of the "qualified voters" nothing is said as to their power "to erect an additional school building in a different place in the district from the old building at the center of the district." We must, therefore, look to the "laws applicable to all classes of schools" to determine where the authority is vested to erect an additional school building.

Section 9198, R. S. Mo. 1929, (Section 11127, R. S. 1919) provides in part that,

"For the purpose of purchasing schoolhouse sites, erecting schoolhouses (library buildings) and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. ****."

Section 9205, R. S. Mo. 1929 (Section 11134, R. S. Mo. 1919) provides in part that,

"The board of directors or board of education shall have the care and keep-

> ing of all property belonging to the district. ****"

Section 9207, R. S. Mo. 1929 (Section 11135, R. S. 1919) provides in part that,

> "The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district -- *****."

In the case of State ex rel. Whitehead v. Wenom, 326 Mo. 352, l. c. 361, the Court in interpreting the before set-out sections said:

> "' Under the statutes of this State (Secs. 11127, 11134, and 11135, R. S. 1919), the school boards, and they alone, are entrusted with the duty of providing and maintaining school facilities, including sites, schoolhouses and furnishings. The methods and means to be employed in the discharge of these functions are committed wholly to their judgment and discretion. It is unnecessary therefore for them to submit to the electorate the question as to whether, under a given situation, they shall increase the housing facilities of the school district by erecting one new building, or more than one, or the question as to where such building or buildings shall be located. The only thing that they are required to go to the taxpayer for is authority to borrow money (or to increase the tax-rate). With respect to this 'the question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose." (Sec. 11127)'".

Although the Wenom case, supra, deals with consolidated school districts, we are of the opinion that the sections above interpreted apply as well to the common school districts with the exception that in the case of the latter the question as to where the building shall be located is determined by the "qualified voters assembled at the annual meeting". When the question therefore arises in the common school district as to

the increase of housing facilities by erecting a new building, we are of the opinion that such a decision is left wholly to the judgment of the school board or board of directors. Such vital matters, however, as authority to borrow money or to increase the tax rate must be decided by the taxpayer so that the latter in final analysis would have the last word.

Section 9311, R. S. Mo. 1929, dealing with laws applicable to common schools provides for a "building fund" thus:

> "Upon the order of the board of directors, it shall be the duty of the district clerk to draw warrants on the county treasurer in favor of any party to whom the district has become legally indebted, either for services as teacher, for material purchased for the use of the school, or material or labor in the erection of a schoolhouse for said district -- the said warrant to be paid out of any moneys in the appropriate funds in the hands of the said treasurer and belonging to the district. The species of indebtedness must be clearly stated and should be drawn on its appropriate fund; all moneys for teachers' wages on the teachers' fund: all moneys used in the purchase of a site, erection of building thereon, and furnishing the same, on building fund; and all other expenses to be paid out of the incidental fund: ****"

From the foregoing, we are of the opinion that if in the judgment of the board of directors of the common school district another building is necessary in addition to the old building at the center of the district, the board may use the "building fund" to erect same but with the reservations above outlined.

Respectfully submitted,

APPROVED:

WM. ORR SAWYERS
Assistant Attorney-General.

ROY McKITTRICK
Attorney-General.

MW/WOS-afj

OLD AGE ASSISTANCE: - No person shall receive relief from any public fund and at the same time receive relief under the Old Age Assistance Act.

8-36

August 23, 1935.

FILED
12

Hon. N. Elmer Butler
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "Do persons, over 70 years of age now drawing a pension for the blind as provided by this state, receive any benefit from the old age pension provided they are eligible in other respects.
>
> "If they do receive a benefit what is the extent of it?"

Your attention is directed to Section 16 of the Old Age Assistance Act, Laws of Missouri, 1935, page 312, relating to persons receiving relief from any public fund other than under the Act. Said section reads as follows:

> "Section 16. Persons on pension list shall receive no other public relief. -- No person receiving assistance under this Act shall at the same time receive any other relief from any public funds, except for medical and surgical assistance."

It is plain from a reading of the above section that no person may receive assistance under the Act and at the same time be entitled to any relief from any other public fund except for medical and surgical assistance.

It is the opinion of this department that if a person is now drawing a pension for the blind as is now provided, he shall not be entitled to receive any benefit under the Old Age Assistance Act as long as he continues to draw a pension for the blind.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General

RCS/afj

SALES TAX: City of St. Louis is liable for tax for supplies used by contractors in fulfilling contracts for improvements of which the city is the ultimate user.

10-31

August 29, 1935.

FILED
12

Hon. John G. Burkhardt,
Tax Attorney,
The City of St. Louis,
St. Louis, Missouri.

Dear Sir:

This department is in receipt of your letter of August 27 wherein you request an opinion regarding the 1% sales tax now effective in the State of Missouri as it may apply to contracts of the City of St. Louis. Your letter is as follows:

> "We have just received a copy of the State Auditor's Special Rule No. 13 interpreting the 1% State Sales Tax. According to this rule it would appear that municipalities are liable for the 1% sales tax upon projects under contract, either upon the full contract price of the project or the price of materials, supplies and fixtures that are used in the project, if same are separately itemized and billed.
>
> "We do not believe that a contractor who buys building materials for use in building a structure for a municipality is buying same for resale. We believe rather that he, the contractor, is the consumer, liable for the tax, rather than the municipality.
>
> "Will you kindly give us your opinion on this matter?"

The original act contained no specific terms making municipalities subject to the tax. The new act, however, in defining the word "person" includes municipalities in the following language (Laws of Mo. 1935, Sec. 1 (a), page 413):

> "'Person' includes any individual, firm, copartnership, joint adventure, association, corporations, municipal or private, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

There are a number of decisions to the effect that municipalities are subject to the tax, the most recent being the case of City of Covington v. State Tax Commission, 77 S.W. (2d) 386, l.c. 391; at the time the decision was rendered, Kentucky had a similar act to that of Missouri. The Court said:

> "It therefore follows that municipalities are liable for the tax for purchases made by said municipalities."

Having disposed of the personal liability of the city for the tax on purchases made by it, or sales to the municipality, we come to the question of the liability of the municipality in making contracts in which materials, supplies and fixtures are used by the contractor in his contract with the city.

The question of liability for the tax as it relates o to contractors and the materials, supplies and fixtures sold to them has been a controversial one for this department ever since the enactment of the original privilege or occupation tax. Who is the ultimate user or consumer--the contractor who purchases the materials from the wholesaler, or the city who receives the benefits of the contract and accepts and approves the project?

The act relieves from tax liability tangible personal property which is sold for resale. The State of Illinois has an act similar in its nature to that of Missouri, the principal element of difference being the fact that the seller is not compelled to collect from the purchaser the amount of the tax. We assume that he merely adds it to the purchase price and treats it as overhead. In the decision in the case of Bradley Supply Co. v. Ames, 359 Ill., l.c. 169-171, the Supreme Court of Illinois in deciding this question as it relates to plumbing and heating contractors, said:

"Defendant contends that the attaching of the plumbing and heating supplies under a contract with the owner is not a sale but that title passes by accession and that the supplies become real property. He relies upon Raff Co. v. Murphy, 147 Atl. (Conn.) 709, which held that a contract to do certain plumbing and electrical work and to furnish materials therefor was not a sale within the meaning of the Statute of Frauds so that it had to be in writing. He also relies on Steiger Terra Cotta and Pottery Works v. City of Sonoma, 100 Pac. (Cal.) 714, where it was held that a contract to furnish and set on a tile roof was a contract for work and labor and not of sale, and that replevin would lie until the tile were installed on the roof. Benjamin on Sales (7th ed. sec. 108) also says that such contracts are for work or labor and not sales of personalty. We agree with these rules and with the contention that the materials furnished become fixtures when attached to the realty and thus lose their identity as personal property; also that a mechanic's lien can be claimed for the value of the improvements so made. (Fehr Construction Co. v. Postl System, 288 Ill. 634; Fifield v. Farmers' Nat. Bank, 148 id. 163, 169; Sword v. Low, 122 id. 487, 496). The question before us is not whether the transaction between the contractors and owners of land is a sale of personalty as that term is defined at common law, in the decisions of courts or in the Uniform Sales act, but whether it is a transfer of tangible personal property to the purchaser for use or consumption and not for resale within the meaning of the Retailers' Occupation Tax act. The definition of 'sale at retail' as 'any transfer of the ownership of, or title to, tangible personal property,' is broad enough to cover the transfer of title made by a contractor who attaches tangible personal property to real estate in accordance with a contract. It is clearly a transfer of title for a valuable consideration.

"Plaintiffs are not liable to pay the tax for another reason. The business of selling plumbing and heating supplies to contractors who intend to install them in a building or attach them to realty is not the occupation intended to be taxed by the legislature. These are not transfers to purchasers for use or consumption. The terms 'use' and 'consumption' have an ordinary or popular meaning. 'Use' means a long-continued possession and employment of a thing to the purposes for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional. Webster's Dictionary defines the word 'use' as an act of employing or state of being employed; to convert to one's service; to employ. (Treolo v. Auto Insurance Underwriters, 348 Ill. 93) It is true that in one sense of the word the contractor does use the supplies in fulfilling his contract, but in the same sense a merchant who sells an article over the counter to a customer would be a user. The user or consumer contemplated by the statute is the ultimate user or consumer who will use the heating and plumbing in his house as long as it lasts or until he desires to do away with it.

"In support of defendant's contention that the sale contemplated by the act is the last sale before use or consumption, stress is placed upon the words 'and not for resale' in the definition of a 'sale at retail.' These words must be considered in connection with the other words of the definition--i.e., in the sense of 'any transfer'--and not as intending a sale of personalty as ordinarily defined."

CONCLUSION

The decision of the Illinois Supreme Court, quoted herein, appears to be directly in point and to hold that the user or consumer is not the contractor but the party who receives the structure contracted for. The serious element in so holding, we think, involves the question of whether or not contracts made with the city for the erection of structures, when so erected, become part of the real estate, or in other words, real estate; therefore, the same would be no longer tangible personal property. However, as stated before, the above quoted decision holds that the city would be the user and consumer and such is our opinion until the Supreme Court of our state has passed upon the question.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

COUNTY DEPOSITORY:)
) Selection not in accordance with
BOND-COUNTY DEPOSITORY:) Section 12184 et seq., R. S. 1929.

September 19, 1935. 9-21

FILED
12

Hon. Chas. E. Budd
Presiding Judge
Cedar County
Eldorado Springs, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of September 6, 1935, in which you request the opinion of this Department on the facts stated therein. Your letter is as follows:

> "I desire at this time to set forth certain facts and figures in behalf of our depository in Cedar County.
>
> "The Sac River Valley Bank has always been the depository for our county money. They have been making a personal depository bond. Now then, Ora C. Cacy, County Collector, and his deputy are bonded by the United States Fidelity and Guaranty Company, and this bonding company is anxious that the depository bond be made. The Sac River Valley Bank is perfectly willing to handle these funds although they don't want to give a bond for it. The County Court realizes that we are responsible for this money. However, the Sac River Valley Bank is willing to make this bond if the County Court would pay the premium.
>
> "We submitted to the Tri-County State Bank of El Dorado Springs, which is

> in this county, a proposition of being depository for the county funds. We have a letter from them in which they state they are willing to make this depository bond with this one stipulation that all warrants drawn on the County Treasurer which are presented and payment refused, that they shall be entitled to draw the interest on these warrants and no other individual shall be entitled to draw interest on any warrant by reason of the fact that the individual who has a warrant can present said warrant to the Tri-County State Bank and collect their money. It has been the custom for a great many years for certain individuals in the county to buy these warrants, hold them, and draw the interest. In these cases, the bank would desire to pay out the money promptly on these warrants and they would hold them for interest. In this way they would be recompensed for securing the bond and handling the accounts.
>
> "We feel like the County Court would like to have your opinion in this matter, and I sincerely trust that you will give this careful consideration and advise at an early date what steps you think would be necessary to take in order to safeguard and protect the funds of this county."

From your letter, as we understand it, you desire this Department to give you our opinion as to "what steps you think would be necessary to take in order to safeguard and protect the funds of this county."

The Legislature in its wisdom has set forth with particularity the manner of selecting county depositories

by the county courts. Briefly we will review the necessary steps to be taken in the selection of a county depository.

Under the provisions of Sections 12184, 12185, 12186 and 12187 of Article 9, Chapter 85, Revised Statutes of Missouri, 1929, a definite scheme and plan for the selection of county depositories is set forth, and under the provisions of these sections it is made the mandatory duty of the county court to select the depository or depositories in which the funds of the county shall be deposited.

Section 12184 makes it the duty of the county court of each county in this State, at the May Term thereof, in the year 1909, and each two years thereafter, to advertise for bids and receive proposals from banking corporations, associations, or individual bankers in such county as may desire to be selected as the depository of the funds of said county.

Section 12185 provides the procedure to be taken by the bidders for the county funds.

Section 12186 relates to the opening of bids and makes it the duty of the county court "to select as the depositaries of all the public funds of every kind and description going into the hands of the county treasurer, and also all the public funds of every kind and description going into the hands of the ex officio collector in counties under township organization, the deposit of which is not otherwise provided for by law, * * *."

Section 12187 provides the kind and character of bonds to be given by the selected county depository and provides for the approval of same by the county court.

Section 12188 of said article and chapter sets forth specifically the manner in which the county funds shall be transferred to the selected county depositories.

Under the provisions of Section 12189, if for any reason the banking corporations, associations, or individual

bankers in any county shall fail or refuse to submit proposals to act as county depositories as provided in Section 12185, then, in that case, the county court shall have the power to deposit the funds of the county with any one or more of the banking corporations, associations, or individual bankers in the county or adjoining counties, and said section further provides the manner for the selection of same and the minimum rate of interest to be charged therefor, and the kind and character of bond or bonds to be given by said selected depositories.

So, it will be seen that the statutes have set forth in detail and with particularity the manner of the selection of a county depository and provide a definite way in which the county funds are to be protected and safeguarded.

We know of no other way that a county depository may be legally selected than in the manner provided in Article 9, Chapter 85, R. S. Mo. 1929, and amendments thereto.

Coming now to the plan submitted by the Tri-County State Bank of El Dorado Springs, as outlined in your letter, we do not find that the county court would have authority to enter into such a contract, as outlined in your letter, with the above bank, whereby the bank would make the depository bond to secure the county against loss and the county court in consideration of the bank giving such bond would stipulate that all warrants drawn on the county treasurer which are presented for payment and payment refused, the bank would be entitled to draw the interest on such warrants and no individual would be entitled to draw interest on any other warrant wherein payment was refused by the county. In other words, if we understand you correctly, it is that all warrants issued by the county court and when there is no money in the fund upon which it is drawn to pay said warrant, and said warrant is protested, the interest accruing on said warrant will be paid to the bank, and no one else other than the bank would have a right to purchase said warrants.

We do not think that it is within the power of the county court to say who shall be permitted to purchase protested

county warrants, nor within the power of the county court to compel the owner to sell same to the Tri-County State Bank of El Dorado Springs for the reason that the owner of said warrant, after it is protested, would have a right to assign same or hold same as they saw fit and the county would have no right to say that it would only pay interest on warrants purchased or cashed by the Tri-County State Bank.

Section 12169, R. S. Mo. 1929, provides for the issuance of county warrants. Section 12170 provides the same must be signed by the president of the court and attested by the clerk. Section 12171 provides as follows:

> "No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

Section 12172 provides for the form of the assignment.

It will be seen that when there is no money in the county treasury to pay any warrant drawn on a particular fund and the warrant presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator, the treasurer shall so certify on the back of the warrant and shall date and subscribe the same. This is what is commonly called "protesting the warrant," and same bears interest from the date of the treasurer's certificate. The warrant is delivered to and is the property of the person in whose favor it is drawn or his assignee, executor or administrator and is entitled to the interest thereon. He is not obligated to cash or sell same to a certain designated bank and may retain same and draw the interest himself.

Therefore, we do not believe that the county court would be authorized to enter into the contract with the bank selected as a county depository, under the terms and conditions as outlined in your letter. The county court could not control the owner of the warrant as to what he would do with

same and if one person was entitled to draw interest on warrants all other persons in a similar situation would be entitled to draw interest thereon.

We realize that the past financial situation has created many vexatious and troublesome problems for the county officials in the protecting and safeguarding of the county funds, but we recognize that the situation has very definitely improved in the past two and one-half years.

We are, therefore, of the opinion that the county court in the selection of a legal county depository must be guided by Article 9, Chapter 85, R. S. Mo. 1929, and amendments thereto, and that the plan outlined in your letter would not be a selection under the provisions of the statutes.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

CRH:EG

STATE BOARD OF HEALTH:)(1)City of St. Louis may provide a
) reasonable fee by ordinance for
BURIAL AND BIRTH CERTIFICATES:) transcripts, certified copies and
correction of records; (2) The City
of St. Louis cannot by ordinance
provide a fee for issuing burial,
removal or cremation permits.

November 20, 1935.

11-21

FILED
12

Honorable John G. Burkhardt
Tax Attorney, Law Department
The City of St. Louis
St. Louis, Missouri

Dear Mr. Burkhardt:

This is to acknowledge your letter dated November 18, 1935, as follows:

> "This department recently rendered an opinion to the effect that the Bureau of Vital Statistics had the right to establish fees and charges for transcripts and certified copies of birth and death records. Pursuant to this opinion, the Board of Aldermen has recently passed Board Bill No. 145, a copy of which is attached hereto.
>
> "We would greatly appreciate the opinion of your office upon the following questions:
>
> > "Does the opinion of the City Counselor's office, referred to above (a copy of which is enclosed), conflict with the state law?
> >
> > "Under the state law, does the City of St. Louis have authority to make a charge for burial, removal or cremation permits?
>
> "Inasmuch as Board Bill No. 145 has been presented to Mayor Dickmann for his approval

> or disapproval, we would greatly appreciate an early reply, so that the opinion may be taken into consideration by the Mayor when action is taken on this bill."

Appended to your letter was a copy of an opinion rendered by you to Hon. A. C. Meyers, concerning the same subject inquired about in your letter, and also copy of Ordinance introduced by Mr. Collins. We agree with the conclusion reached in your opinion but as same does not discuss the question as to the right of the City of St. Louis to charge for burial, removal or cremation permits, we deem it best to write on the entire subject matter.

Board Bill No. 145 is "an ordinance establishing fees to be paid for the services of the Bureau of Vital Statistics of the Health Division of the Department of Public Welfare, and containing an emergency clause" of the City of St. Louis.

Section 1 of said Bill provides as follows:

> "Section One. The Bureau of Vital Statistics of the Health Division of the Department of Public Welfare is hereby authorized to charge the following fees:
>
> "For each transcript of birth or death record . . . . . Twenty-five Cents (25¢)
> For certified copy of birth or death record . . . . . Fifty Cents (50¢)
> Charge per hour for search of records . . . . . Fifty Cents (50¢)
> For each burial, removal or cremation permit . . . . . One Dollar ($1)
> For correction of existing records of birth or deaths occuring prior to 1910 . . . . . Two Dollars ($2)"

A reading of the provisions of Section 1 shows two things: (1) A fee to be exacted for certain transcripts or certified copies of records, and (2) a fee to be charged "for each burial, removal or cremation permit."

We are of the opinion that the City of St. Louis by ordinance may exact a fee for transcripts and certified copies of birth or death records, also a charge per hour for search of records, and also a fee for correction of existing records of births or deaths occurring prior to 1910.

We are of the further opinion that no fee may be charged by the City of St. Louis for burial, removal or cremation permits Article 2, Chapter 52, R. S. Mo. 1929, and amendments, pertain to "Registration of Births and Deaths" and Section 9043 of said article and chapter provides in part as follows:

> "Provided, that in cities where health officers or other officials are conducting effective registration of births and deaths under local ordinances at the time of the taking effect of this article, such officers shall be continued as registrars in and for such cities, and shall be subject to the rules and regulations of the state registrar, and to all of the provisions of this article.
> * * * * *"

We assume that the City of St. Louis had an effective registration of births and deaths under local ordinance at the time Article 2 became effective.

Section 9059, R. S. Mo. 1929, provides for the fees for local registrars, and contains this provision:

> "Provided, however, that in cities having a population of one hundred thousand or over, where health officers or other officials are conducting effective registration of births and deaths under local ordinances, such officers being continued as registrars in and for such cities as provided in section 9043, and being paid by such cities salaries for their official

> services, said officers shall not be entitled to nor have power to collect any fee provided for in this section, but such salaries shall be in full compensation also for their services as registrars: Provided further, that such cities shall provide the office accommodations, clerical help, office furnishings and supplies necessary to enable such officer to properly perform the duties of registrar."

We agree with your opinion as to the interpretation of that section pertaining to the subject under discussion as follows:

> "You will note from this section that in cities having a population of 100,000 or over, health officers that are being paid a salary by the city shall not be entitled to charge a fee provided for by this section. This, however, in our opinion, refers to the fee which the local registrar receives from the State Board of Health, and which, in turn, is chargeable back to the County Court. In other words, there is no prohibition, as we see it, upon the right of a city to charge a fee for birth and death certificates furnished to the general public, while there is a prohibition against charging a fee to the State Board of Health for information forwarded in accordance with the provisions of Chapter 52 of the Revised Statutes of Missouri 1929." (Underscoring ours.)

The State Registrar exacts fees for certified copies of records of any birth or death registered under the provisions of Article 2. We invite your attention to Section 9060, R. S. Mo. 1929, which provides in part as follows:

> "The state registrar shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under provisions of this article, for the making and certification of which he shall be entitled to a fee of fifty cents, to be paid by the applicant. * * * * * For any search of the files and records, when no certified copy is made, the state registrar shall be entitled to a fee of fifty cents for each hour or fractional hour of time of search, to be paid by the applicant. * * * * *"

The fees proposed to be charged by Board Bill No. 145, are reasonable in view of the amount permitted to be charged by the State Registrar by virtue of Section 9060, supra. We are, therefore, of the opinion that the fees to be charged for the transcripts and certified copies and for the correction of existing records prior to 1910, are reasonable.

As hereinbefore stated, it is our opinion that the provision in Board Bill No. 145, exacting a fee of $1.00 "for each burial, removal or cremation permit" is unwarranted and violative of Article 2, Chapter 52, in particular Section 9044, R. S. Mo. 1929, as amended, Laws of Missouri, 1933, page 270. The 1933 law provides in part as follows:

> "The body of any person whose death occurs in the state shall not be interred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed from or into any registration district until a permit for burial, removal or other dispostion shall have been properly issued by the local registrar of the registration district in which the death occurs. Provided, * * * * *; and no local registrar shall, as such, require

from undertakers or persons acting as undertakers any fee for the privilege of burying dead bodies."

Therefore, if the City of St. Louis by ordinance exacts a fee of $1.00 "for each burial, removal or cremation permit" it would be clearly violative of Section 9044, supra, and such is our opinion.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

NEPOTISM: Judges of the county court who vote for the appointment or connive to bring about the appointment of any relative, within the prohibited degree, on the County Old Age Assistance Board, is subject to ouster.

12-21

December 19, 1935

FILED
12

Honorable N. Elmer Butler
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This Department is in receipt of your letter of December 5, wherein you make the following inquiry in regard to the county court appointing relatives to the County Old Age Assistance Board. Your letter is as follows:

> "Will you please give me an opinion on the following:
>
> "The County Court in selecting the County Old Age Assistance Board did it in the following manner:
>
> "The two associate judges submitted a list of names from their part of the county, neither submitted the name of a relative, but the county clerk also submitted a list of names and on his list were the names of a relative of each of the associate judges, one man a brother-in-law of the Southern Judge and the lady a married daughter of the Northern Judge. Then the Presiding Judge selected from all the lists three names, two of them being the names of the two relatives. The Judge whose daughter had been selected

> objected at the time, but later on the court met and by order of Court appointed the three members as selected. Did the two associate judges violate the Nepotism Law? "

It appears that you have received some correspondence from this office in regard to this question. We are unable to locate in our files any previous letters written regarding the subject; hence, it will be our aim to clarify the situation with this opinion. If there is a violation of what is commonly called the Nepotism law, it must be found under Section 13 of Article XIV of the Constitution of Missouri, which is as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

By the terms of the Old Age Assistanct Act, Laws of Missouri 1935, page 309, Section 3, it is the duty of the county court to appoint the County Old Age Assistance Board. Section 3 is as follows:

> "In every county there shall be established a County Old Age Assistance Board, to consist of three persons domiciled in the county, each of whom shall have been a resident taxpaing citizen of the county for a period of five years prior to his or her appointment at least

> one of whom shall be a woman,who shall be appointed by the county court for a term of four years, except that of the members first appointed, one shall be appointed for a term of two years and one for a term of three years. Vacancies shall be filled in the same way in which the original appointment was made. The members of the county board shall serve without compensation, except that the necessary expenses incurred while in the performance of their duties shall be paid to them."

The most recent decision regarding the Nepotism section hereinbefore quoted is that of State ex rel. McKittrick v. Becker 81 S. W. (2d) 948. In that decision the Court held that:

> "Two of judges of Court of Appeals could in exercise of their jurisdiction appoint first cousin of third judge as commissioner, and such appointment would not violate provision of Constitution forbidding officers to appoint relatives to public service, where third judge refrains from voting and other judges exercise appointive power free from connivance, agreement, or conspiracy (Const. art. 14 Sec. 13, adopted in 1924)."

In the case of State ex inf. Ellis v. Ferguson 333 Mo. 1177, the Court held:

> "A mayor of a city of the third class, in appointing his first cousin to the position of pumper of the waterworks system of the city, violated the nepotism amendment to the State Constitution, Section 13, Article XIV, and thereby forfeited his right and title to the office and was subject to ouster in quo warranto proceeding."

In the case of State ex rel. McKittrick v. Whittle 333 Mo. 705, the court held:

> "Section 9209 R. S. Mo. 1929, providing that a board of school directors should have power to contract for the employment of teachers, must be substantially complied with and a director having the deciding vote in employing a teacher comes within the provisions of the nepotism amendment as having 'the right to name or appoint' a teacher, and cannot participate in the appointment of his first cousin by affinity as teacher in the district."

We assume that you are familiar with the case of State ex inf. Norman v. Ellis, which originated in your county, 325 Mo. 154. In this decision it was held that the circuit clerk and the county clerk of Stone County had violated the nepotism section by appointing their wives, and were ousted.

CONCLUSION

Under Section 3 of the County Old Age Assistance Act it was the duty of the county court to appoint three persons to the board. We note in your letter that the relatives, namely, the brother-in-law of the Southern Judge and the married daughter of the Northern Judge were placed by the County Clerk. The presiding judge then selected from all the names the three names of the board, including the two relatives of the two judges. In order for the appointments to have been valid it was at least necessary that one member, either the Northern or the Southern Judge, should concur in the appointments. If either judge voted for the appointment of his relative, of course, under the decisions hereinabove quoted, he is subject to ouster. If neither judge voted for

the appointment of his relative but connived, aided or abetted, he is subject to ouster,

In this opinion we have endeavored to set out the law relating to the nepotism section of the Constitution as construed by the courts. As to whether or not the judges in question have violated the same would be a question of fact which this office cannot pass upon.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

OWN:LC

SUPREME COURT - BOARD OF LAW EXAMINERS: **Examination fees paid by applicants for admission to bar are entirely under the jurisdiction of the Supreme Court and do not come within Section 1 of Laws of Missouri, 1933, (page 415).**

March 20, 1935.

3-21

FILED
13

Hon. R. B. Caldwell
President
Board of Law Examiners
2000 Fidelity Bank Building
Kansas City, Missouri

Dear Sir:

We wish to acknowledge your request for an opinion under date of January 8th, wherein you state as follows:

> "You will recall that several weeks ago the Board of Law Examiners discussed with you the method of handling the fees paid by applicants for admission to the bar and suggested that these funds should be entirely under the jurisdiction of the Supreme Court instead of being the subject of appropriation by the Legislature. You asked that we write you in regard to this matter and I am accordingly doing so.
>
> "Our thought about it is that it would be much more convenient and practical to handle it in this way. The Legislature does not know and cannot estimate what the fees will be during a biennial period. That is particularly true at this time when the rules have been changed so substantially. The application fee has been increased but the number of applicants will doubtless be decreased. In view of these changes there is no criterion by which the Legislature can make any intelligent guess as to what amount should be ap-

propriated. You understand of course, that the appropriation is only of the fees actually paid. In other words, the State pays no part of the expenses or compensation of the Board or its employees.

"There is also the further reason that to handle these funds through appropriation, and to have them disbursed by the State Auditor requires considerable extra work which does not appear to us to serve any useful purpose. As a matter of fact our relations with the State Auditor in connection with the handling of the fund have been most pleasant.

"The right of the court to handle these funds in this way seems clear. The court has held in the case of In re Richards, 63 S. W. (2d) 673, that the court has inherent power to admit attorneys to the bar. By promulgating the rule which became effective on November 1st the court is actually exercising that power in prescribing the qualifications of applicants; the method of examinations and other matters incident thereto. In other words, under the doctrine announced in the Richards case the court has assumed and is actually exercising full authority in regard to the matter of admissions. If it has that authority, as it unquestionably has, then it would seem that it must necessarily have power to do all things indident thereto. One of those things is the appointment of the Board of Examiners and the matter of fixing their compensation and paying their expenses.

"The court has evidently in those rules announced its authority to do what we are now suggesting. Note this language of sub-section 3 of Rule 38:

" 'The members of said Board and additional examiners appointed to assist them shall receive such compensation as may be allowed by this court out of funds arising from examination and admission fees provided for in this Rule.'

"The allowance of fees by the court is of course inconsistent with their allowance by the Legislature or any other agency of the State.

"We have not found any constitutional provision which prohibits the court from doing this, nor which in reality relates to it at all. This does not appear to be analagous to the situation with respect to various other boards and commissions. All of them are in fact created by the Legislature and their existence depends on legislative act. Moreover, no tribunal other than the Legislature has any authority to create them, whereas in the case of this Board its existence, powers and functions do not depend upon legislative enactment, but entirely upon the rule or order of the court itself. Therefore, while it might very well be that compensation and expenses of all other State boards must be fixed by the legislature, the reason for that rule does not exist in the case of the Board of Law Examiners.

"Further evidence that this is the right analysis of the situation, and that this is the view of the court itself, is to be found in the fact that the court in promulgating its rule effective November 1st has fixed a license fee, to be paid annually by attorneys admitted to the bar and those fees are paid to the Clerk of the Supreme Court and kept in what is known as the 'Bar Fund'. Disbursements out of that fund are made in the manner provided in the rules. See Rule 37.

"We do not see any reason for making any distinction between the manner of administering that fund and the fund created by fees from applicants for admission to the bar. The practical administration of each of the funds and the theory authorizing their handling by the court seem most persuasive that each of them should be handled under the direction of the court in the manner suggested.

"We will be glad to have your views in regard to this matter at as early a time as

> is convenient, particularly in view of the fact that the Legislature is now in session."

Laws of Missouri, 1933, Section 1, page 415, provides in part as follows:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. ****"

The question presented is whether examination fees paid by applicants for admission to the bar come under the above section, and are subject to appropriation by the Legislature, or whether they are entirely under the jurisdiction of the Supreme Court to be handled as they see fit?

Section 11695, R. S. Mo. 1929, vests the power of admission to practice in the Supreme Court and provides thus:

> "The power to admit and license persons to practice as attorneys and counselors in the courts of record of this state, or in any of them, is hereby vested exclusively in the supreme court, subject to such regulations as are hereinafter provided."

Section 11697, R. S. Mo. 1929, provides that the Supreme Court shall appoint a board of examiners and provides thus:

> "The supreme court shall, by order, appoint five persons learned in the law, and not connected with any law school,

> who shall constitute the state board of law examiners. The supreme court shall, by order, determine the respective terms of the members of the first board appointed. The members of said state board of law examiners shal l take and subscribe an oath, to be administered by one of the judges of the supreme court, to discharge faithfully and impartially the duties of their office, and shall receive such compensation as may be allowed by the supreme court out of the fund arising from examination fees hereinafter provided for. The supreme court shall also have power to appoint from time to time, when necessary, additional examiners to assist the board, who shall serve for one examination only, and shall receive such compensation as the court may allow, to be paid out of the fund aforesaid."

Section 11702, R. S. Mo. 1929, provides that the examiners are to certify the result of the examination to the supreme court and provides in part thus:

> "The examiners, or a majority of them, shall certify the result of their examination to the supreme court, which court if satisfied that such examination has been properly conducted, and that the applicant has complied with all the requirements hereinafter provided for, shall cause license to be issued to the successful applicants ****."

We are of the opinion that the above sections dealing with attorneys at law unequivocally show that the Legislature intended to vest the power to admit and license persons to practice as attorneys exclusively in the supreme court, and that the board of law examiners was created merely as an "arm of the court" for the purpose of assisting it in determining who has and who has not the necessary qualifications for admittance into the profession. The supreme court appoints the members of the board, determines their respective terms, administers their oath, and allows them their compensation. The court must, in the final analysis, be satisfied that all requirements have been met, and they in turn cause the license to be issued to the successful applicants.

Section 11701, R. S. of Mo. 1929, provides that applicants for a license to practice law pay an examination fee and provides in part thus:

> "Every applicant **** at the time of filing his application shall pay to the said clerk the sum of ten dollars. Said fees from applicants shall constitute a fund from which by order of the supreme court shall be paid the necessary expenses and a reasonable compensation fixed by the court, to the members of the board of examiners, ****. Any surplus remaining from such fees after the payment of the expenses and compensations above mentioned shall be carried in the examination fund of the succeeding year and accounted for as receipts of such succeeding year. The clerk of the supreme court is hereby made the custodian of such fund."

We must determine whether the examination fees in the above section must be placed in the State treasury to the credit of the "examination fund" and be subject to appropriation by the General Assembly for the purpose for which collected. (Laws of Mo. 1933, Sec. 1, page 415, supra).

In the case of In re Richards, 63 S. W. (2d) (Mo.) 672, loc. cit. 675, our Court said:

> "It is not always easy to determine what objects are naturally within the range or orbit of a particular department of government, but it will scarcely be denied that a primary object essentially within the orbit of the judicial department is that courts properly function in the administration of justice, for which purpose they were created, and in the light of judicial history they cannot long continue to do this without power to admit and disbar attorneys who from time to time immemorial have in a peculiar sense been regarded as their officers. Since the object sought is not naturally within the orbit of the legis-

> tive department, the power to accomplish it is in its exercise judicial and not legislative, although in the harmonious co-ordination of powers necessary to effectuate the aim and end of government it may be regulated by statutes to aid in the accomplishment of the object but not to frustrate or destroy it. ****"

The court having stated that the power to admit and disbar attorneys is judicial and not legislative, and that such power can only be regulated by statute for the purpose of aiding the court in governing its "officers," promulgated new rules effective November 1, 1934, for admission to the bar. Under the new rules, applicants must pay an examination fee of Twenty-five Dollars whereas under Section 11701, R. S. Mo. 1929, supra, a fee of Ten Dollars was required. New rules have been adopted as to qualifications of applicants, methods of examination and other matters incident thereto. Section 11697, R. S. Mo. 1929, dealing with the board of law examiners has been substituted by sub-sections 2 and 3 of Rule 38 (Rules Supreme Court of Missouri, page 45) and these subsections read as follows:

> "2. The Board of Examiners herein mentioned shall be composed of five persons learned in the law. The State Board of Law Examiners as at present constituted both as to membership and term of office shall constitute the Board of Examiners herein provided for. Provided, however, that when necessary, additional examiners to assist the Board may be temporarily appointed by this Court.
>
> "3. Upon the expiration of the term of office of any member of the present Board or upon any member of the present Board vacating his office, this Court shall appoint his successor. The members hereafter appointed to said Board and the additional examiners appointed to assist said Board shall take and subscribe an oath prior to the assumption of their official duties, to be administered as this Court may direct, to discharge faithfully and impartially the duties of their office. The members of said Board and additional examiners appointed to assist them shall receive such compensation as may be allowed by this Court out of funds arising from examination and admission fees provided for in this rule."

that the court has the power to regulate the matter of admissions cannot be questioned under the doctrine as announced by the Richards case, supra, and, having such power, we are of the opinion that it has the authority to enact such rules as herein above set out in order to make their power effective. As stated by our Court in the case of Hudgins v. Moorefville Consolidated School District, 278 S. W. 769, 313 Mo. 1, loc. cit. 13:

> "The rule of interpretation being that a power granted carries with it, incidentally or by implication, powers not expressed, but necessary to render effective the one expressed ****."

From the foregoing, we are of the opinion that Section 1, Laws of Missouri, 1933, page 415, supra, does not include the examination fees received by the Clerk of the Supreme Court from applicants for a license to practice law. Under the reasoning of the Richards case and the consequent promulgation of the Revised Rules of the Court, supra, the present board is not to be considered a creature of the Legislature. It exists and functions as an "arm of the court" and such existence and functions may be altered as the court in its discretion sees fit. As an "arm of the court" the board, in no respect differs from its purpose as outlined by Section 11697, supra. The difference now is that the board depends upon the rule or order of the court itself rather than upon legislative enactment. Ordinary state boards exist and have their compensation fixed by statutory enactment, but not so the board of law examiners. Their terms, fees and expenses are allowed by the court, and if in its discretion it desires to abolish the board, we find no constitutional provision which would prohibit it.

We are of the opinion that the examination fees paid by the applicants for admission to the bar are entirely under the jurisdiction of the Supreme Court and are to be handled as it may deem proper.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

MW/WOS:afj

TAXATION:) Tax rate of city of under one thousand population -
) right to levy in excess of twenty-five cents for
MUNICIPAL CORPORATIONS:) street lighting purposes.

5-18

May 16, 1935.

FILED
13

Mr. Virgil Calvin, Clerk
Breckenridge, Missouri

Dear Sir:

A request for an opinion has been received from you under date of March 4, 1935, such request being in the following terms:

> "I am writing for an opinion from you by order of the City Council of the City of Breckenridge, Missouri, regarding the legality of a tax levy of twenty five cents per hundred dollars valuation, for the purpose of lighting the streets of said City.
>
> This is a City of the fourth class, voting a levy of 25¢ for general revenue, and 60¢ for bonded indebtedness. The assessed valuation land and lot and personal, being $331,000.00.
>
> The question we want settled is, will an additional levy of 25¢ for street lighting purposes if voted be legal in a City of this class.
>
> Your valuable opinion on this matter will be most welcome and esteemed."

The Constitution of Missouri, Article X, Section 11, imposes certain restrictions on the tax rate for cities, such section being in part as follows:

> "For city and town purposes the annual rate on property* * * *in towns having one thousand inhabitants, or less, said rate shall not exceed twenty-five cents on the hundred dollars valuation."

The above language makes it clear that a city of less than one thousand inhabitants, within which class the City of Breckenridge falls according to the 1930 United States census, cannot have an annual tax rate exceeding twenty-five cents.

In the case of Brooks vs. Schultz, 178 Mo. 222, 77 S. W. 861 (1903), the City of Cape Girardeau, which already had levied a tax at the rate of fifty cents per hundred dollars, which was the maximum allowed to a city of its size by the above section of the Constitution, attempted to levy an additional two mill tax for library purposes. The Supreme Court of Missouri took the position that a city could not levy a tax to exceed the constitutional maximum, except under certain circumstances for school purposes. The Court said:

> "In the case before us, the city had already levied a tax of fifty cents on the hundred dollars valuationof taxable property in its jurisdiction; that was the limit of its taxing power, and therefore this special tax of two mills on the dollar for library purposes is illegal, unless it can be brought, as respondent seeks to bring it, within the exception which authorizes, under given circumstances, an increase in the rate of taxation for school purposes."

In a previous part of the opinion the court had quoted the above constitutional provision and had rejected the suggestion that the constitutional maximum fixed by that section only imposed a limitation on a levy for general revenue, in the following language:

> "That clause of the section above quoted limits the power of the city literally only in the matter of levying taxes for city purposes, that is, for general revenue. It does not in express words forbid the levying of additional taxes for a public library; it leaves fair room for the contention now made by the learned counsel for respondent, that whilst the city can not go beyond the limit there named for its general revenue, it may, if the Legislature so authorizes, levy a special tax for a purpose local to the city, but not for city purposes, that is, not for general revenue to carry on the city government. We would incline to that interpretation if it were not for the concluding clause of the same section, which is: 'Said restrictions as to rates shall apply to taxds of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness.' That clause was intended to prevent the interpretation now attempted to be put upon the preceding clause, and to declare that the power of the city to levy taxes for any purpose whatsoever was limited to fifty cents on the hundred dollars valuation of taxable property, except as therein or elsewhere in the Constitution authorized."

There would seem little doubt that a city of the fourth class has a right to light its streets under the provisions of R. S. Missouri, 1929, Section 7028, but under the above constitutional inhibition we do not believe that it can be done by increasing the tax rate above the constitutional maximum.

You have undoubtedly been confused by the provisions of Section 6948 R. S. Mo. 1929. This section limits the rate of levy in the following terms:

> "If such report shows that the city has less than 10,000 inhabitants, the city council may levy on all subjects and objects of taxation for city purposes not to exceed fifty cents on the one hundred dollars valuation. Should the population be one thousand or less, said rate of levy shall not exceed twenty-five cents on the one hundred dollars valuation. The foregoing are maximum rates which may be levied in said cities and towns." * * *

There are two following provisos to said section reading as follows:

> "Provided, however, the board of aldermen shall not have power to order a rate of tax levy on real or personal property for the year 1921 which shall produce more than ten per cent in excess of the amount produced, mathematically, by the rate of levy ordered in 1920, and in no subsequent year may any such board of aldermen or any officers or officer acting therefor, order a rate of tax levy that will produce, mathematically, more than ten per cent in excess of the taxes levied for the previous year. Provided, further, that the qualified voters of any such city or town, by a majority vote, shall have power to fix an additional rate higher than above provided for within the limits prescribed by the Constitution at a general election or a special election called for that purpose. Boards of aldermen are hereby empowered to call and conduct a special election under the laws governing such elections, as herein contemplated or submit a proposition for increase of levy, when in the opinion of such board, necessity therefore arises, and shall submit any such proposition at either special or regular election when petitioned therefor by tax-paying

> citizens equaling in number one per cent or more of the qualified voters of the city or town, and the proposition shall be as follows on the ballot:
>
> 'For a levy for city purposes of _____on the hundred dollars valuation' and 'against a levy for city purposes of _____on the hundred dollars valuation.'
> * * * * * *"

The clause above quoted beginning with the term "provided further" has probably been interpreted by you as allowing an election to increase the rate of levy for the purpose of street lighting. However, this proviso modifies directly the foregoing proviso relative to the increase of a tax rate not more than ten per cent each year, and does not modify the maximum amount which may be levied as hereinbefore quoted, to-wit, twenty-five cents on the hundred dollar valuation. This construction is readily verified by referring to page 517, Laws of Missouri, 1921. It will be noted that at that time Section 8399 R. S of 1919, was amendedbby the adding of the two provisos above quoted. It is certain that no vote for the levy of taxes is authorized when the maximum rate is already levied and the City of Breckenridge being of less than one thousand inhabitants it is limited to the twenty-five cent levy.

In passing on this question we are assuming that the levy contemplated is for the purpose of paying the current expense of street lighting and is not for the purpose of voting bonds to fund indebtedness already created for the purpose of lighting the streets.

CONCLUSION.

It is the opinion of this office that a city of the fourth class having a population of less than one thousand inhabitants, which at present levies a tax for city purposes of

twenty-five cents on the hundred dollars valuation, cannot with or without an election, levy an additional twenty-five cent tax or any other additional tax to pay the current expense of street lighting.

Respectfully submitted,

HARRY G. WALTNER, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

SOLDIERS--BONUS: Administrator or Executor of deceased soldier's Will has no constitutional claim to any soldier's bonus money in Missouri, even when soldier applied for same during his lifetime.

May 28, 1935.
L-10

FILED
13

Mr. Robert J. Callahan
National Judge Advocate
706 Chestnut Street
St. Louis, Missouri

Dear Sir:

We have your request for an opinion, dated May 15, 1935, which reads as follows:

> "In behalf of our organization I would appreciate having an interpretation of the so-called Soldiers Bonus Law. My understanding is that the Missouri Bonus Law provides that in case of the death of any person who would if living be entitled to the Bonus under the Act, the same shall be paid to the following persons in the order named and none other:
>
> "First: Surviving wife.
>
> "Second: Surviving child, and if there be more than one child surviving, then equally amount such children.
>
> "Third: Surviving mother.
>
> "Fourth: Surviving father.
>
> "The question which we would appreciate your answering for us is as follows: When a soldier has filed his application for payment of the Bonus and while his application is pending with the Adjutant General awaiting an additional affidavit as to residence of the veteran, said veteran dies leaving a last will and testament, is it not a fact that said amount is payable to his Estate due to the fact that said veteran had

previously made an application and was seeking to recover his Bonus at the time of his death?

"I would appreciate your giving me your interpretation regarding the above as there are some two or three cases similar to this one. It appears to me that in that said soldier had made his application and was entitled to the Bonus at the time of his application, that said amount would be payable to his Administrator."

Article IV, Section 44b, Missouri Constitution provides in part:

"* * * *The wife or husband, dhild, mother or father, in the order named and none other, of any deceased resident who served honorably in the military or naval forces, as provided in this section, shall be paid the sum or allowance that such deceased resident would be entitled to receive hereunder if such deceased resident had lived: * * * * and provided further, that no person shall be entitled to receive the bonus herein provided who was not a bona fide resident of the state of Missouri at least during the twelve months prior to the sixth day of April, nineteen hundred and seventeen, or who has received a state bonus from any other state in the Union."

In answering your question we need not look beyond the constitutional provisions above quoted.

CONCLUSION.

We are of the opinion that where an ex-soldier dies, who otherwise would have been personally entitled to a

soldier's bonus from the State of Missouri, then the wife or husband, child, mother or father, in the order named, and none other, shall be paid the sum that the deceased would have received if he had lived.

The fact that an eligible soldier applied for his State bonus and then died leaving a Will does not alter the constitutional succession to the right to receive this State bonus money. The people of Missouri, by their vote, did not intend that State bonus money become a part of any soldier's estate on his death, or that his administrator under his Will should have anything to do with the administration of bonus money claimed, but never received during his lifetime. By their vote in favor of the constitutional provision, supra, the people of Missouri personally identified and qualified the beneficiaries eligible to State bonus money. An administrator, under a Will, is a stranger to the eligible beneficiaries named in the Constitution. Where there is no constitutional beneficiary living to claim and receive this bonus money the benefice fails for want of a beneficiary.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

COUNTY DEPOSITORY:)
) Selection not in accordance with
BOND-COUNTY DEPOSITORY:) Section 12184 et seq., R. S. 1929.

September 19, 1935.

FILED
13

Hon. Chas. E. Budd
Presiding Judge
Cedar County
Eldorado Springs, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of September 6, 1935, in which you request the opinion of this Department on the facts stated therein. Your letter is as follows:

> "I desire at this time to set forth certain facts and figures in behalf of our depository in Cedar County.
>
> "The Sac River Valley Bank has always been the depository for our county money. They have been making a personal depository bond. Now then, Ora C. Cacy, County Collector, and his deputy are bonded by the United States Fidelity and Guaranty Company, and this bonding company is anxious that the depository bond be made. The Sac River Valley Bank is perfectly willing to handle these funds although they don't want to give a bond for it. The County Court realizes that we are responsible for this money. However, the Sac River Valley Bank is willing to make this bond if the County Court would pay the premium.
>
> "We submitted to the Tri-County State Bank of El Dorado Springs, which is

in this county, a proposition of being depository for the county funds. We have a letter from them in which they state they are willing to make this depository bond with this one stipulation that all warrants drawn on the County Treasurer which are presented and payment refused, that they shall be entitled to draw the interest on these warrants and no other individual shall be entitled to draw interest on any warrant by reason of the fact that the individual who has a warrant can present said warrant to the Tri-County State Bank and collect their money. It has been the custom for a great many years for certain individuals in the county to buy these warrants, hold them, and draw the interest. In these cases, the bank would desire to pay out the money promptly on these warrants and they would hold them for interest. In this way they would be recompensed for securing the bond and handling the accounts.

"We feel like the County Court would like to have your opinion in this matter, and I sincerely trust that you will give this careful consideration and advise at an early date what steps you think would be necessary to take in order to safeguard and protect the funds of this county."

From your letter, as we understand it, you desire this Department to give you our opinion as to "what steps you think would be necessary to take in order to safeguard and protect the funds of this county."

The Legislature in its wisdom has set forth with particularity the manner of selecting county depositories

by the county courts. Briefly we will review the necessary steps to be taken in the selection of a county depository.

Under the provisions of Sections 12184, 12185, 12186 and 12187 of Article 9, Chapter 85, Revised Statutes of Missouri, 1929, a definite scheme and plan for the selection of county depositories is set forth, and under the provisions of these sections it is made the mandatory duty of the county court to select the depository or depositories in which the funds of the county shall be deposited.

Section 12184 makes it the duty of the county court of each county in this State, at the May Term thereof, in the year 1909, and each two years thereafter, to advertise for bids and receive proposals from banking corporations, associations, or individual bankers in such county as may desire to be selected as the depository of the funds of said county.

Section 12185 provides the procedure to be taken by the bidders for the county funds.

Section 12186 relates to the opening of bids and makes it the duty of the county court "to select as the depositaries of all the public funds of every kind and description going into the hands of the county treasurer, and also all the public funds of every kind and description going into the hands of the ex officio collector in counties under township organization, the deposit of which is not otherwise provided for by law, * * *."

Section 12187 provides the kind and character of bonds to be given by the selected county depository and provides for the approval of same by the county court.

Section 12188 of said article and chapter sets forth specifically the manner in which the county funds shall be transferred to the selected county depositories.

Under the provisions of Section 12189, if for any reason the banking corporations, associations, or individual

bankers in any county shall fail or refuse to submit proposals to act as county depositories as provided in Section 12185, then, in that case, the county court shall have the power to deposit the funds of the county with any one or more of the banking corporations, associations, or individual bankers in the county or adjoining counties, and said section further provides the manner for the selection of same and the minimum rate of interest to be charged therefor, and the kind and character of bond or bonds to be given by said selected depositories.

So, it will be seen that the statutes have set forth in detail and with particularity the manner of the selection of a county depository and provide a definite way in which the county funds are to be protected and safeguarded.

We know of no other way that a county depository may be legally selected than in the manner provided in Article 9, Chapter 85, R. S. Mo. 1929, and amendments thereto.

Coming now to the plan submitted by the Tri-County State Bank of El Dorado Springs, as outlined in your letter, we do not find that the county court would have authority to enter into such a contract, as outlined in your letter, with the above bank, whereby the bank would make the depository bond to secure the county against loss and the county court in consideration of the bank giving such bond would stipulate that all warrants drawn on the county treasurer which are presented for payment and payment refused, the bank would be entitled to draw the interest on such warrants and no individual would be entitled to draw interest on any other warrant wherein payment was refused by the county. In other words, if we understand you correctly, it is that all warrants issued by the county court and when there is no money in the fund upon which it is drawn to pay said warrant, and said warrant is protested, the interest accruing on said warrant will be paid to the bank, and no one else other than the bank would have a right to purchase said warrants.

We do not think that it is within the power of the county court to say who shall be permitted to purchase protested

county warrants, nor within the power of the county court to compel the owner to sell same to the Tri-County State Bank of El Dorado Springs for the reason that the owner of said warrant, after it is protested, would have a right to assign same or hold same as they saw fit and the county would have no right to say that it would only pay interest on warrants purchased or cashed by the Tri-County State Bank.

Section 12169, R. S. Mo. 1929, provides for the issuance of county warrants. Section 12170 provides the same must be signed by the president of the court and attested by the clerk. Section 12171 provides as follows:

> "No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

Section 12172 provides for the form of the assignment.

It will be seen that when there is no money in the county treasury to pay any warrant drawn on a particular fund and the warrant presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator, the treasurer shall so certify on the back of the warrant and shall date and subscribe the same. This is what is commonly called "protesting the warrant," and same bears interest from the date of the treasurer's certificate. The warrant is delivered to and is the property of the person in whose favor it is drawn or his assignee, executor or administrator and is entitled to the interest thereon. He is not obligated to cash or sell same to a certain designated bank and may retain same and draw the interest himself.

Therefore, we do not believe that the county court would be authorized to enter into the contract with the bank selected as a county depository, under the terms and conditions as outlined in your letter. The county court could not control the owner of the warrant as to what he would do with

same and if one person was entitled to draw interest on warrants all other persons in a similar situation would be entitled to draw interest thereon.

We realize that the past financial situation has created many vexatious and troublesome problems for the county officials in the protecting and safeguarding of the county funds, but we recognize that the situation has very definitely improved in the past two and one-half years.

We are, therefore, of the opinion that the county court in the selection of a legal county depository must be guided by Article 9, Chapter 85, R. S. Mo. 1929, and amendments thereto, and that the plan outlined in your letter would not be a selection under the provisions of the statutes.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

CRH:EG

CIRCUIT CLERK: County is not liable to the Circuit Clerk for payment of the fees chargeable to the County.

2-19

February 8, 1935.

FILED
14

Hon. T. O. Carver
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Sir:

This is to acknowledge receipt of your letter dated January 31, 1935, requesting an opinion from this office which reads as follows:

> "Section 11814 Laws 1933 at page 372 excepts the Circuit Clerk's fees chargeable to the County from collection.
>
> "The Circuit Clerk now gets a certain salary contingent upon his collecting or taking in sufficient fees to pay said salary.
>
> "Supposing that over a period of time the Circuit Clerk's fees collected would be insufficient to pay his salary but if the fees due said Clerk chargeable to the County had been paid there would have been sufficient fees to take care of his salary allowance in full. Would the County be liable to the Circuit Clerk for payment of the deficit on the Clerk's salary occasioned by the costs chargeable to the County not being paid.
>
> "That is would at anytime the County be required to pay the Clerk's fees on fee bills or cost bills

chargeable to the County.

"I shall greatly appreciate an opinion from you on this point."

Prior to the first Monday in January, 1935, the Circuit Clerk was paid a salary under the provisions of Sections 11786 and 11813, R. S. Mo. 1929. The Circuit Clerk now, under the provisions of Section 11786, Laws of Missouri, 1933, page 369, retains fees up to the amount specified in Section 11786, supra, as compensation for his services in lieu of the salary heretofore paid.

The Legislature clearly intended to pay the Circuit Clerk upon a fee basis;and by its repeal of Section 11813, supra, and the failure to enact a new section in lieu thereof, the Legislature made it clear that a Circuit Clerk should receive no compensation from the County treasury for his services.

The fees which a Circuit Clerk is allowed to charge, collect and retain up to the amount specified in Section 11786, supra, under the provisions of Section 11814, Laws of Missouri, 1933, are all fees accruing to his office except such fees as are chargeable to the County. Section 11814, supra, reads in part as follows:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases , every fee accruing to their offices under the provisions of sections 11785, 11787, and 11788, or of any other statute, except such fees as are chargeable to the county. **** And quarterly such clerk shall pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law. It shall be the duty of the county court to examine such quarterly report and to require of the prosecut-

ing attorney to enforce payment of all fees therein shown to be unpaid in any manner now or hereafter provided by law, and, to that end, such prosecuting attorney shall have authority, at any time, to direct the issuance of any execution or fee bill for costs in any case in which any costs accruing to the county are unpaid."

It is plain from a careful reading of the above section that a Circuit Clerk is not permitted to charge and collect any fees from a county. We are therefore of the opinion that a County is not liable to a Circuit Clerk for any deficit in his yearly compensation, occasioned by the fact that costs chargeable to the County are not paid.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

JET/JLH:afj

COUNTY CLERK: (1) County Clerk not entitled to any fee for issuing county warrants or cancëling same but is entitled to a fee of five cents for filing each cancelled warrant.
(2) Not entitled to any fee for cancelling and filing school warrants.

March 30, 1935.

4-11

FILED
14

Hon. L. E. Cass
Clerk of the County Court
Webster County
Marshfield, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office which reads as follows:

> "Please send me an opinion of fees due the County Clerk for issuing county warrants, also the cancelling fees due on same, also fees due in cancelling school warrants and filing same."

Section 11781, R. S. Mo. 1929, specifies the fees a clerk of the county court shall be allowed for performing various services of his office. The section is long and it would serve no purpose to set same out in this opinion. It suffices to say, said section does not allow the county clerk any fee for issuing county warrants or for cancelling same or for cancelling school warrants and filing same. Said section does allow the clerk five cents "for filing every paper not hereinbefore specified."

I.

We will now examine the statutes in regard to the duty of the county clerk in issuing, cancelling and filing county records.

Section 12161, R. S. Mo. 1929, requires the clerk to issue warrants on the treasurer to be paid by the county court. This section reads in part as follows:

> "It shall be the duty of the clerk of the County court: **** fourth to issue warrants on the treasury for all moneys ordered to be paid by the court, keep an abstract thereof, present the same to the county court at every regular term, balance and exhibit the accounts kept by him as often as required by the court, and keep his books and papers at all times ready for the inspection of the same, or any judge thereof."

Section 12163, R. S. Mo. 1929, provides in part as follows:

> "***** When the court shall ascertain any sum of money to be due from the county, they shall order their clerk to issue a warrant therefor *****."

Section 12169, R. S. Mo. 1929, provides in part as follows:

> "When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, and unless otherwise provided by law, in the following form: ****."

Section 12170, R. S. Mo. 1929, reads in part as follows:

> "Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in Roman letters, without ornament. It shall be signed by the president of the court whilst the court is in session, attested by the clerk, and warrants shall be numbered

progressively throughout each year: ****."

Section 12146, R. S. Mo. 1929, reads:

> "Whenever any county court receives a county warrant from the treasurer of his county, as provided for in the preceding section, it shall be the duty of said court to cause the county clerk to write across the back of said warrant, with good red ink, the word 'canceled,' giving the dates thereof."

Section 12147, R. S. Mo. 1929, provides:

> "It shall be the duty of the county clerk to see that all canceled warrants are filed and kept as other county records. **"

All of the foregoing sections refer to the issuance of county warrants by the Clerk, his attestations thereof and the cancelling and filing of said warrants by the Clerk. Said sections are a part of Article VIII, Chapter 85. Section 12183 of the same article and chapter reads as follows:

> "The court shall allow to the clerk of the county court for his services under this article (except sections 12145, 12146 and 12147), such compensation as may be deemed just and reasonable."

By virtue of the above section, the county court can allow the county clerk such compensation as they deem just and reasonable for performing the services specified in Article VIII., Chapter 85, except the services performed under Sections 12145, 12146 and 12147. If the clerk is to receive any compensation for issuing county warrants, it must be included in the allowance made to the clerk under Section 12183 supra.

The compensation allowed a clerk under Section 12183, supra, is part of the fees of his office and must be accounted for and reported the same as other fees accruing to his office and said compensation cannot be retained in addition to

the aggregate amount of fees a clerk is allowed to retain under Section 11811, Laws of Missouri, 1933; but must be included therein. (Callaway County v. Henderson, 119 Mo. 32; State ex rel. v. Dent, 121 Mo. 162).

Section 12147, R. S. Mo. 1929, makes it the duty of the county clerk to file and keep all canceled warrants the same as all other county records. Section 11781, R. S. Mo. 1929, allows a clerk a fee of five cents "for filing every paper not hereinbefore specified." We think it is plain that a clerk is entitled to a fee of five cents for filing each canceled county warrant.

In the case of State ex rel. V. Brown, 146 Mo. l.c. 406, the court said:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

In view of the above, it is the opinion of this office that the county clerk is not entitled to any fee for issuing county warrants or for cancelling same for the reason that the statute does not allow him any. The county court, under the provisions of Section 12183, supra, may allow the clerks such compensation as they deem just and reasonable for performing their duties, imposed under Article VIII. Chapter 85, which includes the issuing of warrants. For filing canceled county warrants, the county clerk is entitled under the provisions of Section 11781 to a fee of five cents for filing each canceled county warrant.

II.

You ask what fees you are entitled to for canceling and filing school warrants. We are unable to find any statute requiring you to cancel and file school warrants. Under the provisions of Section 9266, R. S. Mo. 1929, the county treasurer is made the custodian of all moneys for school purposes belonging to the different districts until paid out on warrants, duly issued by the order of the board of directors, to the treasurer of some town, city or consolidated district.

Under the provisions of Section 9267, R. S. Mo. 1929, the county or township treasurer is required to settle his accounts with the county court at its first and third regular terms each year and it is made the duty of the court to examine the vouchers, receipts, orders and warrants upon which any payments were made, and, if satisfied that such payments are correct, to make an order of record attesting same. Said section, however, does not require the county court or clerk to cancel said school warrants, or the clerk to file same in his office. Section 12146 specifically requires the court to cause the clerk to cancel county warrants and Section 12147 makes it the duty of the clerk to file all canceled county warrants.

Since the statute does not make it the duty of the county clerk to cancel and file school warrants and consequently allows no fee therefor, it is the opinion of this office that the county clerk is entitled to no fee for canceling and filing school warrants.

Yours very truly,

APPROVED:

J. E. TAYLOR
Assistant Attorney-General.

ROY McKITTRICK
Attorney-General.

JET/afj

HIGH PATROL--CONSTABLES--JUSTICES OF THE PEACE: Constables and their deputies have police jurisdiction over the whole county. Highway Patrolmen are not vested with exclusive jurisdiction of policing State Highways to the exclusion of other peace officers.

6-12

May 28, 1935

FILED
14

Hon. B. M. Casteel,
Supt., Missouri State Highway Patrol,
Jefferson City, Missouri.

Dear Sir:

This Department acknowledges receipt of your letter and enclosure of May 22, 1935.

Your letter states in part as follows:

> "I am inclosing you letter I have received from the Commanding Officer of Troop 'C', relative to an opinion to be rendered by your Department.
>
> "I will appreciate it very much if we could have this at an early date,- due to the fact that matters of this kind are continually coming up through-out the State."

Your enclosure is too lengthy to set out in full and hence we take the liberty of setting out the substance therein contained.

Complaint is made of the practice of maintaining speed traps, particularly in St. Louis County, although it is stated that they are now spreading outside of St. Louis County. It is complained that the net result of such practice has been the slowing down of traffic, the increasing of hazards on the highways, and the un-doing of the results of the efforts of the Missouri State Highway Patrol in educating and regulating the traffic on the highways. It is alleged that the only possible profit to anyone has been the added fees which come into the hands

of certain "Constables and their fee-grabbing Justices". The question is raised whether the Act creating the Missouri State Highway Patrol "vests the exclusive jurisdiction of policing, on highways constructed and maintained by the State Highway Commission, and the regulating of the movement of traffic thereon, in the State Highway Patrol, to the exclusion of all other officers." Another question raised is whether constables and their deputies are limited to their respective townships in making arrests for violations of the law, or whether their powers and duties extend over the entire county.

I.

CONSTABLES AND THEIR DEPUTIES ARE NOT LIMITED TO THEIR RESPECTIVE TOWNSHIPS IN MAKING ARRESTS FOR VIOLATIONS OF LAW. THEIR POWERS AND DUTIES EXTEND OVER THE ENTIRE COUNTY.

Section 11756, R. S. Mo. 1929, sets out the general powers and duties of a constable, as follows:

> "Constables may serve warrants, writs of attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties."

In the case of Huhn v. Lang, 122 Mo. 600, l. c. 606, the court said:

> "The duties and powers of the constable within the jurisdiction of a justice are identical with those of a sheriff * * *."

Section 11516, R. S. Mo. 1929, sets out the duties of sheriffs in part as follows:

> "Every sheriff shall be a conservator of the peace within his county * * *."

In the case of Jones v. State, (Tex.) 65 S. W. 92, the court defines the terms "conservators of the peace" and "peace officers" thus:

> "According to the dictionaries, a conservator is a preserver or maintainer. See 1 Rap. Law Dict.; Cent. Dict. A conservator of the peace is an officer authorized to preserve or maintain the public peace. Id. It would therefore seem to follow that one who is authorized to preserve or maintain the public peace is a peace officer."

The question is raised whether constables and their deputies are limited to their respective townships in making arrests for violations of the law, or whether their powers and duties extend over the entire county.

In the case of The State v. Pollock, 49 Mo. App. 445, l. c. 447, the court said:

> "It was stated at the argument that the exclusion of evidence showing defendant's official character was on the ground that he was not in the township of which he was constable. This is not a sufficient objection. He was in the county in which his township was located, and as such officer he had powers and duties over the entire county. R. S. 1889, sec. 2380" (now sec. 11756, R. S. Mo. 1929, supra).

It is evident from the foregoing that constables and their deputies are conservators of the peace or peace officers and as such are charged with the duty of enforcing all laws within their respective counties.

II.

ACT CREATING MISSOURI STATE HIGHWAY PATROL DOES NOT VEST EXCLUSIVE JURISDICTION OF POLICING STATE HIGHWAYS IN THE STATE HIGHWAY PATROL, TO THE EXCLUSION OF OTHER PEACE OFFICERS.

Section 1 of the 1931 Session Acts, page 231, creates the "Missouri state highway patrol" and provides in part as follows:

> " * * * but the powers and duties hereby conferred on the members of such patrol shall be supplementary to and in no way a limitation on the powers and duties of sheriffs, police officers, or other peace officers of this state."

Section 12 of the same Act provides:

> "It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight, and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction of any improved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible therefor and to bring them before the

> proper officials for prosecution. It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes."

The question is raised whether Section 12, supra, "vests the exclusive jurisdiction of policing, on highways constructed and maintained by the State Highway Commission, and the regulating of the movement of traffic thereon, in the State Highway Patrol, to the exclusion of all other officers."

In the case of Gendron v. Dwight Chapin & Co., 37 S. W. (2d) 486, l. c. 488, 225 Mo. App. 466, the court said:

> "In construing the act, we are bound to ascertain and give effect to the intention of the Legislature as expressed in the statute, and, where the meaning of the language used is plain, it must be given effect by the courts (Betz v. Kansas City So. Ry. Co., 314 Mo. 390, 284 S. W. 455, 461; Grier v. Ry. Co., 286 Mo. loc. cit. 534, 228 S. W. loc. cit. 457; Sleyster v. E. Donzelot & Son (Mo. App.) 25 S. W. (2d) loc. cit. 148), and this without regard to the results of the construction or the wisdom of the law as thus construed (State ex rel. v. Wilder, 206 Mo. 541, 105 S. W. 272), and we have no right, by construction, to substitute any ideas concerning legislative intent contrary to those unmistakably expressed in the legislative words (Clark v. Railroad Co., 219 Mo. loc. cit. 534, 118 S. W. loc. cit. 44)."

Section 1, supra, of the Act creating the Missouri State Highway Patrol provides in clear and unambiguous

language that the powers and duties conferred on members of the patrol are supplementary to and in no way a limitation on the powers and duties of sheriffs, police officers, or other peace officers of this state.

From the foregoing, we are of the opinion that the Act creating the State Highway Patrol does not vest the exclusive jurisdiction of policing, on state highways, and the regulating of the movement of traffic thereon, in the State Highway Patrol, to the exclusion of all other officers. We realize the need of curbing speed traps and the evils which attend such practice. However, as our courts have repeatedly held, we have no right, by construction, to substitute any ideas concerning legislative intent contrary to those unmistakably expressed in the legislative words.

III.

PROSECUTIONS BEFORE JUSTICES OF THE PEACE FOR MISDEMEANORS MUST BE BY INFORMATION MADE BY THE PROSECUTING ATTORNEY OF THE COUNTY IN WHICH THE OFFENSE MAY BE PROSECUTED, OTHERWISE JUSTICES SUBJECT TO OUSTER.

Until the Legislature enacts such laws as are necessary to prohibit such practice, some remedy may be afforded in seeing to it that the following procedure is carried out in proceedings before justices of the peace in the case of misdemeanors.

Section 3414, R. S. Mo. 1929, provides as follows:

> "Justices of the peace shall have concurrent original jurisdiction with the circuit court, coextensive with their respective counties in all cases of misdemeanor, except in cities having courts exercising exclusive jurisdiction in criminal cases, or as otherwise provided

> by law: Provided, that all prosecutions before justices of the peace for misdemeanor shall be commenced and prosecuted in the township wherein the offense is alleged to have been committed: Provided further, that nothing herein contained shall prevent the defendant from taking a change of venue, as provided for in this article."

In the case of State v. Alford, 142 Mo. App. 412, l. c. 415, 127 S. W. 109, the court in construing the above section, said:

> "The information charges that the offense was committed in Jobe township, and the prosecution was commenced before George W. Johnson, a justice of the peace of Johnson township. Section 2748 of the Revised Statutes 1899, as amended by the act of the Legislature in 1907, reads: 'Provided, that all prosecutions before justices of the peace for misdemeanor shall be commenced and prosecuted in the township wherein the offense is alleged to have been committed'.
>
> "We had occasion to pass on this statute in State of Missouri v. Grant Sexton, at the last term of this court, and we there held that in order to give jurisdiction in a misdemanor prosecuted before a justice of the peace, that the prosecution must be instituted before some justice of the peace in the township where it is claimed the offense was committed. It is a general rule that the justice of the peace has only such jurisdiction as the statute confers upon him, and that the facts giving such jurisdiction must affirmatively appear on the face of the proceeding. (Barnes v. Plessner, 121 Mo. App. 677, 97 S. W. 626; Shaw v. Railroad, 110 Mo. App. 561, 85 S. W. 611; Patchen v. Durrett, 116 Mo. App. 437, 92 S. W. 721.)

"The Legislature has the right to say in what jurisdiction statutory misdemeanors shall be prosecuted and to make that jurisdiction exclusive. (State v. Gordan, 60 Mo. 383; State v. Hall, 189 Mo. 262, 87 S. W. 1181.)

"In the case of State v. Sexton, supra, the authorities upon this point are collected, and we re-affirm what we said in that case."

Although, as we have stated, constables and their deputies are not limited to their respective townships in making arrests for violations of the law, yet we are of the opinion that by virtue of Section 3414, supra, in order to give jurisdiction in a misdemeanor prosecuted before a justice of the peace, the prosecution must be instituted before some justice of the peace in the township where it is alleged the offense was committed. In other words, if a constable or deputy constable arrests a traffic violator outside of his township, but in his county, he can not take the alleged violator back to his township to be tried before a justice of the peace, but must bring him before a justice of the peace in the township where it is alleged the offense was committed.

Section 3415, R. S. Mo. 1929, provides as follows:

"Prosecutions before justices of the peace for misdemeanors shall be by information, which shall set forth the offense in plain and concise language, with the name of the person or persons charged therewith: Provided, that if the name of any such person is unknown, such fact may be stated in the information, and he may be charged under any fictitious name; and when any person has actual knowledge that any offense has been committed that may be prosecuted by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the justice of the

peace having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a justice of the peace in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with a justice having jurisdiction of the offense, founded upon or accompanied by such complaint."

Section 3416, R. S. Mo. 1929, provides as follows:

"All such informations shall be made by the prosecuting attorney of the county in which the offense may be prosecuted, under his oath of office, and shall be filed with the justice as soon as practicable, and before the party or parties accused shall be put upon their trial, or required to answer to the charge for which they may be held in custody: Provided, that complaints subscribed and sworn to by any person competent to testify against the accused may be filed with any justice of the peace, and if the justice be satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information."

Section 2162, R. S. Mo. 1929, provides that:

"Every justice of the peace who shall be convicted of bribery, perjury or other infamous crime, or of any misdemeanor in office, shall be removed from office."

It is to be noted that prosecutions before justices of the peace for misdemeanors shall be by information, and further that such information must be made by the prosecuting attorney of the county in which the offense may be prosecuted. It has been the common practice, as we understand it, for certain constables and their deputies in "cruising the highways" to make arrests and instead of trying them before a justice of the peace in the township where it is claimed the offense was committed, to cause the alleged violator to drive back to his own township to appear before a justice. As we have pointed out, this is clearly in violation of Section 3414, supra. Furthermore, when the alleged violator is brought before the justice, the general practice is for the latter to inquire of the officer the nature of the charge and then the question of guilty or not guilty. In the usual case the alleged violator will plead guilty and pay his fine rather than put up a cash bond and be forced to return a good distance to stand trial, for, as happens in the average case, the alleged violator may live a good distance from the scene of the alleged offense.

We are of the opinion that under Sections 3415 and 3416, supra, when an alleged violator is brought by a constable, deputy, or peace officer, as the case may be, before a justice of the peace charged with a misdemeanor, before the party or parties accused shall be put upon their trial or required to answer to the charge for which they may be held in custody, or before any punishment can be meted out, an information must be obtained from the prosecuting attorney of the county in which the offense occurred. This is mandatory under the statutes and any justice of the peace who attempts to cause a person to stand trial, answer to the charge, and to mete out punishment without the alleged offender being apprized of the nature of his offense by information, is guilty of misdemeanor in office and subject to ouster as set out in Section 2162, supra.

Although, as we have stated, it is mandatory under the statutes that an information be obtained from the prosecuting attorney of the county in which the offense occurred, it is not imperative on the prosecuting attorney to file an information on the mere filing of a complaint with him by one having knowledge that an offense has been committed.

The court in the case of State v. Ransberger, 106 Mo. 135, l. c. 137, on holding that the prosecuting

attorney may, in his discretion, file an information or refuse to do so if a complaint be filed, said:

> "Judge Ellison, after reviewing the law as to the nature and attributes of an information, and the method of its presentation to the court, adds: 'From these considerations, it would be clear to the legal mind that a common-law information is one that is intrusted solely to the discretion of our state attorney to be given or withheld at his will, unhampered by statutory restraint, and, as the case in some respects presents a constitutional question it becomes, under our conclusion herein, of great public importance, that the opinion of the Supreme Court should be taken.'"

From the foregoing, we are of the opinion that the prosecuting attorney may, in his discretion, file an information or refuse to do so if a complaint be filed, and if such can not be obtained, the justice of the peace can not hold the alleged violator, but must free him. The prosecuting attorney should have knowledge, that is, be reasonably convinced, not only that an offense has been committed, but that the accused committed it. Whenever an information is sought from the prosecuting attorney upon a complaint and he be reasonably convinced that the accused has not violated the law as charged by the peace officer, but that the accused has run into a "so-called trap", he may, in his discretion, refuse to file the information.

The above procedure must be carried out by peace officers who bring alleged violators before justices of the peace.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

MW:HR

MOTOR VEHICLES: If a person in good faith leases motor vehicle to transport property belonging to him over the highways, then neither lessor or lessee are subject to regulation of Public Service Commission.

8-16

August 13, 1935.

FILED
14

Hon. B. M. Casteel
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Colonel:

This is to acknowledge your letter as follows:

"The inclosed letter from Capt. Lewis B. Howard, Commanding Officer of Troop "D" of the Missouri State Highway Patrol is self-explanatory.

"Will you kindly furnish this Department with an opinion on the points mentioned."

Captain Howard's letter provides as follows:

"1. Request that a ruling be obtained from the Attorney General as to the legality of leases on motor trucks for a period of ten days or less, as to whether or not the lessor of the truck would come under the supervision of the Public Service Commission, taking it for granted that he receives compensation for this truck during the period of the lease.

"2. We give you two specific cases as follow:

"(a) Ashley Mixon Company, who handles canning machinery, leased a truck for a period of five days from John Doe to haul a quantity of canning factory machinery from Springfield to

> Southeast Missouri, and was to pay John Doe on a mileage basis. The machinery belonged to the Ashley Mixon Company and this Company hired the driver for this truck. Would either the lessor or the lessee be subject to the laws of the Public Service Commission?
>
> "(b) The Ajax Pipe Line Company leased an Oklahoma truck, which was also bearing Missouri license plates, for a period of ten days, to move a quantity of pipe belonging to the Ajax Pipe Line Company from Dixon to Washington. In this case the lessor of the truck continued to drive same for a fixed amount a day for his services and the services of the truck. Would either the lessor or the lessee in this case be subject to the laws of the Public Service Commission?"

In the case of Schwartzman Service v. Stahl et al., 60 F. (2d) 1034, the District Court of the Western District of Missouri, Central Division, said, in construing the Act pertaining to the transportation of persons and property by motor vehicles, page 1037:

> "It is obvious, in view of the evidence before the court, that it was needful legislation not only to limit the number of motor vehicles in use on the highways, both as common carriers and con-contract haulers, but in like manner to supervise and regulate them in the matter of the size of the trucks, the character of business done, and the responsibility of the operators."

The Public Service Commission has the right to regulate the transportation of persons and property for hire by motor vehicles over the highways of this State. Laws of Missouri, 1931, page 304.

Section 5264, Laws of Missouri, 1931, page 304, provides in part as follows:

> "(b) The term 'motor carrier,' when used in this act, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service, for hire as a common carrier. * * * * *
>
> "The term 'contract hauler,' when used in this act, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as herein defined."

Section 5265 provides for certain exemptions to which the provisions of the Act do not apply. Section 5280, Laws of Missouri, 1931, page 316, provides in part as follows:

> "* * * Provided, the provision of this act shall not apply to trucks of one and one-half ton capacity and less."

For the purpose of this opinion we assume that the trucks mentioned in your letter were of greater capacity than one and one-half tons, and when we allude to a truck hereafter we assume that it is a truck not within the exemption of Section 5280.

The Act giving the Public Service Commission the right to regulate the transportation of persons or property for hire over the highways of this State did not give the Commission any right to regulate individuals in transporting property belonging to such. In other words, if a person owns a truck such may transport his property without complying with the provisions of the act. A person owning a truck might likewise lease said truck to an individual and as long as said lease agreement was a bona fide and good faith transaction and not a mere subterfuge in order to circumvent the Public Service Commission Act, then, in our opinion, the person leasing the truck, or the person to whom the truck was leased, would not be subject to the laws of the Public Service Commission.

Applying the above premise to the question asked it would be our opinion that neither the lessor or the lessee of the truck, which hauled the machinery belonging to the Ashley Mixon Company, would be subject to the Public Service Commission, as we assume that the Ashley Mixon Company in good faith leased said truck and hauled its own materials.

Our answer to your second question will be the same as to the first.

As to whether or not the leasing of a truck by the owner to another in order to avoid the jurisdiction of the Public Service Commission would be a question of fact to determine the good faith of such arrangement. If the owner of a truck is engaged in the business of leasing same solely to avoid regulation by the Public Service Commission, then, in our opinion, said person would be a "motor carrier" within the meaning of the act because said act provides specifically, "or of providing or furnishing such transportation service, for hire as a common carrier." If you find any owner who leases trucks as a subterfuge to avoid regulation by the Public Service Commission, then it would be your duty to cause said person to comply with the provisions of the act. However, an isolated case (as we understand your present inquiry) would not bring the lessor of the truck within the provisions of the act.

As to the lessee procuring license plates, if such has the use of the truck under lease agreement for a period greater than ten days, see our opinions dated December 31, 1934, and June 20, 1935, to Honorable B. M. Casteel and Honorable V. H. Steward, respectively. Copies of these opinions will be supplied if desired.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

MOTOR VEHICLES - Tractors used in construction work need not have license.

Re Op. J. 1/31/34
and Ops. attached

August 24, 1935.

FILED
14

Col. B. Marvin Casteel,
Sup't. State Highway Patrol,
Jefferson City, Missouri.

Dear Sir:

On December 18, 1934 this department rendered you an opinion with respect to the licensing of caterpillar tractors used on the highways of the State of Missouri. Some misunderstanding has resulted from the rendition of this opihion, and we desire to clarify the holding therein.

The only tractors that need be licensed are those driven upon the highways of the state. If the tractors in question are being used in the construction of a new road, or in like work, there is no need for said tractors to be licensed inasmuch as the license fee is a fee paid for the use of the highways of the State of Missouri.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

FOR OPINION

JWH:AH

INHERITANCE TAX: Joint bank accounts not subject to tax.
Irrevocable trust with reservation of life income to grantor subject to tax.

11-6

November 5, 1935.

FILED

Mr. Harry J. Cantwell,
Attorney at Law,
Main & Locust Streets,
St. Louis, Missouri.

Dear Sir:

This department is in receipt of your letter requesting an opinion as to the following state of facts:

> " * * * a certificate of deposit made payable to Sarah E. or Susan Simmons for $80,526.83; cash in the bank in the name of Sarah E. or Susan Simmons, $28,728.69. Both of these items are in addition to the gross estate as previous mentioned.
>
> "There is in addition to these two items found in the estate, a third item on which I mainly desire the opinion of your office, which is as follows:
>
> "On the 17th day of October, 1925, the deceased executed an Indenture of Trust, whereby she refers to herself as a 'Donor' and assigned, transferred and delivered certain personal property, consisting of stock and bonds, which are itemized in the trust agreement, which had been transferred and sold in some instances until now the sum in the trust estate is $50,316.73. The St. Louis Union Trust Company is made the trustee of this sum to be used for this purpose - that they shall have full power and authority to manage and control the trust estate and power and

> authority to sell, exchange, lease, rent, mortgage, pledge, assign, transfer or otherwise dispose of all or any part thereof, upon such terms and conditions as it may see fit, and after paying all reasonable costs and expenses incurred, shall pay over the entire net income in equal monthly or other convenient installments unto the said 'Donor' for and during her natural life, and after the date of the Donor's death, the entire trust estate and undistributed income shall be divided into four equal shares, to be disposed of by bequests to certain relatives mentioned in the trust agreement.
>
> "Please advise me if, in making this estate up for taxation purposes, I should assess taxes on this trust estate and on the money held jointly by the deceased and her sister."

In reply to your question with reference to joint bank accounts, I wish to say that there is no inheritance tax assessed against the survivor, provided the property has been held in the names of one or more persons as joint tenants with right of survivorship and not as tenants in common. If they hold the property as tenants in common, the interest passing by reason of the death of one of the joint depositors is subject to inheritance tax; however, where they hold as joint tenants with right of survivorship, the joint deposit agreement is sufficient to pass the title to the survivor without any inheritance tax.

Section 5400, R.S. Mo. 1929 provides in part as follows:

> "When a deposit shall have been made by any person in the name of such depositor and another person and in form to be paid to either, or the survivor of them, such deposit thereupon and any additions thereto made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to either during the life time of both, or to the survivor after the death of one of them."

In the very recent case of Murphy v. Wolfe, (Sup. Ct. Mo.) 45 S.W. (2d) 1079, decided February 6, 1932, Judge Ragland, after quoting Section 5400, supra, said:

> "As construed by this court in two recent cases, the statute gives rise to a presumption that a deposit made within its purview becomes the property of the depositors as joint tenants, and in the absence of competent evidence to the contrary, actually fixes the ownership of the fund in the persons named as joint tenants with the attendant right of survivorship. Ambruster v. Ambruster, 326 Mo. 51, 31 S.W. (2d) 28; Mississippi Valley Trust Co. v. Smith, 320 Mo. 989, 9 S.W. (2d) 58."

In view of the foregoing, it is apparent that each of the joint tenants owns the whole of the deposit, so that upon the death of one there is no transfer of ownership and therefore there can be no inheritance tax assessed against the survivor.

In answer to your second question, it appears that the trust in question was created on the 17th day of October, 1925.

Section 570, R.S. Mo. 1929 (being the statute with which we are here concerned) provides, as far as is pertinent, as follows:

> "A tax shall be and is hereby imposed upon the transfer of any property, * * * *. When the transfer is made by a resident or by a non-resident when such non-resident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale or gift made in contemplation of the death of grantor, vendor or donor, or intending to take effect in possession or enjoyment at or after such death.

> * * * Such tax shall be imposed when any person, association, institution or corporation actually comes into the possession and enjoyment of the property, interest therein, or income therefrom, whether the transfer thereof is made before or after the passage of this law."

We recognize that the very purpose of the provision in the above section imposing a tax on transfers intended to take effect in possession or enjoyment at or after death, is to establish a bar to frequent attempts to transmit estates to beneficiaries, unimpaired by the payment of inheritance taxes, by means of trusts or conveyances whereby the grantor reserves the beneficial enjoyment of the property during his life.

This department on May 27, 1933, in an opinion rendered to Mr. Pryor A. Stewart, ruled that an irrevocable transfer in trust with reservation of life income to the grantor was not subject to the inheritance tax laws of the State of Missouri. This opinion was written on the authority of the case of May v. Heiner, 281 U. S. 238. However, in view of recent decisions construing this case, we at this time overrule our former opinion and now hold conveyances of this nature subject to tax.

The Supreme Court of Connecticut in the case of Blodgett v. Guaranty Trust Co., 114 Conn. 207, in holding a conveyance similar to the one under discussion as subject to the inheritance tax, despite the decision of the Supreme Court of the United States in the case of May v. Heiner, supra, said:

> "The first question reserved in each case is: Did the property which was the subject of transfer 'pass by deed, grant, or gift....intended to take effect in possession or enjoyment at the death of the grantor or donor' within the meaning of the Connecticut succession tax statute, in force at the date of the deed, or within the meaning of any subsequent amendment or revision of said succession tax statute?
>
> * * * * *

"The original Connecticut Act, Chapter 180, Public Acts 1889, Sec. 1, included provision for a tax on 'property within the jurisdiction of this State, and any interest therein,..... which shall pass....by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise.' In 1897 (Public Acts, Chap. 201) this provision does not appear, but it was restored in substance, by Sec. 3 of Chapter 332, Public Acts of 1915, and has since continued unchanged in any respect materially affecting the present inquiry. General Statutes (1918) Secs. 1261-1271; Public Acts 1929, Chap. 299, Secs. 1 and 2; General Statutes (1930) Chap. 77, Secs. 1360, 1361.

* * * * *

"This court has not had occasion to pass directly upon the question, freed from the element of retrospective operation, but our full concurrence with the general view just stated is clearly indicated in Blodgett v. Union & New Haven Trust Co., 97 Conn. 405, 410, 116 Atl. 908. We there pointed out that the 'qualifying and enlarging phrase,' 'in possession or enjoyment,' included in our original succession tax Act (1889), dropped from the law in 1897, and reinserted in 1915, 'marks the difference between a tax on the privilege of succeeding to the property of a decedent, and a tax on the privilege of succeeding to the possession and enjoyment of property which the decedent has conveyed away during his lifetime reserving only a right to the income during his own life.

* * * *

"It is stated in Milliken v. United States (1931) 283 U. S. 15, 19, 20, 51 Sup. Ct.

324, 326, that in the Reinecke case and May v. Heiner 'the only relevant question was one of construction, whether (the gifts) were of the class intended by Congress to be taxable under Sec. 402 (c) as transfers "intended to take effect in possession or enjoyment at or after death."'

* * * * *

"It is obvious from the quotation from the opinion in the Reinecke case which we have given above, that the decision, upon which the succeeding cases relied, was motivated by the nature of the Federal estate tax, which is upon the transfer of, rather than the succession to, property of the decedent. Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747; Y. M. C. A. of Columbus v. Davis (1924) 264 U. S. 47, 44 Sup. Ct. 291; Edwards v. Slocum (1924) 264 U. S. 61, 62, 44 Sup. Ct. 293. 'The tax is on the act of the testator not on the receipt of property by the legatees.' Ithaca Trust Co. v. United States (1929) 279 U. S. 151, 155, 49 Sup. Ct. 291; Corbin v. Townshend, 92 Conn. 501, 505, 103 Atl. 607; Gleason & Otis, Inheritance Taxation (4th Ed.) p. 2 et seq. On the other hand, with a few exceptions, the State inheritance tax statutes levy a duty or excise upon the beneficiary for the privilege or right of succession to property.

* * * * *

"Therefore, we feel that we are not constrained to place a similar construction upon our own statute and are still at liberty to adhere to the views as to its meaning and scope which usually have been held as to State statutes of similar nature and terms and which we indicated in Blodgett v. Union & New Haven Trust Co., supra; these lead to the conclusion that the property which was the subject of transfer was within the

meaning of the statute, and taxable accordingly. 'The transaction was within the description of the statute. The property passed from the decedent to the beneficiary "by deed, grant or gift." Though upon the creation of the trust an equitable remainder in the trust fund, after the life estate of the decedent in such fund, vested in interest in the beneficiary, she was not entitled to "possession or enjoyment" of the fund or any part of it until the death of the decedent....Her present right to the future "possession or enjoyment" of the trust fund, which was "vested" in the sense of being assignable and transmissible by her during the life of the decedent....was not "possession or enjoyment," within the meaning of the statute. The statute recognizes the familiar distinction between taking effect in possession or enjoyment and vesting in right, title or interest.... Apparently the legislature intended to reach for the purpose of taxation the shifting of the enjoyment of property--the "economic benefits" thereof or "economic interest" therein (compare Saltonstall v. Saltonstall, 276 U. S. 260, 271, 48 Sup. Ct. 255, 72 L. Ed. 565; Reinecke v. Northern Trust Co., 278 U. S. 339, 346, 49 Sup. Ct. 123, 73 L. Ed. 410, 66 A. L. R. 397)--from a former owner at his death, even though such shifting of enjoyment followed necessarily from a prior transfer of title <u>inter vivos</u>. As was said in State Street Trust Co. v. Treasurer & Receiver General, 209 Mass. 373, 379, 95 N. E. 851, 852, "The policy of the law is, that the owner of property shall not defeat or evade the tax by any form of conveyance or transfer, where after death the income, profit or enjoyment enures to the benefit of those who are not exempted."' Worcester County National Bank v. Commissioner of Corporations and Taxation, supra."

This case was later affirmed by the United States Supreme Court in Guaranty Trust Co. v. Blodgett, 287 U. S. 509.

The Supreme Court of Minnesota in the case of In re Estate of Rising, 186 Minn. 56, had before it a trust similar to the one here under consideration. The statute of Minnesota, or so much thereof as is pertinent, provides as follows:

> "Section 1. A tax shall be and is hereby imposed upon any transfer of property.....
>
> "(1) When the transfer is by will or by the intestate laws of this state...
>
> "(3) When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this state, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death.
>
> "(4) Such tax shall be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof, by any such transfer whether made before or after the passage of this act."

The Supreme Court of Minnesota in holding said trust taxable because of the reservation of the income therefrom by the donor, employed substantially the same reasoning as did the Supreme Court of Connecticut, saying:

> "The opposing argument seeks justification in May v. Heiner, 281 U. S. 238, 50 S. Ct. 286, 74 L. ed. 826, 67 A. L. R. 1244. Consideration of that decision must begin with Reinecke v. Northern Tr. Co. 278 U. S. 339, 49 S. Ct. 123, 73 L. ed. 410, 66 A. L. R. 397, involving

seven trusts. Two were revocable and so taxable. The other 'five trusts,' not revocable, were yet held not taxable because there was no transfer by reason of death, within the meaning of the federal law. Life interests in income were created but not for the settlor. There were provisions for accumulation of income but not for the donor. The gifts were instantly complete, inter vivos, because nothing of substance remained to pass from donor to or for the benefit or enjoyment of donees at or after death of the donor.

"The reason why there was no transfer subject to the federal tax was thus stated (278 U. S. 347):

"'In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * It is not a gift tax, * * *. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift inter vivos, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one (other than the donor) with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.'

"This language was lifted bodily, by quotation, to justify and explain the result in May v. Heiner, 281 U. S. 238,

244, 50 S. Ct. 286, 74 L. ed. 826, 67 A. L. R. 1244, notwithstanding the very different sort of gift there considered--different in that there was reserved to the donor a very substantial kind of right and enjoyment not to cease until her death. The gift was in trust to pay income to the donor's husband for life, then to the donor if she survived him, with remainder over. Again, simply because there was doubt of construction, to be resolved in favor of the taxpayer, it was held there was no taxable transfer.

" * * * Of course such decisions end debate as to the construction of the act of congress which they interpret. But, however persuasive, they are not binding upon us in the construction of our own statute, as to which it is our privilege to err, if that be the result of our deliberate judgment. That aside, our state tax is so far different, in incidence, from the federal excise that the cases are easily distinguishable. 'In its plan and scope' the latter is 'on transfers at death or made in contemplation of death.' 'It is not a gift tax.' Our law, on the contrary, does tax gifts. The federal 'exaction is not a succession tax * * *. The right to become beneficially entitled is not the occasion for it.' Nichols v. Coolidge, 274 U. S. 531, 541, 47 S. Ct. 710, 71 L. ed. 1184, 52 A. L. R. 1081. Our law imposes not alone a transfer tax but a succession tax also. State v. Brooks, 181 Minn. 262, 232 N. W. 331. * * * *

"Incongruous or not, our state tax is expressly put on successions of the kind now involved. Doubt, if any, left by subd. 3 of Sec. 1 is removed by subd. 4, explicitly taxing the receipt of 'any

> property or the income thereof' when the donee becomes 'beneficially entitled, in possession or expectancy.'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that an irrevocable transfer in trust with reservation of life income to the grantor is subject to the inheritance tax laws of the State of Missouri. The distinction between the case of May v. Heiner and the later Connecticut and Minnesota cases cited herein undoubtedly rests upon the proposition that the Supreme Court of the United States in the case of May v. Heiner had before it an estate tax or a tax upon the right to transmit property, while in the Blodgett case and the Rising case the statutes construed were statutes placing a tax upon the right to receive the property. In view of the recent decision by the Supreme Court of the State of Missouri in the case of In re Rosing's Estate, 85 S. W. (2d) 495, there can no longer be any question that the Missouri inheritance tax is a tax on the right to receive property. In that case Judge Tipton said:

> "Taking the Act as a whole, there is no doubt but what our inheritance tax is a tax upon the right of the heir or legatee to receive the property."

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:HR

SHERIFFS - Duties to attend court - compensation.

November 15, 1935

11-16 to

FILED
14

Honorable T. O. Carver
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Sir:

We have your request of November 9, 1935 for an opinion, as follows:

"A controversy has arisen between the Sheriff and County Court about as follows: The Sheriff very seldom, if ever, is at his office or where he can be found to take care of the general run of business or duties of the Sheriff's Office. The County Court has refused to pay him his per diem charge for waiting on the County Court and Probate Court, except for the opening day, for the reason that the Sheriff is never present and does nothing to earn the money and the Court contends that they do not need his services even if he was present and that they have the power or option to determine whether or not he is needed and whether or not he should be paid when not needed and when not present.

"Will you kindly furnish me with an opinion as to whether

the County Court is acting within its rights and powers in refusing to pay the Sheriff as outlined above."

In answer to your inquiry, we quote Section 1870, R. S. Mo. 1929:

"The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

The statute which defines the duties of the sheriffs generally is Section 11518, R. S. Mo. 1929, which, among other things, provides:

"Every sheriff * shall attend upon all courts of record at every term * "

A county court is a court of record. Article VI, Section 36, Mo. Constitution. It would therefore appear that it is the duty of the sheriff to attend the daily sessions of all courts of record in his county. We construe the above statute to be mandatory upon the sheriff, and in State v. Yager, 250 Mo. 388, (1913), Division 2 of the Supreme Court held that such duties were mandatory upon the sheriff and that his failure to attend sessions of court was ground for removal.

Under the provisions of Section 1871, R. S. Mo. 1929, it is provided:

#3 - Honorable T. O. Carver

"The court shall audit and adjust the accounts of the officer attending it, made pursuant to this chapter, and certify the same for payment."

The rate of compensation of sheriffs is provided by Section 11789, R. S. Mo. 1929 as follows:

"For attending each court of record * * per day. . . . . $3.00 "

From the above and foregoing, it is apparent that the sheriff must attend each session of court of the county court, for which he is entitled to pay at the rate of $3.00 per day. This pay is for actual attendance upon such court, and it is the duty of the county court to audit and pay the statutory fee for such services of the sheriff in attending court.

It is, therefore, the opinion of this office that it is the duty of the sheriff to attend the county court each day it is in session; that this duty is by law imposed upon the sheriff, and does not depend upon the will or wish of the county court in the matter. The sheriff is not entitled to such compensation for such services unless he actually attends court, since the power of the county court to audit and pay such claims is limited to pay for actual attendance at said court.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER.EE

PENAL INSTITUTIONS - STATE PRISON BOARD - Right to manufacture and sell certain articles to State and political subdivisions thereof.

4-1

March 26, 1935.

FILED
15

Mr. R. L. Chapman,
Superintendent of Industries,
Jefferson City, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of March 12, 1935, such request being in the following terms:

"At a recent meeting a general discussion was had relative to a state-use law concerning the marketing of products manufactured by the inmates of the Missouri State Prison to the various other state institutions and to the political subdivisions of the state.

It was the consensus of opinion of the several persons present that Section 8340 of the Revised Statutes of Missouri, 1929, could be enforced and that all state institutions and the various political subdivisions of the state could be compelled to purchase the products and supplies which they use which could be manufactured in the penal industries.

The writer would appreciate, at your convenience, your opinion pertaining to the above, and in the event you concur, would also appreciate your comments on the questions listed below:

1. What method of enforcement could be used to compel the state institutions and the various political subdivisions of the state to purchase from the penal industries those products which they use manufactured by the prison?

2. Should Section 8340 be held valid and capable of being enforced, what relation would same have to the law creating the office of the State Purchasing Agent? "

I

SCOPE OF STATUTE

R. S. Missouri, 1929, Section 8340, authorizes the State Prison Board to acquire and operate plants, through inmate labor "with the view of manufacturing, so far as may be practicable, such articles agreed upon by said board as are needed in any of the institutions hereinabove in this section mentioned or referred to, (all the State penal or reformatory institutions) also such as are required by the state or political subdivisions thereof, in the buildings and offices of the institutions owned, managed or controlled by the state or political subdivision thereof, also including articles and material to be used in the erection of buildings or other improvements upon, in, or in connection with, any state institutions or state properties, or in the construction, improvement or repairs of any state highways or county highways, including bridges and culverts."

Section 8342 provides in part as follows:

> "Before any purchase shall be made of any said articles for the institutions hereinabove mentioned, from any other source, written requisitions shall be made upon said board by the proper purchasing agents of the state, or of the political subdivisions thereof, or of the trustees or managers of said institutions, for the said articles; and duplicate certificates shall be made by said board that it is unable to furnish or supply the same within sixty days, and said requisitions and one of said certificates shall be retained and kept by the board."

The scheme of these statutes seems to contemplate manufacture of certain supplies required by (1) the State penal and reformatory institutions, (2) other departments of the State, and (3) political subdivisions of the State.

The language of Section 8342 indicates that when any unit of any of these three classes needs any of the articles which the State Prison Board is authorized to have manufactured, such unit must requisition the Board to supply it, and can only buy such articles from other sources if it has a certificate from the State Prison Board that the Board cannot supply such articles within sixty days. Section 8342 contains a further provision that "no claim shall be audited or paid without such certificate". Thus, the

statute on its face seems to require all departments and political subdivisions of the State to give the State Prison Board an opportunity to supply to them these articles.

II

METHOD OF ENFORCING STATUTE

The case of State ex rel. Department of Penal Institutions v. Becker, 329 Mo. 1041, 47 S.W.(2d)781 (1932), suggests one method of enforcing the above statutes, which is by mandamus to compel the appropriate officials to award a contract to supply manufactured articles to the Department of Penal Institutions, or Prison Board. The bill in that case was against the Secretary of State and the Commissioner of Motor Vehicles and it concerned automobile license plates and chauffeurs' badges, and the petition likewise asked for cancellation of a contract which had already been entered into with a private concern. For the scope of the law adequately to be tested, it would be advisable to bring such proceedings against the appropriate officials of a political subdivision, as well as against some state departmental head. If a contract for the articles in question had not been let, and if such contract were definitely in contemplation, injunction might be a proper remedy.

Another possible remedy is suggested by that part of Section 8348 above quoted which provides that no claim shall be audited or paid without a certificate from the State Prison Board that it is unable to furnish within sixty days after demand, the articles purchased in connection with the account presented for audit. If the state auditor, or the comparable official of the political subdivision in question, should refuse to approve the account without the certificate, a mandamus suit could be brought to compel such approval, or if no such refusal should be made, an injunction suit might be brought to prevent such approval.

III

EFFECT OF STATE PURCHASING AGENT ACT

In connection with the question in your letter numbered "2", we do not believe that the State Purchasing Agent law (Laws of 1933, page 410) would effect the scope of Sections 8340 and 8342 for the reason that Section 13 of such Act provides as follows:

> "If any law shall provide that the state shall purchase for its own use the products manufactured by any institution of the state or shall give preference to the products of any such institution, the

> "provisions of this Act shall be deemed modified to permit the Purchasing Agent to purchase such products or give such preference in any manner prescribed by such law."

The only effect of the State Purchasing Law on the enforcement of Section 8340 might be that the State Purchasing Agent would be a party to legal proceedings instead of such official as might have been performing his functions in the absence of such Act.

The only case which we have been able to discover which construes Section 8340 so as to furnish any present assistance is the case of State ex rel. Department of Penal Institutions v. Becker, referred to supra. That case indicates a sharp divergence of opinion between the then members of the Supreme Court of Missouri regarding the scope of Section 8340, which is highly important to the present inquiry, even though that case raises certain special questions not involved in your request. The relief sought in that case has been outlined above. In addition to Section 8340 there was involved R. S. Missouri, 1929, Section 7760, requiring the Commissioner of Motor Vehicles to give preference to the State Prison Board in letting the contract for license plates and chauffeurs' badges. That case did not concern articles needed for any public buildings or offices or for the improvement of highways. In an opinion by Gantt, J., in which concurred White, Frank and Henwood, JJ., the court held that so much of Section 7760 as granted a preference to the State Prison Board was unconstitutional as not being a proper subject to be incorporated in that Act, having come to the conclusion that Section 8340 was not broad enough in scope to authorize the Prison Board to manufacture the articles in question.

Atwood, C.J. handed down a dissenting opinion, in which concurred Ragland and Ellison, JJ., in which he construed Section 8340 as granting the power in question. The minority opinion contained the following:

> "The decision reached in the majority opinion rides off on the holding that the Department of Penal Institutions has no power to manufacture license plates and chauffeurs' badges because the proviso in Section 7760, Revised Statutes 1929, as an enactment conferring such power, is ruled to be in violation of Section 28, Article IV of the Missouri Constitution. It is my view that such power is well vested in the commissioners of this department, frequently re-

"ferred to as The Prison Board, not by anything appearing in Section 7760, but by the provisions of Section 8340, Revised Statutes 1929. If this position is well taken the constitutional objection, upon which the majority opinion rests, drops out of the case."

Section 8340 was then referred to and quoted, and the opinion continued:

"Respondents' brief casually disposes of the foregoing provisions with the observation that 'license plates are not "articles or products sold on the open market," and hence are not embraced within the language of said Section 8340.' The majority opinion treats of them as follows: 'Respondents suggest that license plates and chauffeurs' badges are manufactured and sold as per specifications in a contract and are not articles sold on the open market. It will not be necessary to determine this question, for relators plead that as a matter of law it is the duty of respondents Secretary of State and Commissioner of Motor Vehicles to award the contract to the board. In other words, they claim the contract under Section 7760, Revised Statutes 1929. Thus it appears that the Board is not seeking to manufacture said articles for the open market. The suggestion of the Prison Board is overruled.'

The expression, non sequitur, so familiar in logic, fairly applies to the above course of reasoning and conclusion reached. From the mere fact that relators here seek to compel the Secretary of State and the Commissioner of Motor Vehicles to contract with the prison board for this particular lot of plates and badges pursuant to the proviso in said Section 7760, it by no means follows that the board's authority to manufacture license plates and chauffeurs' badges must appear in Section 7760, or that these articles are not such 'articles or products that may be disposed of upon the open market at a profit to the State,' which under the provisions of Section 8340, supra,

"the prison board is authorized to manufacture and produce. I think the very question thus suggested by respondents must be determined, and the plain meaning of Section 8340 requires that it be ruled contrary to respondents' contention.

* * *

The evident purpose of Section 8340 is to help effectuate a sound, humane public policy with reference to employment of inmates of penal institutions, and its provisions should be liberally construed. Our approval of respondents' narrow and unwarranted interpretation of this statute can but give rise to confusion and doubt as to the prison board's power, heretofore unquestioned, to engage in other lines of manufacture and production upon the successful continuance of which great public interest depends. Such approval should not be given, and for reasons herein stated I respectfully dissent."

It must be noted that in the briefs of counsel as summarized in the official reports, very little emphasis was laid on the scope of Section 8340, almost the entire argument being confined to the question of the constitutionality of Section 7760, so it would seem that the construction of Section 8340 was not adequately presented to the court. This factor and the further factor that articles were involved in that case which were not specifically covered by Section 8340, would leave that case as hardly controlling, but it gives/very valuable insight into the attitude which the Supreme Court of Missouri might take in another case.

In conclusion, it is our opinion that R. S. Missouri, 1929, Sections 8340 and 8342, do give to the State Prison Board the right under certain conditions to manufacture and supply, to all the penal and reformatory institutions of this State, the various other departments of the State and the political subdivisions thereof, certain articles to be manufactured under the supervision of the State Prison Board, and it is our further opinion that the proper method of enforcing this right would be by mandamus or injunction, as more fully discussed above, and that the State Purchasing Agent Act of 1933 (Laws of 1933, page 410) would have no effect on such right.

Very truly yours,

APPROVED:

EDWARD H. MILLER
Assistant Attorney General

ROY McKITTRICK
Attorney General

COUNTY TREASURERS - Meaning of "just and reasonable" compensation.

April 4th, 1935

FILED
15

Honorable Homer G. Chaffin
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Mr. Chaffin:

We have your request of March 8, 1935 for an opinion upon the following:

> "I am writing to you for an opinion upon the following matter:
>
> "H. A. Stone was elected county treasurer in this county at the general election in 1932. He entered upon the duties of that office January 1, 1933. The county court then, under Section 12138, R. S. Mo. 1929, fixed his salary at $125.00 per month, which had been the salary paid to county treasurers in this county for a long period of years.
>
> "At the February term of the county court, the county court reduced this compensation to $75.00 per month, a copy of which order reducing it is attached hereto.
>
> "I should appreciate your opinion as to the validity of the reduction order, and a ruling as to the proper compensation to be paid to the county treasurer."

#2 - Honorable Homer G. Chaffin

Prior to the 1933 session of the Legislature, the compensation of county treasurers was provided for under Article 8, Chapter 85, R. S. Mo. 1929. The 1933 Legislature, Laws Mo. 1933, p. 338, passed what is sometimes termed the consolidation act, whereby the offices of county treasurer and county collector, in counties of less than 40,000 population were consolidated; said consolidation to take effect at the expiration of the present term of county treasurers, to-wit, January, 1937. We find that the county treasurer of your county, under and pursuant to Section 12130, R. S. Mo. 1929, was elected at the 1932 general election for a term of four years.

The only statute, applicable, authorizing the county court to fix the compensation of the county treasurer in your county, is Section 12138, R. S. Mo. 1929, which provides:

> "Unless otherwise provided by law, the county court shall allow the treasurer for his services under this article such compensation as may be deemed <u>just and reasonable</u>, and cause warrants to be drawn therefor."

Under the above statute, the county court is not vested with unlimited powers, but said statute, like all others, calls for reasonable, as distinguished from arbitrary, action on the part of the county court.

It is now necessary to decide what the Legislature meant by the peculiar wording of the above statute. The phraseology "as may be deemed just and reasonable" in the above statute cannot be overlooked in its construction. We are not given the liberty to cut out parts of the statute, but must give effect to every word and clause in the statute. Castilo v. State Highway Commission, 279 S. W. 673.

Webster's Dictionary defines "just" as:

> "violating no right or obligation; giving to every man his due;"

and the same author defines "reasonable" as:

> "governed by reason; agreeable to reason, just;"

When the important office of county treasurer was created by legislative enactment, it was created with the full knowledge of the heavy responsibility of looking after and sacredly preserving intact the public moneys, or trust funds, placed in the hands of one public official for safekeeping. To obtain competent public officials for such burdensome duties, it was the intention of the Legislature that adequate compensation would be a prerequisite to obtaining such services, and the spirit underlying the action of the Legislature was that county courts could fix a salary for the county treasurer, taking into consideration the type of official desired, cost of living, and the general price trend of the times, so that the salary when so fixed would meet the wishes of the Legislature to be <u>just and reasonable.</u>

In State ex rel. v. Carr, 178 Mo. 229, l.c. 233, the Supreme Court of this State said:

> "It is one of the cardinal rules for the construction of statutes, that the spirit and purpose of the enactment is an invaluable guide to the meaning thereof, for the letter of the law often killeth, while its spirit maketh alive."

It is to be judicially noted, a fact which is known to all mankind, that since the election of Mr. Stone as county treasurer, the cost of living, and the price trend of commodities in general has been upward. In fact, more money is required today to meet the ordinary living expenses of any individual than was required at the time of your county treasurer's election. It would therefore appear, in the light of increasing prices and cost of living, that any alteration or change in the salary

of the county treasurer, in order to meet the mandatory requirements of the statute that it be "just and reasonable" compensation, would be upward instead of downward.

It cannot be successfully contended that a public judicial body, such as the county court, has unlimited power to do that which may be arbitrary and unreasonable. To so interpret the above statute with reference to the powers of the county court, would bring us within the condemnation of the Supreme Court of this State in Shohoney v. Railroad Co. 231 Mo. 131, l.c. 156, when it said:

> "The words of the statute would be without life, mere sound and fury signifying nothing -- the mischiefs would abide, the remedy be lost -- "

In the preparation of this opinion, we have kept constantly before us the words of Woodson, J., in State ex rel. v. Insurance Company, 224 Mo. 84, l.c. 92:

> "The prime effort of all judicial interpretation is to ascertain what the Legislature really intended in using the particular language."

From your request, it appears that the present county treasurer has served more than half his term at the salary of $125.00 per month, which has been paid almost from time immemorial in your county. It is to be gathered from Givens v. Daviess County, 107 Mo. 603, that the salary of the county treasurer in substance was an annual salary of $1500.00 per year, which was an incident of the office at the time of his election for more than one-half of his term, and which he, as such officer, was entitled to receive. The declaration by the Supreme Court that the county treasurer's salary is an annual salary, which cannot be split up into periods at any time a county court may so choose to act, is binding upon us.

#5 - Honorable Homer G. Chaffin

In State ex rel. Harvey v. Linville, 300 S. W. 366, the Supreme Court, speaking of annual salaries, used this language:

> "We conclude further that 'annual' as applied to salaries, means not the calendar years, but the years of the incumbent's term."

In giving to the language "just and reasonable", as used by the Legislature, its true and perfect interpretation, we may consult the statutes with reference to other officers, wherein the Legislature itself fixed the salaries of other county officials at such figures which the Legislature itself believed to be just and reasonable. Your county contains a population of 16,148, according to the United States decennial census of 1930. The Legislature, in your county, has fixed what it believed to be a just and reasonable compensation for the circuit clerk at $1700.00 per year, Laws Mo. 1933, p. 369; for the county clerk the sum of $1700.00 per year, with the additional sum of $1600.00 per year for deputy hire; and "just and reasonable" compensation for the county superintendent of schools is $1800.00 per year, Laws Mo. 1933, p. 384. Thus, the Legislature itself has outlined with reference to other county offices in your county, what would appear to be just and reasonable compensation.

CONCLUSION

This office is of the opinion that the attempted reduction order of the county court, reducing the salary of the county treasurer from $125.00 per month to $75.00 per month is invalid; that "just and reasonable compensation" for the county treasurer in your county would be a minimum of $125.00 per month.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

JUSTICES OF THE PEACE - Fees - Transcript fees in criminal cases.

L-19

May 26, 1933

FILED
15

Hon. Richard Chamler,
Prosecuting Attorney,
The County of Randolph,
Moberly, Missouri.

Dear Sir:

A request for an opinion has been received from you dated March 8, 1933, in which the following question is asked:

> "Section 11778, Revised Statutes of Missouri, 1929, allows Justice of the Peace 50¢ for entering judgment in every case. May the Justice also charge 50¢ for the transcript and 50¢ for 'certifying all papers and recognizances in a criminal case other than homicide'. The County Court is endeavoring to disallow these fees to Justice of the Peace."

There can be no question about the propriety of the fee of 50¢ to be allowed a justice "for entering judgment in every case" which is provided for in Section 11778. Also the statute expressly authorizes a fee of 50¢ "for certifying all papers and recognizances in a criminal case other than homicide". The only question then is whether, in a case in which the imposition of the above two fees is authorized by the statute, there can be an additional fee of 50¢ allowed for the transcript.

R. S. Missouri, 1929, Section 3451, relating to criminal proceedings before justices of the peace, provides as follows:

> "When an appeal is taken and perfected according to this article, it shall be the duty of the justice to cause all material witnesses to enter into a recognizance, in the sum of fifty dollars each, conditioned for their appearance to testify in the cause at the term to which the appeal is returnable, and shall file

> in the office of the clerk of the court having jurisdiction of the appeal, within three days after the appeal is taken, a copy of the entries on his docket, with the affidavit of appeal and all the original papers filed in the case, including the recognizance of the witnesses and of the defendant for his appeal, duly certified by the justice."

The duty imposed by such section seems to be the basis of the fee of 50¢ authorized by Section 11778 "for certifying all papers and recognizance in a criminal case other than homicide".

Section 3451 relates to misdemeanors. Section 3489 relates to certification of examinations and recognizances in proceedings before justices involving felonies, and provides as follows:

> "All examinations and recognizances taken in pursuance of the provisions of this article shall be certified by the magistrate taking the same, and delivered to the clerk of the court in which the offense is cognizable, on or before the first day of the next term thereof, except that where the prisoner is committed to jail, the examination of himself and of the witnesses for or against him, duly certified, shall accompany the warrant of commitment, and be delivered therewith to the jailer."

The language last quoted from Section 11778 would seem applicable and to warrant a fee of 50¢ for certification under this Section 3489 where a felony is involved, as would it warrant such a charge under Section 3451 where a misdemeanor was involved.

Section 11778 which enumerates the various services for which justices of the peace may charge fees, does not mention or use the word "transcript". Furthermore, that which the justice sends to the higher court under Section 3451 or Section 3489 is itself a transcript of the proceedings had before him, and since Section 11778 authorizes specifically a fee to the justice for performing such duty, we do not believe that another fee for performing the same duty could be authorized by giving to such duty a different name.

In conclusion, it is our opinion that in a criminal case involving a misdemeanor before a justice of the peace, in which judgment is entered, the justice is entitled to a fee of 50¢ for entering such judgment; that if such judgment was against the defendant, and an appeal taken therefrom, the justice of the peace is entitled to an additional fee of 50¢ for certifying all papers and recognizance to the office of the clerk of the court having jurisdiction of the appeal, under the provisions of R. S. Missouri, 1929, Section 3451, but that no additional fee may be charged as a transcript fee; that where a criminal proceeding before a justice involves a felony other than homicide, such justice is entitled to a fee of 50¢ for certifying all papers and recognizance to the clerk of the court in which the offense is cognizable, under the provisions of R. S. Missouri, 1929, Section 3455, but that no transcript fee other than this can be charged by such justice.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

PROBATE JUDGE - Method of accounting by probate judge for fees collected during his term which had accrued to his predecessor.

L-15

May 28, 1935

FILED
15

Hon. Richard Chamier,
Prosecuting Attorney,
The County of Randolph,
Moberly, Missouri.

Dear Sir:

A request for an opinion has been received from you dated March 6, 1935, in which the following question is asked:

> "The Probate Judge of this County is of the opinion that his predecessor in office is entitled to the fees earned by said predecessor. By what method does he protect his office in the reports he must make to the State Auditor? Does he take credit for the costs collected by the former Probate Judge?"

When the term of a probate judge expires, as to fees accrued but uncollected during his term, R. S. Missouri, 1929, Section 11782 imposes on such former probate judge the following duty:

> "and within three months after the expiration of his term of office he shall file for record with said clerk of the circuit court a statement, verified by his affidavit, of all fees which accrued but were not collected during his term of office, specifying the names of the parties from whom due, the amounts due, on account of what services rendered and the date of accrual."

When this statutory provision is complied with there comes into existence a record showing in detail and by specific description the uncollected fees which did not accrue to or during the term of his successor.

As to such of the above fees as are paid to the successor probate judge, R. S. Missouri, 1929, Section 11822 provides for the keeping of books by various officers con-

taining "a correct account of all fees collected by such officer", and Section 11823 provides as follows:

> "It shall be the duty of all sheriffs, marshals, coroners, and all clerks of courts of record, and all other officers, to enter in such book all fees that they may now have in their hands belonging to others, giving the name of the owner and amount of such fees."

Section 11824 provides for semi-annual payment of the fees governed by Section 11823 to the county treasurer, and Section 11825 requires the county treasurer to keep an account of them and to pay them to the proper owners.

The responsibility for the proper ultimate application by a former probate judge of fees collected by his successor and paid over to such former probate judge under the provisions of the statutes last referred to, seems to be imposed upon such former probate judge by Section 11782 under the following provision:

> "and whenever at any time after the expiration of the term of office of any probate judge the amount of fees collected by or for him, irrespective of the date of accrual, shall exceed the sum equal to the aforesaid annual compensation provided for a judge of the circuit court having jurisdiction in such county, it shall be the duty of such probate judge to pay such excess, and all fees thereafter collected by or for him on account of fees accrued to him as such probate judge less ten per cent. thereof, within thirty days from the time of collection, into the county treasury for the benefit of the school fund."

As to fees accruing to a former probate judge which his successor neither earns nor collects, it would seem that such fees would not be reflected in any report or settlement of such successor, as they would neither have been earned by him nor would they have passed through his hands.

In conclusion, it is our opinion that unless otherwise provided by law, a probate judge, as to fees accruing to but uncollected by his predecessor in office, should, as to any such fees collected by him, pay them over to the county treasurer semi-annually and show such payment on any report

or settlement, if it has been made, and if such payment has not been made to the county treasurer at the time of such report or settlement, should show such collections as fees accruing to his predecessor; that as to such fees accruing to his predecessor as are collected by such predecessor and do not pass through the hands of the probate judge, the probate judge in his report or settlement need not reflect the same.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

H 315

COUNTY COURT: Warrants--right of county court to reduce rate of interest on.

June 19, 1935.

FILED
15

Hon. Richard Chamier
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

A request for an opinion has been received from you dated March 6, 1935, in which the following question is asked:

> "The County Court of this County wishes to reduce the interest rate on warrants if and when the same are protested. May they do this by stating on the back of the warrant that the interest, if and when the warrant is protested, will be 5% per annum?"

Section 12169, R. S. Missouri, 1929, fixes the form for county warrants, which includes no provision respecting interest. Section 12171 as to the form of protest for such warrants provides in part as follows:

> "when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

Thus, neither the body of the warrant on the face thereof, nor its certification of protest on the back thereof, refers in any way to interest.

However, county warrants do bear interest as a matter of law after protest. Thus in the case of Skinner v. Platte County, 22 Mo. 437 (1856) the Court said:

> "In order to draw interest, the warrant for the allowance must be made out and presented for payment to the treasurer; if he has funds to pay with, he pays the warrant without interest; if he has no funds to pay with, 'he shall so certify on the back of the warrant, date and subscribe the same.' (R. C. 1845, p. 311, sec. 6.) From this date the warrant will bear interest."

and in the case of Isenhour v. Barton County, 190 Mo. 163, 88 S. W. 759 (1905) the Court said:

> "County warrants are creatures of the statute, and can only be issued in accordance therewith, but when no rate of interest is prescribed upon their face, they bear interest at the rate of six per cent per annum, as provided by section 3705, Revised Statutes 1899, after presentation to the treasurer of the county by which issued, and failure to pay because of there being no money in the treasury for their payment. (Robbins v. Lincoln County Court, 3 Mo. 57; Skinner v. Platte County, 22 Mo. 438; State ex rel. v. Trustees, 61 Mo. 155)."

There is a statute fixing the rate of legal interest on obligations containing no provision for interest, this being R. S. Missouri, 1929, Section 2839, which fixed the rate at 6% per annum. The statutory form of county warrants and the

form for protesting the same contain no provisions respecting interest, and therefore Section 2839 would fix the rate of interest which warrants should bear. The County Court being of limited statutory powers cannot vary the form of county warrants and thereby prescribe a different rate of interest.

Before closing this opinion we direct your attention to Section 12184-A, page 358, Laws of Missouri 1933. By following the provisions of this section it should be possible for your county court to obtain cash for the holder of county warrants, and at the same time save a substantial amount of interest as undoubtedly the loan could be obtained from some federal agency, etc. at a lower rate of interest than six per cent.

CONCLUSION.

It is the opinion of this Department in view of the foregoing that the County Court of Randolph County has no authority to reduce the rate of interest which its warrants shall bear by stating on the back of the warrant that if and when the warrant is protested it shall bear five per cent interest per annum.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
Acting Attorney General.

HGW:MM

SPECIAL JUDGE, compensation of under R. S. Mo. 1929, Section 1944.

June 21, 1935.

FILED
15

Hon. Richard Chamier,
Prosecuting Attorney,
The County of Randolph,
Moberly, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of March 6, 1935, such request being in the following terms;

> "The Bar of this county may appoint a special judge in a case tried some years ago before a Referee. It will be necessary for the special judge to review the evidence and findings made by the Referee. Will he be entitled to the fee of $10.00 a day for the time spent in reviewing the case or will compensation be allowed only for that period actually spent in trying the case."

The information contained in such request was supplemented by letter from you of June 12, 1935, in the following terms:

> "In answer to your letter of May 28, 1935, in reply to my letter of March 6, 1935, to General McKittrick, will say that in the case referred to, the finding of the Referee was not merged in a judgment, but the Referee simply made his report, and Judge A. W. Walker, who appointed the Referee, was defeated by Judge Hammett, who is now Circuit Judge, and Judge Hammett disqualified, and the matter is now before the Special Judge on the question of approving the Referee's Report and the Exceptions filed thereto.
>
> The Referee was more than a week in hearing the evidence and there is a voluminous transcript containing many hundred pages of evidence. The report of the Referee was filed shortly before Judge Walker went off the bench. No evidence is to be heard by the Special Judge, but the case is to be tried on the evidence taken before the Referee.

> There is no agreement between the parties as to a fee, and the Special Judge was elected by the Bar under Section 1944."

R. S. Missouri, 1929, Section 1944, provides as follows:

> "The person elected as special judge, as provided by the preceding section, shall receive the sum of ten dollars per day for each day actually engaged in transacting the business of such term or part of term of court, to be paid out of the state treasury upon the certificate of the clerk of said court."

This statute has never been construed by an Appellate Court of this State and, therefore, the answer to your question must be based on a reasonable construction of its terms.

The question is, what the phrase "actually engaged in transacting the business of such term or part of term of court", means. A first impression might be that this phrase would be confined to time actually on the bench hearing evidence and arguments of counsel. However, it seems more likely that the phrase is broader in meaning and includes the time spent by the judge in actually working on the case, as opposed to the tenure of office of such special judge, from the time of his appointment until its termination.

In a situation such as that presented by your letters, where the special judge is elected only for one case, and this case has been referred to a referee who has made a report prior to the election of such special judge, the special judge would probably sit on the bench only during the argument of counsel on the exceptions to the report of the referee, which would probably consume a part of one day. However, in order to take proper action on the report, many days of work would be necessary where the report and the evidence are voluminous and exceptions are filed to such report. It would be the duty of the special judge to study carefully the report and evidence for it is his function to take such action as is indicated to him by the whole record. In the case of Fine Art Pictures Corp. v. Karzin et al., 29 S.W. (2d) 170 (1930), the court said:

> "The trial court was not bound by the findings of the referee, whose power was limited to re-

> commending a judgment, and it was entitled in arriving at the terms of its judgment to disregard the report entirely, or to adopt such parts as seemed to it to be right, or to modify it and adopt it with corrections. Lack v. Brecht, 166 Mo. 242, 65 S.W. 976; Utley v. Hill, 155 Mo. 232, 55 S.W. 1091, 49 L.R.A. 323, 78 Am. St. Rep. 569; State ex rel. v. People's Ice, Storage & Fuel Co., 248 Mo. 168, 151 S. W. 101; City of St. Louis v. Parker-Washington Co., supra; Crowell v. Metts, 213 Mo. App. 683, 253 S.W. 205; Valleroy v. Enright, supra; West v. Bank of Caruthersville, 110 Mo. App. 490, 85 S.W. 601; W. T. Rawleigh Medical Co. v. Woodward (Mo. App.) 230 S.W. 647; Springfield Gas & Electric Co. v. Southern Surety Co. (Mo. App.) 250 S.W. 78." 29 S.W. (2d) 174.

There remains then the narrow issue of whether a special judge, under the circumstances detailed in your letter, is actually engaged in transacting the business of the court only when he is sitting on the bench hearing the arguments of counsel, and if he is to be paid only for his time so spent, which will probably entitle him to $10 as his total compensation for acting in the case, when he may be obliged to spend his entire time for several weeks working on the case. We believe the answer to this question must be no, if the statute as applied to these facts is to operate reasonably and fairly. A lawyer is transacting the business of his client while preparing in his office a case for trial, or a brief to be argued, as well as when he is in the courtroom trying or arguing his case. Both are essential to a proper serving of the interests of his client. It would seem to us likewise that a judge is transacting the business of the court when he is investigating and working on a case in his chambers alone, equally as when he is sitting on the bench hearing evidence or arguments.

In conclusion, it is our opinion that a special judge elected under the provisions of R. S. Missouri, 1929, Section 1943, is entitled, under Section 1944, to the sum of $10 per day for the time spent by him working on and reviewing the report of a referee, the evidence adduced before such referee, and the exceptions filed to such report, when it is his duty to enter judgment based on such report, as well as for the time when he is sitting on the bench hearing the arguments of counsel in connection with such report, when no evidence is to be adduced be-

fore him, and his judgment is to be entered solely on the basis of the evidence adduced before the referee, the report of the referee, the exceptions thereto, and the arguments of counsel thereon.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

MISSOURI STATE PENITENTIARY: Prison-made Merchandise - Interpretation of Sumner-Ashurst Bill, H.R. #7940 as it relates to (1) shipping prison-made merchandise into any state or territory; (2) marking of such shipments; (3) seizure of prison-made goods; (4) parties against whom action shall be brought; (5) parties liable in case of reshipment of merchandise; (6) party liable through numerous transactions; (7) status of drop shipments; (8) interstate commerce feature.

August 1, 1935.

FILED
15

Mr. R.L. Chapman,
Superintendent of Industries,
Missouri State Prison,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter desiring interpretation and construction of certain phases of House Bill 7940 passed by the 74th Congress and approved by the President on July 24, 1935, containing eight separate questions, which are as follows:

"(1) Our interpretation of Section One of this Act is that shipments of prison-made merchandise can be transported into any state or territory of the United States so long as such shipments are not made in violation of the laws of any such state or territory and comply with the provisions as to the marking of such shipments as herein set forth. Is this interpretation correct?

(2) We construe Section Two as meaning the Missouri penal industries cannot ship any merchandise produced by them in inter-state commerce unless such shipments are plainly and clearly marked as provided for in this section. Is this correct?

(3) As provided in Section Three, can the Federal Government seize, hold, and condemn shipments of prison-made merchandise, the property of the State of Missouri, made in inter-state commerce in violation of the provisions of this legislation?

(4) Under a further provision of this Act, can the Federal Government bring suit in the Federal Courts against the State of Missouri, the Department of Penal

Institutions of the State of Missouri, the various commissioners of the Department of Penal Institutions, or the Superintendent of Industries, for a violation of the provisions of same?

(5) Should the products of the Missouri penal industries, originally sold and shipped to a person or firm located or doing business in the State of Missouri, be reshipped in interstate commerce in violation of the provisions of this law, who would be liable for prosecution for such violation, the Missouri penal industries or the person or firm making such reshipment?

(6) If it is held that the person or firm owing the merchandise at the time illegal shipment was made is alone liable for prosecution for such violation, would this hold true through numerous transactions down to the individual consumer?

(7) Should the products of the Missouri penal industries be sold to any person or firm, the purchased articles remaining on our premises for drop-shipment * to the points as specified by the purchaser, who would be liable for prosecution for such articles shipped in inter-state commerce in violation of the provisions of this legislation?

* Drop-shipments show the name of the purchaser on the bill of lading as the shipper instead of the original source of the merchandise.

(8) Should a person or the agent of any firm purchase the products of the Missouri penal industries, paying cash for the same on our premises, and then transport these goods in inter-state commerce by means of a private vehicle not otherwise engaged in trucking or hauling for hire, who would be liable for prosecution for a violation of this law? Would such use cause a vehicle belonging to a private individual or firm to be held as engaging in inter-state commerce?"

The Act in its entirety is as follows:

"Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

"That it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners (except convicts or prisoners on parole or probation), or in any penal or reformatory institution, from one State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof, or from any foreign country, into any State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place non-contiguous but subject to the jurisdiction thereof, where said goods, wares, and merchandise are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, Puerto Rico, Virgin Islands, or District of the United States, or place noncontiguous but subject to the jurisdiction thereof. Nothing herein shall apply to commodities manufactured in Federal penal and correctional institutions for use by the Federal Government.

"Sec. 2. All packages containing any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal or reformatory institution, when shipped or transported in interstate or foreign commerce shall be plainly and clearly marked, so that the name and address of the shipper, the name and address of the consignee, the nature of the contents, and the name and location of the penal or reformatory institution where produced wholly or in part may be readily ascertained on an inspection of the outside of such package.

"Sec. 3. Any person violating any provision of this Act shall for each offense, upon conviction thereof, be punished by a fine of not more than $1,000, and such goods, wares, and merchandise shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

"Sec. 4. Any violation of this Act shall be prosecuted in any court having jurisdiction of crime within the district in which said violation was committed, or from, or into which any such goods, wares, or merchandise may have been carried or transported, or in any Territory, Puerto Rico, Virgin Islands, or the District of Columbia, contrary to the provisions of this Act."

We shall attempt to interpret your eight individual questions in their numerical order.

I

We think you are correct in your interpretation, as under the first section it is made unlawful for any prison-made goods to be shipped into another state in violation of the laws of that state.

This House Bill follows very closely the wording of the Webb-Kenyon Act passed by Congress on March 1, 1913. This Act related to the sale and transportation of intoxicating liquor and made it a violation for the same to be shipped into another state in violation of the laws of that state. The effect of the Act was to eliminate any interstate commerce protection or advantage by reason of a shipment or sale being interstate commerce. This was the effect of the decision in the case of Clark Distilling Co. v. Western Maryland R. Co., 61 L. Ed. 326. Therefore, we think House Bill 7940 takes away the immunity characteristic of interstate commerce and the protection and freedom which was originally enjoyed by prison-made goods, and that the interstate commerce feature in reality no longer applies to convict-made merchandise.

In the recent case of McCormick v. Brown, 286 U.S. 131, it was held that any shipment or transportation of intoxicating liquor into or out of the state can be controlled and regulated by the state without violating interstate commerce laws, and we deem the same applicable to the question of prison-made merchandise.

You are privileged to ship prison-made merchandise into any state or territory of the United States if the shipment in any manner does not violate the laws of said state or territory and the packages comprising the shipment are plainly and clearly marked as set forth in Section 2 of the Act.

II

What we have said under Question 1 relating to the marking and labeling of shipments of prison-made goods is also applicable to Question 2, and we are in accord with your interpretation as contained in your question.

III.

The Act provides for the seizure of convict-made merchandise and for a fine in each offense of not more than $1,000.00. It seems that in such cases it is immaterial as to the owner of the merchandise; the action is brought against the article itself. It is the article itself that is the offender and is subjected to forfeiture or seizure.

This principle of law is enunciated in the case of Dobbins's Distillery v. United States, 96 U.S. l.c. 399, as follows:

> "Nor is it necessary that the owner of the property should have knowledge that the lessee and distiller was committing fraud on the public revenue, in order that the information of forfeiture should be maintained. If he knowingly suffers and permits his land to be used as a site for a distillery, the law places him on the same footing as if he were the distiller and the owner of the lot where the distillery is located; and, if fraud is shown in such a case, the land is forfeited, just as if the distiller were the owner. Burroughs, Taxation, 67.
>
> "Cases arise, undoubtedly, where the judgment of forfeiture necessarily carries with it, and as part of the sentence, a conviction and judgment against the person for the crime committed; and in that state of the pleadings it is clear that the proceeding is one of a criminal character; but where the information, as in this case, does not involve the personal conviction of the wrong-doer for the offense charged, the remedy of forfeiture claimed is plainly one of a civil nature; as the conviction of the wrong-doer must be obtained, if at all, in another and wholly independent proceeding. 1 Bish. Crim. Law (6th ed.), sect. 835, note 1; United States v. Three Tons of Coal, 6 Biss. 371."

In the case of automobiles being used in violation of the prohibition law, the Court in the case of Moss v. Summit County, 208 P. 507, said:

> "* * * Then, again, all the courts hold that the proceedings to forfeit automobiles which are used in violation of the provisions of the prohibition laws, whether state or Federal, are civil in their nature, and are proceedings in rem, since the automobile to be forfeited is treated as the offending thing.

> Hoskins v. State, 82 Okla. 200, 200 Pac. 168; Kirkland v. State, 72 Ark. 171, 65 L.R.A. 76, 105 Am. St. Rep. 25, 78 S.W. 770, 2 Ann. Cas. 242; United States v. One Stephens Automobile (D.C.) 272 Fed. 188. To the same effect is State v. Davis, 55 Utah, 54, 184 Pac. 161. If, therefore, the taking of the automobile in question by the officer in the case at bar shall be considered as though it had been taken in a civil rather than in a criminal proceeding, the plaintiff, nevertheless, should not recover."

Another decision clearly showing that while it is not necessary that the owner of the merchandise be innocent and not a party to the crime, yet the goods may be seized, is found in 2 R.C.L., page 1397:

> "Under a statute providing for a forfeiture of property used in violation of the act property may be subject to forfeiture thereunder, though the owner did not share in the guilt of the user of it, to whom he had intrusted possession and control. Thus where the owner of an automobile has entrusted the use and control of it to another it is subject to forfeiture where used in violation of the United States revenue laws providing for forfeiture of property so used, though the owner had no knowledge of the unlawful use. United States v. Mincey, 254 Fed. 287, 165 C.C.A. 575, 5 A.L.R. 211 and note. In this case the automobile was used by a servant of the owner without his master's knowledge or consent, to transport liquors in violation of the United States statute forfeiting conveyances used in the removal of goods or commodities with intent to defraud the United States of the tax thereon."

We are therefore of the opinion that the Federal Government may seize and condemn prison-made merchandise regardless of the fact that it be the property of the State of Missouri, for the reason that it is the property itself--the res--which is the offender. In every instance the decisions consulted show that the action for forfeiture and seizure was brought against the article itself, the owner and others involved not being included as parties.

IV.

If your question relates to an action to forfeit and seize the goods and the parties to the proceeding, then the decisions and the conclusion reached in Question 3 will apply; however, we will interpret your question to mean - in the event of a violation, who will be subject to prosecution or criminal action?

Referring to Sec. 1 of the bill it states "it shall be unlawful for any person knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods, wares, and merchandise manufactured, produced, or mined wholly or in part by convicts or prisoners, etc." It is our opinion that the State itself would in no wise be involved. It is a well settled principle of law that in criminal actions the agents of the State or of persons cannot commit crimes and be absolved from the same for the reason that they are agents or employees and acting for the principle or for the State.

If the personnel of the department of penal institutions instructed, aided or assisted in violation of the Act, then they are personally liable to prosecution; likewise, the various commissioners of the department. If you as Superintendent of Industries carry out the transaction alone without the knowledge or without incriminating the other officials, then you alone would be subject to prosecution.

V.

Any prison-made merchandise shipped by you to any purchaser within the State of Missouri does not constitute any violation of the Act. If the party to whom the merchandise is shipped within the State reship the same to another state, then that party or parties alone are subject to prosecution, and no one connected with the Missouri penal industries would be subject to prosecution, provided no officer or employee entered into a conspiracy to violate the Act or knowingly aided or assisted in the reshipment of the goods.

VI

It is our opinion that every transaction or transportation involving the shipment of prison-made merchandise from the State of Missouri to another state in violation of the laws of that state, that all persons connected with the transaction, aiding, assisting or in any wise involved in the violation, would be subject to prosecution, and each act or instance in which merchandise was so transported in violation of the act would constitute a separate and distinct violation of the act.

VII

In view of the terms of the Act, we can discern no difference in the event drop shipments are made. The Act uses the following phraseology: "knowingly to transport or cause to be transported, in any manner or by any means whatsoever, or aid or assist in obtaining transportation for or in transporting any goods * * *" Bearing in mind your explanation of drop shipments, it appears that by the same you merely insert the purchaser's name as the consignor and you as the real vendor appear to be eliminated from the transaction.

We are of the opinion that drop shipments would in no wise relieve those participating in the transaction from prosecution. You would be knowingly assisting, aiding or participating in such shipment, which would be a violation of the Act.

VIII

To be subject to and have the protection of interstate commerce, goods must be transported from one state to another under contract to purchase. In the event purchases come direct to the prison, the merchandise is received, the same paid for, and the transaction is then and there final and closed, then we are of the opinion that the transaction has lost its interstate commerce feature even though the parties be residents of different cities.

In the decision in the case of Ware & Leland v. Mobile County, 209 U.S., l.c. 411, the Court said:

> "While the general principles applied in these cases are not to be denied, there is a class of cases which hold that contracts between citizens of different states are not the subjects of interstate commerce simply because they are negotiated between

> citizens of different states, or by the agent of a company in another state, where the contract itself is to be completed and carried out wholly within the borders of a state, although such contracts incidentally affect interstate trade."

Speaking of insurance policies being transactions in interstate commerce, the Court, in the case of Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357, said:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent to the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect--are not executed contracts--until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia, by a citizen of New York whilst in Virginia, would constitute a portion of such commerce."

We base the above conclusion on the two above decisions. However, we wish to remind you of the provisions of the Act which are broad enough to incriminate you, or any other person, if you knowingly aid or assist in the transportation of the goods. If those elements do not enter into the transaction, then the purchaser alone is liable if he transports prison-made merchandise into another state in violation of the laws of that state and would be subject to prosecution under the Act regardless of the manner in which the merchandise was so transported into the other state.

We do not deem it your duty when purchases are made in the manner outlined in your question, to make private investigation and determine the ultimate destination of the merchandise so purchased.

For your further information, we are of the opinion that when prison-made merchandise is shipped to another state and it is necessary for the shipment to traverse the borders of the third state in arriving at its final destination, the same would not constitute a violation in the third state. With reference to this question, the Court, in the case of Haumschilt v. State, 221 S.W. 196, said:

> "The state can forbid and punish the transportation of intoxicating liquor across the state and into another state only in case the proposed use in the state into which it was to be taken was contrary to law there, so that the transportation was deprived of the protection of the commerce clause of the federal Constitution by this act."

We are further of the opinion that persons purchasing prison-made merchandise in other states, when desiring it for their own personal use, the same does not constitute a violation of the Act, as was held in the case of Theo. Hamm Brewing Co. v. Chicago, R.I. & P. Ry. Co. (D.C. Minn. 1913) 215 F. 672:

> "The Webb-Kenyon Act does not render illegal the shipment of liquor in interstate commerce to a consignee desiring it for his personal use, though without a permit required by the law of his state."

We have noted the laws of a number of states and in most instances they appear to prohibit the sale of prison-made goods in the open market; therefore, the purchase of prison-made goods by an individual for his personal use does not violate the laws of such states, as was said in the case of Sturgeon v. State, 17 Ariz. 513, 154 P. 1050; 0

> "In the following cases it was held that liquors purchased for the personal use of a person are not invalidated by the Webb-Kenyon Act when not prohibited by the law of the state where the purchaser lives." (Cases cited).

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

RECORDER OF DEEDS: It is legal for the Recorder of Deeds to appoint the Circuit Clerk Deputy Recorder at Moberly

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8-10

August 5, 1935

FILED 15

Honorable Richard Chamier
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

This Department is in receipt of three separate letters requesting opinions regarding the appointment of deputies to the office of Recorder of Deeds in your County. The first request of July 22, 1935, is as follows:

> "Randolph County maintains circuit court and county offices at two towns within the County, Moberly and Huntsville, which are more than five miles apart. Please advise me if it is proper for the Recorder of Deeds, who maintains an office in Huntsville, the County Seat, to deputize the Circuit Clerk as Deputy Recorder of Deeds for the purpose of issuing marriage licenses at Moberly, Missouri. It has been the custom in this County to so deputize the Circuit Clerk since the time the two offices were separated in 1892."

We shall first discuss the legality of the appointment of Circuit Clerk as Deputy Recorder of Deeds, the Circuit Clerk residing and performing his duties in the City of Moberly, and the Recorder of Deeds maintaining his office at Huntsville. This question involves the holding of two offices by one and the same person. In various counties where the Clerk of the Circuit Court is ex officio Recorder of Deeds, the Legislature recognizes the fact that there is no incompatibility or inconsistency in the same person holding both offices.

In the Laws of 1933, page 360, Section 11528, the Legislature amended the law relating to combining the offices of the Recorder of Deeds and the Circuit Clerk according to population, as follows:

> "The clerks of the circuit courts shall be ex officio recorder in their respective counties, except in counties containing 20,000 inhabitants or more."

Section 11538, Laws of 1933, page 361 provides that counties having a population of 20,000 or more, the question of combining the two offices shall be submitted to the qualified voters at a general election. During the early history of our State the offices of County and Circuit Clerk were at one time combined and held by one and the same person. In the case of State v. Lusk, 48 Mo. 242, the Court said:

> "A writ of <u>quo warranto</u> was sued out of the Cole Circuit Court against the defendant to test his right to hold the office of county clerk, he having been elected to and having entered upon the duties of the office of clerk of the Circuit Court. The relator claims that by this act he has in effect surrendered the office of county clerk, for the reason that the duties of the two offices are incompatible in law. If this were so, there is no doubt that the acceptance of the second office would vacate the first (State ex rel. Owens v. Draper, 45 Mo. 355); and counsel have given some forcible illustrations of the difficulty arising under some circumstances in holding both offices by the same person. But their incompatibility consists not so much in the nature of their duties as in the fact that both courts may be sitting at the same time, so that the clerk must be personally absent from one. But this difficulty has never been recognized in Missouri as necessarily constituting incompatibility in a legal sense, inasmuch as in one or even in both of the courts, the clerk may appear by deputy. Were the duties necessarily personal, the deduction of counsel would be sound, but as it is we have no right to pronounce the offices incompatible.

> "Another and conclusive reason against the views of the relator arises from the customs of the State. From our earliest history, in a large portion of the State, those offices have been held by the same person, and no question has been raised as to their compatibility. With this general and well-known practice, we have had legislation declaring other offices incompatible, but none in regard to these. We are bound to regard it as a tacit legislative approval of the practice--an indorsement that demands the weightiest reasons to warrant us in disregarding it."

In the case of State v. Kansas City, 261 S. W. the question of a person holding two offices is exhaustively discussed, and the leading cases are contained therein at l. c. 115:

> "The only point raised by appellants in this case, which was not decided adversely to appellants' contention in the Prior Case, is the contention that relator's appointment and acceptance of the office of deputy sheriff on January 1, 1921, and his discharge of the duties of that office up to the time of trial, was incompatible with the office of clerk of the board of public works. The evidence showed that the duties of relator as such clerk were clerical, and the law fixes his duties as deputy sheriff as being to attend to all the duties of a sheriff. In support of appellants' contention that such positions were incompatible, the following cases are cited: State ex rel. v. Walbridge, 153 Mo. 194, 54 S. W. 447; State ex rel. v. Draper, 45 Mo. 355; State ex rel. v. Lusk, 48 Mo. 242. And respondents cite as holding that such offices are not incompatible with each other, State ex rel. v.Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R.A. 616 (court en banc) and Gracey v. St. Louis, 213 Mo. 395,

111 S. W. 1159.

"In State ex rel. v. Walbridge, 153 Mo. 194, 54 S. W. 447, the relator had been a policeman, whose terms was for a fixed period of four years, at a salary of $75 per month, and on January 5,1892, at his own request, and by order of the board of police commissioners of St. Louis, he was appointed turnkey, whose term was for andindefinite term, at a salary of $50 per month, and it was held, citing the case of State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, that the two positions were incompatible with each other, and his appointment and acceptance of the position of turnkey terminated his term as policeman, and that his subsequent appointment and acceptance of the office policeman terminated his office of turnkey. We think that case is distinguishable from this because there, by agreement, there was an exchange of one office for the other, and policemen and turnkeys have some control over and are required to deal with or assist each other. In State ex rel. v. Draper, 45 Mo. 355, it was held that the office of circuit judge and a member of the Legislature could not be held at the same time, because the two offices were incompatible at common law, and, also, the Constitution prohibited any person holding any lucrative office under this state from being a member of the Legislature. In State ex rel. v. Lusk, 48 Mo. 242, the court held that the offices of clerk of the county court and clerk of the circuit court of Cole county were not incompatible, and one person could hold both offices at the same time, because the clerk could act by deputy in one or both courts. But the court added:

> 'Were the duties necessarily personal, the deduction of counsel would be sound, but as it is we have no right to pronounce the offices incompatible.'
>
> "In State ex rel. v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616, before the court, en banc, the question was most elaborately considered. MacFarlane, J., rendered the opinion, and it was held that the office of deputy sheriff and school director were neither incompatible at common law nor prohibited by the Constitution, and that the test was, not the physical inability of one person to discharge the duties of both offices at the same time, but some conflict in the duties required of the officers."

The Act of 1885, creating the additional Court at Moberly, Section 8, is as follows:

> "All general laws now in force or which may hereafter be enacted regulating and governing courts of record, and all laws defining the practices and proceedings in such court, are declared to be in force and effect in the court whereby established."

Section 11542 R. S. Mo. 1929, relates to the appointment of deputies by the Recorder of Deeds, and is as follows:

> "In all counties wherein the offices of clerk of the circuit court and recorder of deeds have been or may be separated, the recorder of deeds may appoint in writing one or more deputies to be approved by the county court of their respective counties, which appointment, with the like oath of office as their principals, to be taken by them and indorsed thereon, shall be filed in the office of the county clerk. Such deputy recorders shall possess the qualifications of clerks of courts of record, and may, in the name of

> their principals, perform the duties of recorder of deeds, but all recorders of deeds and their sureties shall be responsible for the official conduct of their deputies. But no recorder now holding office shall appoint such deputy or deputies until he shall have entered into a new bond to the state in such sum, manner and form as is now required by law."

CONCLUSION

We are of the opinion that the Recorder of Deeds may appoint the Circuit Clerk at Moberly as a Deputy Recorder of Deeds; that the two offices are not incompatible and inconsistent, and the appointment should be made in conformity with Section 11577, quoted supra.

II

On July 24, you wrote this department as follows:

> "On July 22, I sent you an opinion regarding conduct of the Recorder's office. Permit me to ask this further question. Could the Recorder, in Huntsville, give the marriage license to the Circuit Clerk, or his Deputy, in Moberly, already signed in blank and allow the Circuit Clerk to merely issue the license?"

Section 2978 R. S. Mo. 1929 relates to marriage licenses, and the pertinent part is as follows:

> "The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same, which may be in the following form: * * * * *"

Section 2980 R. S. Mo. 1929 states:

> "If any recorder willfully neglect or refuse to issue a license to any person legally entitled thereto on application, on payment or tender of the fee provided for in the next preceding section, or shall fail or refuse to record such license, with the return thereon, as herein provided, * * * * * * * * * *"

Section 2983 contains the powers and limitations of the Recorder in issuing licenses. To permit the Circuit Clerk or his Deputy, at Moberly, to fill in the blanks contained in the marriage license would defeat the purposes of the statute, the vital one being the fact that the Recorder himself must be satisfied or make the finding that the applicants for licenses are qualified and entitled to the same. This he could not do if he merely placed the blank into a third party's hands with his signature.

In the case of State ex rel. v. Moore 96 Mo. App. l. c. 435, the court holds that it is the duty of the Recorder to record a license at the time it is issued. Speaking on this point, the Court said:

> "The manifest purpose of the marriage-license statute was to make such licenses, returns thereto, and certificates of marriage, public records so as to give notice to all the world of the occurrence to which they severally relate. Their contents thereby become matters of public knowledge because the law requires them to be kept, authorizes them to be used, and secures to all persons access to them, that knowledge of them may be public. It would therefore seem that a construction of the marriage license statute that requires the recording of all licenses when issued would obviate and clear away the difficulties which present themselves under the contrary construction for which respondent contends. After a rather full examination of the

entire marriage-license statute in all its length and breadth, we have been unable to escape the conviction that the Legislature intended that the licenses authorized by it should be placed on record by the recorder issuing them when issued, and in accordance with that conviction we must so rule. This construction, it seems to us, will best subserve the purpose of the statute.

The respondent suggests that the rule in respect to recording such instruments as the law demands shall be recorded does not require them to be recorded until they are finished. Conceding this to be the general rule of practice prevailing in respect to such instruments, does the recording of a marriage license when it is issued violate it? When the blank form of the license has been filled out by the recorder and his hand and official seal affixed thereto, is not there a finished instrument? The return to be made thereon to him by the person solemnizing the marriage is the independent act of another. Such return is as distinct from the return as a writ of summons issued by a clerk of a court of record is from the return made thereon by the sheriff."

CONCLUSION

We are of the opinion that licenses issued in the manner as contemplated by your letter, would not constitute a legal procedure. The statutes make it the duty of the Recorder to determine whether the applicants are persons qualified to obtain a license, and we do not believe that he could delegate this authority to an outside person having no connection with his office.

III

On July 20 you made this office the following inquiry:

> "The Randolph County Bar Association has requested the appointment, by the County Court, of a deputy to be stationed at Huntsville. The Court wishes to know if it is proper to allow one of the County officials at Huntsville, or one of their deputies, to take the office of deputy Circuit Clerk. If the above is not possible then can the county hire a private person to assume the duties of Deputy Circuit Clerk and to be stationed at the courthouse in Huntsville?"

It appears by the Act of 1885 creating the Court at Moberly, that no powers or changes were made with reference to the legally constituted Court at Huntsville. Section 5, page 117 of the Act of 1885, is as follows:

> "The clerk of said court shall procure and keep a seal to be used as the seal of said court. He shall also keep an office at the said city of Moberly and shall appoint a deputy, resident of said city of Moberly, for whose acts he shall be responsible, and who shall in his absence have the care and management of all books and papers pertaining to said court, and exercise the powers and perform all the duties of the office in the absence of his principal."

Section 8, page 117 of the same Act, is as follows:

> "All general laws now in force or which may hereafter be enacted, regulating and governing courts of

> record, and all laws defining the practice and proceedings in such courts, are declared to be in force and effect in the court hereby established."

Thus it will be noted that the court created at Moberly, after the creation of the same, became amenable to the procedure, practice and rules the same as in the other Circuit Court.

In 1933, Section 11812 of the Revised Statutes of 1929 was amended at page 371 in reference to the appointment of deputy circuit clerks. Said section now reading as follows:

> "Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the county court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

We come to the conclusion that the above section is applicable to the appointment of deputies in your county. We

are of the further opinion that the Circuit Clerk of the County could appoint some other county official at Huntsville to perform the duties of deputy circuit clerk at Huntsville; this conclusion being based upon the authorities as contained in your first letter relating to the appointment of deputy circuit clerk as deputy recorder of deeds at Moberly.

Referring to the last question contained in your letter, as to whether or not the County could hire a private person to assume the duties of the deputy circuit clerk to be stationed at Huntsville, we are of the opinion that under Section 11812 the County Court could not, of its own volition, make such an appointment, but the circuit clerk could appoint some person as deputy, with the approval of the County Court. This being on the condition that the fees from said office will compensate the additional deputy, as under Section 11814, page 372, Laws of Missouri 1933, it becomes the duty of the circuit clerk to pay the deputies out of the fees earned by his office. Said statute relating to the same being, in part, as follows:

> "And quarterly such clerk shall pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, * * * * * * * * * * * * *."

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

OWN:LC

DEPARTMENT OF HEALTH :)
)
BEAUTY:)

Qualifications of persons applying for registration to conduct beauty school, and procedure to be followed to revoke a license for reasons enumerated in Section 9102, R. S. Mo. 1929.

August 9, 1935.

8-10

FILED
15

Mr. H. G. Cherry, Director
Division of Cosmetology
& Hairdressing,
State Board of Health,
Jefferson City, Missouri.

Dear Mr. Cherry:

This is to acknowledge your letter dated August 2, 1935, as follows:

> "Referring to the conversation that I had with you this morning, I would like to have an opinion from your office in regard to Section 9092, relative to application for a certificate of registration of a school of beauty culture - whether or not our Department can accept or refuse to issue a license, after inspection has been made as to location and equipment of said school and the qualification of the party or parties who are to operate the school.
>
> "I would also like information as to the procedure to be made by this Department to revoke a license under Section 9102."

The Division of Cosmetology and Hairdressing is under the supervision of the State Board of Health. Section 9093, R. S. Mo. 1929, provides as follows:

> "The control, supervision and enforcement of the terms and provisions of this article shall be under the state board

of health, or by whatever name said board may hereafter be designated."

Section 9092, R. S. Mo. 1929, provides for the issuing of a certificate by the State Board of Health to any person, firm or corporation desiring to engage as a school in teaching any one or more of the classified occupations provided by Article 5, Chapter 52, R. S. Mo. 1929. Said section provides in part as follows:

> "It shall be competent for any person, firm or corporation to apply to the state board of health for a certificate of registration of a school for any one or more of the classified occupations within this article upon the payment of a reasonable annual registration fee as determined annually by the said board but in no case to exceed the sum of one hundred dollars. No such school for hairdressers or cosmetologists within this article shall be granted a certificate of registration unless it shall attach to its staff a regularly licensed physician and employ and maintain a sufficient number of competent instructors, registered as such, but not less than one instructor to each twenty students, and shall require a course of training not less than one thousand hours over a period of six consecutive months for the classified occupation of hairdresser and cosmetologist and not less than one hundred fifty hours for the classified occupation of manicurist, such training to include practical demonstrations, written or oral tests, and practical instructions in sanitation, sterilization and the use of antiseptics, cosmetics and electrical applicances, consistent with the practical and theoretical requirements as applicable to the classified occupations as provided in this article: * * * * *."

It is thus seen that a corporation may be given a certificate of registration. A corporation is defined by Corpus Juris, Vol. 14, page 50, as follows:

> "The following definition of a corporation was given by Chief Justice Marshall in the celebrated Dartmouth College case: 'A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.'"

And while a corporation may not be licensed to practice the occupations, such as hairdressing, cosmetology and manicuring, yet, a corporation may be given a license to conduct

a school. The only qualifications that are required for one to conduct a school are those set forth in Section 9092, supra, namely: (1) That the person applying for a certificate of registration must pay an annual registration fee; (2) That the school must have attached to its staff a regular licensed physician; (3) That the school must employ and maintain a sufficient number of competent instructors, registered as such; and (4) must teach certain subjects, giving oral or written tests, and (5) the school must be conducted in a sanitary manner.

It is thus seen that Section 9092, supra, makes it mandatory upon the school to comply with certain conditions in applying for a certificate and if the school complies with said conditions, in our opinion, you cannot refuse to issue to it a license. The qualifications of the party or parties operating the school would not be a factor in determining whether a certificate should be issued, as for example: a corporation does not have the qualifications possessed by a natural person. The qualifications of persons attached to the staff of the school may be inquired into, for example: You may inquire if the physician is a regularly registered one, also if the instructors are regularly registered operators. The statutes provide that registered operators must have certain qualifications in order for such to be licensed.

If a registered operator applies for a certificate of registration for a school, then surely the registered operator's qualifications are sufficient as the statute provides that no license shall be granted to an operator unless "they are of good moral character and have an education equivalent to the completion of an eighth grade and shall have served and completed the required time and studies as determined by the state board of health * * * * *." Section 9095, R. S. Mo. 1929.

It is our opinion, from the foregoing, that any person, firm or corporation applying to the State Board of Health for a certificate of registration of a beauty school for any of the classified occupations enumerated in Article 5, Chapter 52, and meeting all the requirements of Section 9092, supra, are entitled to be granted a certificate of registration. In

other words, the only facts to be inquired into are whether or not the school has competent instructors (registered operators), a regular licensed physician and that it requires a course of training prescribed by the statute and gives written or oral tests and has practical instruction in sanitation, sterilization etc.

II.

In answer to your question as to the procedure to be followed in order to revoke a license for the reasons named in Section 9102, R. S. Mo. 1929, we refer you to Section 9103, R. S. Mo. 1929. Said section (9103) provides in part as follows:

> "At least twenty days prior to the date set for any such hearing before the board for the revocation of any such certificate, the secretary of the board shall cause written notice to be personally served upon the accused in the manner prescribed for the serving of original writs in civil actions. To said notice shall be attached an exact statement of the charges and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel, at the time and place designated in said notice, * * * * *."

Section 9103 also permits the licentiate to appear at the hearing in person or by counsel, and also, if not satisfied by the decision of the Board, to be granted a writ of review in the circuit court.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

BARBERING: **It is the duty of the State Board of Barber's Examiners to proceed against all persons violating provisions of Chapter 103, R. S. Mo. 1929.**

10-8

October 8, 1935.

FILED
15

Hon. Richard Chamier
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "A barber residing in Randolph County had a hearing before the State Barber's Board at a meeting in Moberly, Missouri, and his license was revoked. He is now practicing the occupation of barbering in this County without a license or permit. The State Barber Board called my attention to Section 13534, which makes it a violation to so practice without a permit or license.
>
> "A portion of this section is as follows:
>
> "'or for the violation of any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, AND THE BOARD SHALL PROCEED AGAINST ALL SUCH PERSONS****prosecutions under this chapter shall be begun and carried on in the same manner as other prosecutions for misdemeanors in this State.'
>
> "I would appreciate your advice on the procedure necessary on the part of the Board to comply with that clause cited above which has been capitalized. I am wondering if their action in signing a

complaint before a Justice of the Peace in this County would be sufficient to satisfy the statement that the Board shall proceed against all such persons."

Your attention is directed to Section 13534, R. S. Mo. 1929, relating to the Board of Barber Examiners proceeding against persons practicing the occupation of barbering without first having procured a permit. Said section reads as follows:

"Any person practicing the occupation of barber without having obtained a certificate of registration or permit as provided in this chapter, or willfully employing a barber who has not such certificate of permit managing or conducting a barber school or college, without first securing a permit from such board, or falsely pretending to be qualified to practice as a barber or instructor or teacher of such occupation under this chapter, or failing to keep the certificate, card or permit mentioned in this chapter properly displayed or for any extortion or overcharge practiced, and any barber college, firm, corporation or person operating or conducting a barber college without first having secured the permit provided for by this chapter, or failing to comply with such sanitary rules as the board, in conjunction with the state board of health, prescribes, or for the violation of any of the provisions of this chapter, shall be deemed guilty of a misdemeanor, and the board shall proceed against all such persons, and upon conviction thereof they shall be punished by a fine not less than ten dollars nor more than one hundred dollars, or by imprisonment in the county jail not less than ten days nor more than ninety days. Prosecutions under this chapter shall be begun and carried on in the same manner as other prosecutions for misdemeanors in this state."

In construing the above statute, it is obvious that it is the duty of the board of barber examiners to proceed

against all such persons as may be violating the provisions of Chapter 103, of R. S. Mo. 1929, relating to barbering. This statute makes it mandatory upon the board to proceed, and that the prosecutions are to be begun and carried on as other prosecutions for misdemeanors in this State. Your attention is directed to the case of Ex Parte Brown, 297 S. W. loc. cit. 447, wherein the Court in speaking of the interpretation of a statute said:

> "**** When a fair interpretation of a statute which directs acts or proceedings to be done in a certain way shows that the Legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, then such statute is mandatory. ****"

Your attention is further directed to Sections 3414, 3415, 3501 and 3502 of R. S. Mo. 1929, relating to the prosecution of misdemeanors in this State. You will find, from a careful reading of these sections that a complaint made under oath and delivered to the Prosecuting Attorney by the Board of Barber Examiners will be sufficient and will satisfy the intent of the Legislature as expressed in Section 13534, supra.

CONCLUSION.

It is the opinion of this department that it is the duty of the Board of Barber Examiners to make a complaint under oath of any alleged violations of Chapter 103, R. S. Mo. 1929, and deliver the same to the Prosecuting Attorney to effectuate the meaning of the statute making it mandatory upon the board to proceed.

Respectfully submitted,

APPROVED:

RUSSELL C. STONE
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS-afj

SALARIES AND FEES: Circuit Clerk is entitled to salary beyond December 31 and until first Monday in the following January, at which time his term expires.

November 1, 1935

FILED
15

Mr. C. W. Chastain,
Deputy County Clerk,
Plattsburg, Missouri.

Dear Sir:

We are in receipt of your inquiry of October 24, 1935, which is as follows:

> "The County Court would like to have an opinion upon the following:
>
> "Mrs. Grace C. Bland retired from the office of Circuit Clerk of this County on the First Monday of this year which was January 7th. She had held that office for twelve years and she thinks she took office on January 1st. Each year she was paid the salary set by statute which during her last term of office was $2000.00 per year. This was paid in equal monthly installments and she received her last payment December 31, 1934. The question is whether the Court should pay her for the week between January 1st and January 7th of this year."

Section 39 of Article 6 of the Missouri Constitution provides as follows:

> "The St. Louis Court of Appeals and Supreme Court shall appoint their own clerks. The clerks of all other courts of record shall be elective, for such terms and in such manner as may be directed by law * * *."

Section 11664, R. S. Mo. 1929, provides as follows:

> "At the general election in the year eighteen hundred and eighty-two, and every four years thereafter, except as hereinafter provided, the clerks of all courts of record, except of the supreme court, the St. Louis court of appeals, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

It will be noted that this last section provides that the circuit clerk, who, of course, is the clerk of a court of record, shall enter upon the discharge of his duties on the first Monday in January next after his election, and shall hold his office for the term of four years and until his successor is duly elected and qualified, unless sooner removed from office.

Section 655, R. S. Mo. 1929, adopts on behalf of the State certain rules of construction of the statutes, among them being:

> "Words and phrases shall be taken in their plain or ordinary and usual sense."

Your inquiry shows January 7, 1935, to be the first Monday of the year, so there is no question here presented as to the effect of holding over beyond the end of the term and until such later date as the successor is elected and qualified. Your question really appears to be whether the term of "four years" from the first Monday in January of a given year means January 1st or four years, measured by days, weeks and months, from the date the party was inducted into office. In other words, what is the meaning of the word "year" as used in this statute?

By the rule of construction adopted as the first rule in Section 655, the word "year" means 365 days.

In the case of State ex rel. Withers v. Stonestreet, 99 Mo. 361, this question was discussed and a similar statute was construed by the Supreme Court of this state. In that case the court was construing a statute which said:

> "Each inspector shall * * * hold his office for two years from the date of his appointment, and until his successor is duly appointed and qualified * * *."

The facts were that the original appointment was made on June 18, 1879, but one of the appointees held over beyond his two-year period until September 26, and at that time the Governor appointed another to the office, and this latter appointee claimed the right to hold the office for two years from September 26. The court declined to adopt that view, saying, l. c. 374:

> " * * * there appears a legislative command that the terms of office of each appointee is to last two years 'from the date of his appointment;' * * *
>
> "It will therefore be ruled in answer to the first question propounded: That, inasmuch as the term of office of the first appointee began on the eighteenth day of June, 1879, and continued for two years from and after that date, that the term of office of each successive appointee, whether for a whole term, or for the part of an unexpired term, was regulated and controlled by the date fixed by the first appointment; and that it was beyond the power of the executive, when making subsequent appointments, to ignore or disregard the tenure of office thus first established. * * * Belt's term of office was only for the remainder of a term of office which had never been fulfilled, to-wit, the time intervening between September 26, 1888, and June 18, 1889."

We understand that your circuit clerk inquired about held this office until January 7, 1935. No other person held it during that time. You had a circuit clerk at that time and that was this person. The compensation of an officer is regulated by statute and the fair meaning of the word "year", as used in Section 11664, is 365 days, except when there is a leap year, and then it means 366 days, and it does not end on the 31st day of December of a given year in this instance.

CONCLUSION

It is our opinion that the clerk who was elected and who qualified and acted as your circuit clerk from the first Monday in January, 1931, was elected for a term which expired on January 7, 1935, and as such clerk is entitled to compensation until that date.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

OIL INSPECTION DEPARTMENT: BONDS.

Appropriation Act insuff cie.t to authorize payment of premium on official bonds.

November 5, 1935. 11-6

FILED 15

Honorable Roy H. Cherry
State Inspector of Oils
of Missouri
Jefferson City, Missouri

Dear Mr. Cherry:

Acknowledgment is herewith made of your request for an opinion of this office on the following matter:

> "In accordance with our conversation, I am calling your attention to the matter of the payment of premiums on bonds furnished to the State of Missouri by the deputies and other employees of this department.
>
> Since the enactment of the Motor Fuel Tax Law it has been the custom, at least, for the State to pay these premiums. Recently the State Auditor has refused payment on the bond of a special agent of this department by reason of some opinion of your office. I dislike very much to require the employees of this Department to now pay these premiums for the reason that their salaries have been very materially reduced from those paid by our predecessors. For instance, the deputy inspectors have heretofore been paid a salary of $2400 per year and now by reason of reduced appropriation by the General Assembly, they are paid only $2000 per year. I might also add that the motor fuel tax collections of this department have been increased by almost half a million dollars over previous years. The inspection fees have likewise been pro-

portionately increased.

> An examination of the appropriation made by the recent General Assembly for the support of this department shows that the wording of this bill is almost identical with that of the appropriations made by other sessions of the General Assembly. These bonds have heretofore been paid out of the appropriation for operations. If there is any legal way by which these bonds may be paid out of our appropriation for operations, I believe it should rightfully be done."

Your employees may be divided into two groups, those provided for under the Motor Vehicle Tax Act constituting one group, and those employed under the Oil Inspection Law constituting the other group. These employees are provided for in different acts and separate appropriations are made therefor. We shall accordingly deal with them separately.

I.

SPECIAL AGENTS AND HEAD BOOKKEEPER MUST PAY PREMIUMS ON BONDS REQUIRED BECAUSE APPROPRIATION ACT INSUFFICIENT TO COVER THAT ITEM OF EXPENSE.

Section 7816 R. S. Missouri 1929 provides for the appointment of special agents and a head bookkeeper. This section provides:

> "The special agent and the head bookkeeper shall, before entering upon the duties of their respective offices, each execute and file with the inspector a bond, with security to be approved by the inspector, tothe State of Missouri in the sum of Ten Thousand Dollars, which bond shall be conditioned upon the faithful performance of the duties of their said respective offices."

By the very terms of this provision the supplying of such a bond is a condition precedent to the entering upon the duties of the office. It is a qualification for the office the same as any other requirement that might be made. As such, the duty rests upon the employee to meet that qualification of office. There is no where to be found in the motor vehicle fuel act any provision for the payment of the premium on the bond by the State. Under such circumstances, the ruling of the court in the case of In Re: Buck's Estate, 220 S. W. 714, is applicable. The Court in that case held that an administrator was required to personally pay the premium on the bond required by law to be supplied, and that it was not a proper charge against the estate he was serving. The Court held, l. c. 716:

> "It was the duty of the administrator pendente lite to defray the cost of his bond as such administrator, because it is an expense incident to his qualification as such officer of the court, and not to administer the estate."

The Appropriation Act authorizing the expenditure of moneys from the highway fund is found on pages 106,107, Laws of Missouri 1935, and reads as follows:

> "A. PERSONAL SERVICE:
> For the salaries of special agents, (who, in addition to their other duties, shall be charged with the duty of investigating throughout the State applications for and payment of motor fuel tax refunds), bookkeeper, assistant bookkeepers, refund clerk, checking clerks, audit clerks, file clerk, inspection clerks, license and registration clerks, secretary to inspector, R. R. checking clerk, exemption clerk, ...$72,000.00
>
> B. ADDITIONS:
> Operative equipment; consisting of laboratory, scientific and testing equipment, office furniture and equipment, ... 500.00

C. REPAIRS AND REPLACEMENTS:
Office furniture and equipment.....$300.00

D. OPERATION:
General expense consisting of communication, printing and binding, transportation of things, travel within and without the State, other general expense, material and supplies consisting of light, heat, power and water supplies, stationery and office supplies, ...$42,850.00

To pay claims for refund of taxes paid on motor vehicle fuels as provided by law, ...520,000.00"

It appears that the only provision within which premiums on officialbonds might fall would be under "operations." The Legislature by its terms has denominated that general expense shall consist of communication, printing and binding, transportation of things, travel within and without the State, and "other general expense." Without question, premiums on bonds do not constitute any of the enumerated classification of things, nor do they fall within the broadest interpretation of those designated thus.

This office in an opinion dated October 5, 1933, to Honorable J. C. Breshears, Commissioner of Agriculture, followed the rule laid down in the case of State ex rel. vs. Dierks, 214 Missouri 578, which held that the terms "other general expense" modified directly the specific enumeration contained in a similar appropriation act and that it could only modify the specific classifications named and amplify those terms so as to include expenses directly connected with the items enumerated. The following quotation is taken from the Dierks case supra, page 591:

"Now take either of the two appropriation ordinances in evidence, for they are both the same in words, except as to the last clause, we have no specific appropriation for this work or for this relator. Relator contends that the words 'other expenses of House of Delegates,' are sufficient to authorize the payment of this money out of the unexpended balance in that fund. The whole clause of the ordinance reads:

'Publishing proceedings, printing, stationery, office expenses, furniture, rent of telephone and other expenses of House of Delegates, ...$8,000.00.'

To our mind the rule of ejusdem generis fully applies here. The term 'other expenses' means expenses of the character theretofore mentioned in that clause of the appropriation act and does not include an appropriation for work of the character performed by relator. To hold that it did include such would be to nullify the provisions of section 14, article 5, of the city charter, supra."

We adhere to this opinion heretofore rendered and hold that the term "other general expense" modifies directly the enumerated items, to-wit, "communication, printing and binding, transportation of things, travel within and without the state" and is not sufficient to authorize the expenditure of moneys to pay premiums upon official bonds.

CONCLUSION.

It is therefore our opinion that the State Auditor is not authorized to pay the premiums due on bonds supplied by the special agents and head bookkeeper from the appropriation made by the Fifty-Eighth General Assembly.

II.

CHIEF CLERK AND DEPUTY INSPECTORS MUST PAY PREMIUM ON BONDS BECAUSE APPROPRIATION IS NOT SUFFICIENT TO AUTHORIZE PAYMENT.

The appointment of a chief clerk and of deputy oil inspectors is provided for under the Oil Inspection Laws. Section 13387 R. S. Missouri 1929, provides for the appointment of a chief deputy, a chief clerk and a number of deputy inspectors, and further provides:

"The State Inspector shall require of each deputy and of his chief clerk a bond for the faithful performance of his duties. Saidbond to be in the sum of ten thousand dollars, for the benefit and use of the State of Missouri and the said State Inspector, who shall have the approval of said bonds as satisfactory security, and for the breach thereof said state inspector shall have the right of action in his own name for the recovery of any loss he shall have sustained by reason of any default by his said deputy. And the State of Missouri shall also have the right of action on said bonds to recover the loss if any the State may have sustained through the default of the chief clerk or of any such deputy.* * * **

By the foregoing provision the State Inspector is authorized to require official bonds of the Chief Clerk and the deputy oil inspectors. The statutory authority therefore exists authorizing the receiving of these bonds. However, the appropriation act covering the expenses of the Oil Inspection Department payable from general revenue is very similar in its terms to the appropriation act hereinbefore referred to under part one of this opinion. This Act is found at page 106, Laws of Missouri 1935, and reads as follows:

"A. PERSONAL SERVICE:
Salaries of state oil inspector, chief chemist, chief clerk, deputy inspectors, stenographers, chemist helpers and janitors.....$72,360.00

B. ADDITIONS:
Operative equipment; consisting of laboratory, scientific and testing equipment, office furniture and equipment..... 500.00

C. OPERATION:
General expenses; consisting of communication, printing and binding, travel, other general expense..... 30,000.00
Material and supplies: consisting of stationery and office supplies, ... 1, 050.00"

It will be noted that the terms of this act are, so far as the question here involved, practically identical with Section 41 hereinbefore construed appropriating money for the State Highway Department fund, and it is not necessary here to repeat what has heretofore been said as to the inadequacy of this appropriation to authorize the auditor to pay from public funds the premiums on bonds of the chief clerk and the deputy oil inspectors.

CONCLUSION.

It is therefore the opinion of this office that because of the insufficiency of the provisions of the appropriation act the State Auditor is not authorized to pay premiums on the bonds of the chief clerk and the deputy oil inspectors.

III.

THE STATE OIL INSPECTOR IS REQUIRED TO PAY PREMIUM ON OFFICIAL BOND AS APPROPRIATION ACT IS INSUFFICIENT TO AUTHORIZE EXPENDITURE OF STATE FUNDS FOR THAT PURPOSE.

Section 13386 R. S. Missouri 1929, requires the State Inspector of Oils to give a bond in the sum of Twenty Five Thousand Dollars, conditioned upon the faithful performance of his duties, before entering upon the discharge of the duties of his office.

The two appropriation acts hereinbefore considered are the only ones which could possibly be construed as authorizing the payment of the premium for the official bond required by the foregoing section. As those appropriation acts are insufficient to authorize the payment of premiums of employees they are likewise insufficient to authorize the payment of the premium on the bond of the State Inspector.

CONCLUSION.

For the reasons hereinbefore set out, it is the opinion of this office that the appropriation acts appropriating money for the use of the State Oil Department are insufficient to authorize the State Auditor to pay for the premium on the official bond of the State Inspector of Oils.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

OLD AGE PENSION:

1. Only persons receiving assistance at time of death entitled to funeral expenses.

2. No accrued or unpaid assistance due until application has been finally approved.

11-14

November 12, 1935

FILED 15

Miss Reba E. Choate
Assistant Commissioner
Old Age Assistance Division
Jefferson City, Missouri

Dear Madam:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "The following question has arisen: Is an applicant for old age assistance who dies previous to the completion of his case by the State Old Age Assistance Board eligible for funeral benefit or accrued assistance?"

I

Only persons receiving assistance at time of death entitled to funeral expenses.

Constitutional Amendment number 1, found at page 478 of Laws of Missouri 1933, which amends Article IV, Section 47, of the Constitution of Missouri and authorizes the granting of pensions by the general assembly to persons over seventy years of age who are incapacitated from earning a livelihood and are without means of support, reads as follows:

> "That article IV, Section 47, of the Constitution of Missouri, be

> and the same is hereby amended by adding at the end of said section the following words: 'Provided further, that nothing in this Constitution contained shall be construed as prohibiting the general assembly from granting or authorizing the granting of, pensions to persons over seventy years of age, who are incapacitated from earning a livelihood and are without means of support, as may be provided and regulated by law."

Section 15 of the Old Age Assistance Act, Laws of Missouri 1935, page 312, provides:

> "On the death of any person receiving old age assistance, such reasonable funeral expenses for burial shall be paid to such persons as the state board directs; provided, that such expenses do not exceed $100.00 and the estate of the deceased is insufficient to defray the same."

Whether the general assembly, under the constitutional amendment to Section 47 of Article IV of the Missouri Constitution, had the authority to provide for the payment of funeral expenses of persons receiving assistance or applicants for assistance, we deem it unnecessary to decide. The plain wording of Section 15, supra, we think, answers your first question. Under the provisions of said section only the funeral expenses of persons receiving assistance at the time of their death are to be paid. If applicant's application for assistance has not been finally allowed and the amount of assistance fixed as provided by section 10 of the Old Age Assistance Act at the time of such applicant's death, it is obvious that the applicant would not be at such time receiving assistance.

It is, therefore, the opinion of this department that, under the provisions of Section 15 of the Old Age Assistance Act, only the funeral expenses of those persons receiving old age assistance at the time of their death should be paid.

I I

No accrued or unpaid assistance due until application has been finally approved.

It is plain, from a reading of the constitutional amendment authorizing the granting of Old Age Pensions and from a reading of the Old Age Assistance Act, that the Legislature intended to aid those persons over the age of seventy years incapable of earning a living and without the means of adequate support, and did not intend to aid the heirs or personal representatives of such persons. In other words, the right to assistance under the provisions of the Act is a personal right of those entitled to such assistance by reason of their age and inability to earn a livelihood, and who are without means of adequate support.

However, Section 24 of said Act provides that in case any applicant shall die having any accrued or unpaid assistance, the amount thereof shall be paid to the legal representative of said applicant, or if none be appointed within sixty days to those entitled thereto under the laws of this State. Said section reads, in part:

> "* * * * and in case any applicant shall die, having any accrued or unpaid assistance, the amount thereof shall be paid to the legal representative of such applicant; but if there be no administration upon the estate of the deceased applicant within a period of 60 days after his death, then the amount due shall be paid to whomsoever would be entitled thereto under the laws of this State, and the provisions of this Act; * * *"

Webster's New International Dictionary defines the word "accrue" as follows:

> "3. Law. To come into existence as an enforceable claim; to vest as a right; as, a cause of action has accrued when the right to sue has become vested."

Section 14 of the Act provides when assistance is to commence, if allowed. Section 10 of said Act provides the method and manner of allowing and disallowing applications for assistance, and of fixing the amount of assistance, if any. Said section reads:

> "Whenever an application is made for old age assistance, the county board shall promptly make investigation of the facts, and, after hearing the applicant, if it approves the application, shall make a recommendation of the amount of assistance to be allowed, or, if it disapprove, make a recommendation that no assistance be allowed. Upon the request of an applicant, the county board may, if it sees fit, direct a rehearing, of which the applicant shall have at least ten days' notice, and at which he may appear and offer evidence. The decision of the county board shall be forwarded to the state Commissioner who may approve or disapprove, or recommend changes in the decision of the county board. If the state Commissioner and the county board are unable to agree in regard to the allowance, disallowance, or the amount of assistance, the application, along with a record of all the proceedings in regard to it, shall be forwarded to the State Board for review, whose decision shall be final, subject to the right of appeal as herein otherwise provided. An applicant whose application for assistance has been

rejected may not reapply for assistance until the expiration of twelve months from the date of the previous application, unless the rejection of said application shall be solely for failure to qualify as to age and such applicant has within the 12 months period reached the qualifying age."

From the above section it is plain that the county board first either allows or disallows the application for assistance, and,if it approves the application, makes a recommendation of the amount of assistance. The decision of the county board is forwarded to the State Commissioner, who may approve or disapprove or recommend changes in the decision of the county board. If the Commissioner and the county board agree on the allowance and the amount of the assistance then it would seem that the application is finally allowed and the amount of assistance is fixed. If, however, they are unable to agree the state board reviews the matter and its decision is final subject to the right of appeal to the circuit court.

In view of the above, it is our opinion that the amount of assistance is not allowed,within the meaning of Section 14, until either the county board and the State Commissioner agree on the amount of allowance or,if unable to agree, until the state board fixes the amount of assistance, or if an appeal is taken from the state board to the circuit court until said court renders a judgment allowing and fixing the assistance.

It is, therefore, the opinion of this department in view of all of the above, that no accrued or unpaid assistance is due any applicant until his application has been finally approved and the amount of assistance fixed, in one of the ways pointed out above. As stated above, the assistance allowed an applicant is for the personal benefit of said applicant and not for the benefit of his heirs or personal representative. Therefore, when the applicant dies before his right to assistance has been determined, there is no accrued or unpaid assistance due him and the right of assistance, if any, does not survive to such applicant's heirs or representative. If, however, applicant's application has been approved and the amount of the assistance determined during his lifetime, he was entitled to such assistance from the first day of the calendar month following

that on which the petition was received by the county board, and if any of such accrued or unpaid assistance has not been paid the amount thereof should be paid to the legal representative of such applicant, or, if none be appointed within a period of sixty (60) days after death, to whomsoever is entitled thereto under the laws of this State.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

OLD AGE ASSISTANCE ACT: County judge may not appoint relative to county old age assistance board.

12-3

November 29, 1935.

FILED
15

Miss Reba E. Choate,
Assistant Commissioner,
Old Age Assistance Division,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Miss Choate:

This department is in receipt of your request for an opinion as to the following:

"Is it lawful for a county judge to appoint a relative as a member of the county old age assistance board?"

Section 13, Article XIV of the Constitution of the State of Missouri provides:

"Any public officer or employe of this state or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the state or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Section 3, Laws of Missouri, 1935, page 308 provides:

> "In every county there shall be established a County Old Age Assistance Board, to consist of three persons domiciled in the county, each of whom shall have been a resident taxpaying citizen of the county for a period of five years prior to his or her appointment at least one of whom shall be a woman, who shall be appointed by the county court for a term of four years, except that of the members first appointed, one shall be appointed for a term of two years and one for a term of three years. Vacancies shall be filled in the same way in which the original appointment was made. The members of the county board shall serve without compensation, except that the necessary expenses incurred while in the performance of their duties shall be paid to them."

In the recent case of State ex inf. McKittrick v. Whittle, 333 Mo., page 705, Judge Gantt said:

> "The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment."

CONCLUSION

In view of the foregoing, it is the opinion of this department that it would be in violation of Section 13, Article

XIV of the Constitution of the State of Missouri for a judge of a county court to vote for the appointment of a relative within the fourth degree, either by consanguinity or affinity, to the County Old Age Assistance Board.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

OLD AGE ASSISTANCE: Benefits from war risk insurance not public funds, but may be taken into consideration under Secs. 4 and 6 of the Act and deducted from maximum amount of $30.00 per month.

12-4

December 3, 1935.

FILED
15

Miss Reba E. Choate,
Assistant Commissioner,
Old Age Assistance Division,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Miss Choate:

This department is in receipt of your letter of November 26 requesting an opinion relating to the Old Age Assistance Act. Your letter is as follows:

> " * * * * Many applicants for assistance are receiving from the Federal Government World War Insurance benefits. The Buchanan County Board contends that this is not money from public funds and have requested that we secure an opinion from your office as to whether or not applicants for old age assistance who receive from the Federal Government payments on war risk life insurance carried by a son who was killed in France, are eligible to apply for old age assistance."

Your request involves an interpretation of Section 16 of the Old Age Assistance Act, which is as follows (Laws of Mo. 1935, page 312):

> "No person receiving assistance under this Act shall at the same time receive any other relief from any public funds, except for medical and surgical assistance."

Under the terms of this act, any person possessing the qualifications enumerated in Section 6 thereof may make application, and if found to possess the proper qualifications, is entitled to receive not more than $30.00 per month; but under the terms of Section 16, the person shall not at the same time receive any other relief from any public funds except for medical and surgical assistance. We think it was the intention and purpose of the Legislature in inserting Section 16 in the Act to prevent persons from receiving assistance, help, aid or relief from several sources at the same time, i.e., state, county, city or federal government. At the time the Act became effective and until such persons were found to be qualified and entitled to the old age assistance and actually received the assistance, many of such persons will continue to receive relief from the county or city, such relief being paid from public funds, examples of such persons being those in county infirmaries, in soldiers' homes, and those receiving monthly relief from the county.

The term "public funds" is defined in Ayres v. Lawrence, 59 N.Y., l.c. 198 as:

> "Taxes, customs, etc. appropriated by the government to the discharge of its obligations."

Therefore, by inserting in Section 16 the exception, to-wit, "except for medical and surgical assistance", all relief from public funds, and we might go so far as to include in the above mentioned Community Chest funds and funds collected purely for charitable purposes and disbursed by charitable organizations, must cease before a person may be entitled to receive the old age assistance; however, in the event the person becomes in need of medical or surgical assistance, public funds of the nature mentioned above may be used and the persons receive the old age assistance in the same amount as adjudged by the Board.

Coming closer to the question, i.e., whether or not benefits received by a mother or father from the government under a war risk insurance policy are public funds within the meaning of Section 16 of the Old Age Assistance Act---during the World War, when a man entered the army he had the privilege, if he so desired, to avail himself of the opportunity to enter into a contract with the United States Government for a maximum amount of insurance, $10,000.00. The premiums were cheaper than on contracts of insurance with some private insurance company. At the close of the War the soldier was given the privilege of converting the insurance into old line or other types of insurance with private insurance companies. Many elected to retain their government insurance. In either event, we consider the same to be insurance paid according to contract--at least, the government treats the same as a contract in the case of Eggen v. United States, 58 F (2d) 618:

> "A policy of war risk insurance was a contract of insurance between the government and the insured. It was not a gratuity nor an arrangement for a pension. The contingencies insured against were death and total permanent disability. If a policy lapsed, for nonpayment of premiums, before death or total permanent disability occurred, there could be no recovery under the policy. If either of the contingencies insured against occurred during the life of the policy, there could be a recovery."

The beneficiary under the policy is receiving funds by virtue of a contract made by the deceased person, and we consider payments made to the beneficiary under the contract in the same category as payments received from old line insurance companies by virtue of a contract made by a deceased person.

CONCLUSION

We are of the opinion that benefits or payments made under a war risk insurance policy are not public funds within the meaning of Section 16 of the Old Age Assistance Act, and would not preclude persons from making applications and receiving benefits under the Act; however, the benefits received under the war risk insurance policy may be taken into consideration under Section 4; likewise, Section 5, and the war risk insurance payments may be deducted from the maximum amount of $30.00 per month.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

OLD AGE PENSIONS: Applications for assistance should be dated on the day actually received by the county board, and compensation, if any, should commence on the first day of the month following that on which the application was actually received.

December 11, 1935 12-11

Miss Reba E. Choate
Assistant Commissioner Old Age
Assistance Division
Jefferson City, Missouri

FILED
15

Dear Madam:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "During the month of September the St.Louis Old Age Assistance Board received 3,100 applications. On September 28 the St.Louis office closed its office and refused to take any applications. It was November 4 before we could persuade them to reopen. The St.Louis office now asks if it may date all applications back to September 28.
>
> We have informed the St. Louis office that the applications must be notarized on the day filed and not dated back. They, however, have asked us to request an opinion of your office as to whether or not these applications filed in November can be honored as of September.
>
> May we have an opinion of your office on this matter. "

Section 9 of the Old Age Assistance Act, Laws of 1935, page 310, provides an applicant for assistance shall deliver his claim, in writing, to the county court, in the manner and form prescribed by the State Board. Said section reads as follows:

> "An applicant for assistance shall deliver his claim, in writing, to the county board, in the manner and form prescribed by the State Board. All statements in the application shall be sworn to or affirmed by the applicant, setting forth that all facts are true in ever material point."

Section 14 of said act provides:

> "The assistance, if allowed, shall commence on the first day of the calendar month, following that on which the petition was received by the county board."

It is a fundamental principle of statutory construction that words of common use are to be construed in their natural and ordinary meaning. It is also a cardinal principle that where a statute is plain and unambiguous there is no room for construction. Sections 9 and 14, supra, are plain and unambiguous; Section 9 provides that an applicant shall deliver his claim, in writing, to the county board in the manner and form prescribed by the State Board, and Section 14 provides that the assistance, if allowed, shall commence on the first day of the calendar month following that on which the petition was received by the County Board.

It is, therefore, the opinion of this office that an application for assistance should be dated on the day

it is actually received by the County Court, that is, the day such application is delivered to the county board by the applicant, and the assistance, if allowed, shall commence on the first day of the calendar month following that on which the petition was delivered to and received by the county board.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

TAXATION: --Legislature may provide maximum municipal tax for liquor license.

E-19

February 18, 1935.

FILED
16

Senator A. M. Clark
Chairman of Senate Committee
on Criminal Jurisprudence
Jefferson City, Missouri

Dear Senator Clark:

Acknowledgment is herewith made of your request for an opinion of this office on the following subject:

> "In the event that the Legislature by law authorizes incorporated cities, towns and villages to impose license taxes upon the manufacturing, distribution and sale of intoxicating liquors, may the Legislature also limit the amount of such license taxes that such cities, towns and villages may charge?"

Before turning directly to this problem we first direct attention to the status of intoxicating liquor in the State of Missouri. There is no inherent right for the privilege of dealing in intoxicating liquor and it is unlawful to do so without specific legislative authority. In the case of State vs. Ingram and Adams, 118 Mo. App. 323, the following remarks are made, l. c. 327:

> "We find that, notwithstanding the fact that a saloon or other house in which intoxicating liquors are sold was not a nuisance at common law for the reason that it was not unlawful to sell liquors in the absence of statutory restrictions as stated in the text supra, this is not the law in this State, inasmuch as at a very early date our Supreme Court established the doctrine that because of its tendency to deprave public morals, the

> right to sell intoxicating liquors is not a natural privilege, but is a calling which no one has a right to pursue without first obtaining a permit or license from the proper authorities. (Austin v. State, 10 Mo. 591; State v. Bixman, 162 Mo. 1, 62 S. W. 828; Barnett v. Pemiscot County Court, 111 Mo. App. 692, 86 S. W. 575). In view of this doctrine of our Supreme Court, the common law does not prevail here on this question, and we must treat it as a settled principle, at variance therewith, in the jurisprudence of Missouri, that the sale of liquors without a license is therefore unlawful, even in the absence of a statute so declaring.* * * *"

The Supreme Court in the case of State ex inf. vs. Missouri Athletic and St.Louis Clubs, 261 Mo. 527, reviewed the various remarks of the Appellate Courts of our State, stating as follows, l. c. 558, 589:

> "It is scarcely worth while at this day and time to consume space discussing the character of the liquor traffic, except to say that early in our judicial history Judge Napton, who may well be styled the Story of our jurisprudence, said, in Austin v. State, 10 Mo. 591, that 'the sale of intoxicating liquors is by law illegal and is not a privilege of a citizen of this or any other State, and that the right to sell same can only be acquired by complying with the law.' Thirty-five years later, with no adverse intimation in the interim, this court reiterated the doctrine announced in the Austin case, supra, and in a per curiam opinion in State ex rel. v. Hudson, 78 Mo. 302, said, in addition, that 'the license fee exacted of dramshop keepers is not a tax, but a price paid for the privilege of carrying on a business detrimental to public morals, and which the Legislature in the exercise of its police power has the right to prohibit altogether.' And Burgess, J., in State v. Seebold, 192 Mo. l. c. 727, said: 'It is fundamental that no one has a natural right to sell intoxicating liquor, because the tendency of its use is to deprave public morals, and to do so without a license from proper authority is unlawful.' (Citing cases.) So it was held in Higgins vs.

Talty, 157 Mo. 280, that a dramshop license was a mere permit, not a contract, between the State and the licensee, in which the latter has no vested rights, but is subject at all times to the police power and is revocable at any time the State may see proper to do so for any violation of the dramshop law, whether the license so provides or not.

Other opinions of this court and the courts of appeals add such force to the doctrine announced as repetition and unvarying adherence give to any judicial declaration. The last word on the subject has been so aptly said by Woodson, J., speaking for this court, in State v. Parker Dist Co. 336 Mo. l. c. 255, that it may be appropriately incorporated here as follows:

'The authorities also establish the fact that the liquor traffic is not a lawful business, except as authorized by express legislation of the State; that no person has the natural or inherent right to engage therein; that the liquor business does not stand upon the same plane, in the eyes of the law, with other commercial occupations. It is placed under the ban of the law, and it is thereby differentiated from all other occupations, and is thereby separated or removed from the natural rights, privileges and immunities of the citizen.

'The foregoing enunciations of the courts are based upon the well known fact that intoxicating liquors and the traffic therein, have brought intemperance, poverty and misery upon many of our citizens, and have been a fruitful source of crime on every hand.'"

From these citations there can be no doubt as to the statutes of intoxicating liquor in this State. We shall now direct attention to the specific problem.

I.

TAXING POWER OF CITIES IS NOT DERIVED DIRECTLY FROM THE CONSTITUTION BUT IS ONLY SUCH AS IS GRANTED BY THE LEGISLATURE

The primary taxing power being vested in the Legislature it necessarily follows that such taxing power as is vested in municipalities must be derived from the Legislature. The two provisions relative to this matter are Sections 1 and 10 of Article X of the Constitution of Missouri. These read as follows:

> "Section 1.* * * The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes."

> "Section 10.* * * The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

These provisions are unambiguous in that they authorize the Legislature to delegate the taxing power to counties and municipal corporations "under authority granted", and prohibit the Legislature from directly levying a tax upon the property or inhabitants of lesser governmental agencies for local purposes.

A clause in a liquor control act limiting the maximum or the minimum license fee which the municipality could charge for a license to manufacture and sell intoxicating liquors would be proper. From the request it appears that it is not proposed to actually levy any tax or require any particular sum to be paid, but to leave the imposing of the license fee to the proper municipal authorities. Such a law could not therefore

be construed as levying a tax within the prohibition of Section 10 of Article X supra.

On the other hand, by placing the maximum and the minimum license fee, or either, which may be charged the Legislature is but laying down a rule or regulation to guide the municipal authorities in the exercise of the taxing power.

Such a procedure is not in conflict with the constitutional provisions heretofore referred to and in fact has definite precedent in this state.

II.

LEGISLATURE MAY PRESCRIBE MAXIMUM AMOUNT OF LICENSE FEES TO BE CHARGED BY MUNICIPALITIES FOR MANUFACTURE AND SALE OF INTOXICATING LIQUORS.

By an ordinance enacted in 1881 the City of St.Louis imposed a dramshop license fee of $60.00. On March 24, 1883, an Act of the General Assembly became effective which provided:

> "for every such (dramshop) license there shall be levied a tax not less than $25.00 nor more than $200.00 for State purposes, and not less than $250.00 nor more than $400.00 for county purposes for every period of six months; the amount of tax in every instance to be determined by the court granting the license."

One Troll on July 2, 1895, tendered the license fee of $60.00 prescribed by the city ordinance. The collector of revenue of the City of St.Louis refused the tender demanding $250.00, for the reason that the state law required such fee to be paid. The Relator denied the validity of the act of the General Assembly on the ground that it conflicted with Sections 1 and 10 of the Constitution hereinbefore referred to

> "because instead of leaving it to the local authorities to fix the tax for county purposes the act fixed it between certain limits: 'not less than $250 nor more than $400,' and made it obligatory on the local authorities to levy and collect not less than $250 for county purposes on every license;* * * *"

The foregoing are the facts considered in the case of State ex rel. Troll vs. Hudson, 78 Mo. 302. The Court in passing upon the issue presented stated l. c. 304:

> "The license fee exacted by the general law regulating dramshops and the act amendatory thereof, approved March 24th, 1883, is not a tax within the meaning of sections 1, 3 and 10 of article 10 of the constitution, but is a price paid for the privilege of doing a thing, the doing of which the legislature has a right to prohibit altogether. Such laws are regarded 'as police regulations, established by the legislature for the prevention of intemperance, pauperism and crime, and for the abatement of nuisances,' and are not regarded as an exercise of the taxing power. 'Pursuits that are pernicious or detrimental to public morals may be prohibited altogether, or licensed for a compensation to the public.'" * * *

While it may be stated that this case refers specifically to the fixing of license fees for county purposes, a quick reference to the constitutional provisions involved shows that municipalities and counties are in exactly the same position in respect to these provisions. There can be no distinction drawn between a municipality and a county insofar as the issues herein are concerned.

The foregoing decision is referred to and approved in the case of Gower vs. Agee, 128 Mo. App. 427, 432, and in the case of State vs. Bixman, 162 Mo. 1, 21, 22.

We call your attention to the fact that the Legislature has consistently recognized its authority to control the amount changed by counties for the privilege of conducting dram shops, and when it is seen that counties and municipalities are in the same class no doubt should remain as to the authority of the Legislature to place reasonable limitations upon municipalities in the granting of licenses to sell intoxicating liquor.

III.

THE LEGISLATURE SUPREME IN THE REGULATION AND LICENSING OF MANUFACTURE AND SALE OF INTOXICATING LIQUORS.

Before leaving this subject we desire to call attention to Section 7287 R. S. Mo. 1929, which reads as follows:

> "No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit, or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

In the case of Keane vs. Stradtman, 18 S. W. (2d) 896, this Section was held to apply to all municipal corporations in this State. The provisions of Subdivision 22 of Section 6171 R. S. Missouri, 1929, gives "exclusive power" to cities of the first class to restrain, suppress, regulate and license dramshops. The special charters of various municipal corporations in this state grant exclusive power to regulate, control and license the sale of intoxicating liquor. Such powers have been granted by the State to such cities and unless changed by the Legislature such powers are now in full force and effect. However, the State has exclusive power to regulate and control the licensing and sale of intoxicating liquor. It was held in the case of St.Louis vs. Tielkemeyer, 226 Mo. 130, l. c. 140:

> "It is insisted by appellant that the city ordinance in question is void because inconsistent with the State statute on the same subject.
>
> The city of St.Louis has express authority under its charter 'to license, tax and regulate. . . . saloons, beer houses, tippling houses, dramshops and gift enterprises.' (Art. 3, sec. 26, Clause 5.)
>
> The State, however, has the sovereign power to regulate those matters and its authority being paramount, it follows that a city ordinance is not valid if it is in conflict with the law of the State on the same subject."

As the State has the sovereign power to regulate these matters and its authority is paramount, it follows that a city ordinance is not valid if it is in conflict with the law of the State on the same subject. These "exclusive powers" granted to municipal corporations are construed to be exceptions to a general law passed respecting the licensing, manufacture and sale of intoxicating liquors. In the case of State vs. Binswanger, 122 Mo. App. 78, 81, the Kansas City Court of Appeals said:

> "The city of St.Joseph is a city of the second class* * *By the express terms of Section 5508, Subdivision 21, the Legislature gave to such cities the exclusive power to license, regulate or suppress dramshops. In State v. Kessells, 130 Mo. App. 233, we decided, that such charter expressly excluded the general State law as to dramshops from operation within the limits of such cities. We called attention and gave effect to the well recognized rule of law that a particular provision such as contained in subdivision 21 of section 5508 of the charter of cities of the second class would overcome a general law on the same subject."

After the decision in this case the Legislature enacted what became Section 7225 of the 1909 Revision, and which reads as follows:

> "The provisions of this article shall apply to and be enforced in every incorporated town and city in this state, whether incorporated under special charter or under the general law relating to cities, towns and villages, any ordinance of any city, town or village to the contrary notwithstanding."

A similar provision is found in Section 28 of the Liquor Control Act, Page 88 of the Laws of Missouri, Extra Session, 1933-34. In construing Section 7225 of the 1909 Act the Kansas City Court of Appeals in the case of State ex rel vs. Long, 164 Mo. App, 658, l. c. 665, stated:

> "It seems to us that giving to the county court the right to fix the license for state and county purposes, and the board of aldermen the right to fix the amount in cities of the fourth class for city purposes, are not inconsistent provisions, although the amount thecounty court may assess is limited by the statute. Of course if the aldermen were to assess an exorbitant sum, the ordinance would be unreasonable, and therefore, void.
>
> The relator further contends that section 7225 of the Revised Statutes 1909, controls the action of the council in this matter. This section is found in the general dramshop act, and provides that that act shall apply to and be in force in every incorporated town and city in the state, any ordinance of such city to the contrary notwithstanding. This section was enacted in 1907, and the reason for which is apparent. Just before the Legislature convened in 1907, the Kansas City Court of Appeals had held in

State v. Kessler, 120 Mo. App. 233, 96 S. W. 494, and State v. Binswanger, 122 Mo. App. 78, 98 S. W. 103, that the state law was not in force in the city of St. Joseph, and that that city had the exclusive power to regulate and license dramshops. The Legislature enacted this section in order to annul the effect of those decisions and to put the state law in force in every part of the state. It was not intended that the act should in any manner regulate thegranting of licenses by municipalities, as that right and power already existed under their charters, and section 9582 was in full force requiring that all municipal regulations be in conformity to the state law."

Assuming that the Legislature continues to exercise the sovereign power of the State to regulate and license all intoxicating liquor and to delegate such power to every city, town and village within this State, the Legislature may fix the license fees to be charged by each county, city, town and village.

CONCLUSION.

It is therefore our opinion that the Legislature may constitutionally provide a maximum and minimum limitation, or either, on the amount municipal authorities may charge for the privilege of manufacturing, distributing or selling intoxicating liquors.

Respectfully submitted,

FRANKLIN E. REAGAN,
AssistantAttorney General.

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM

OFFICERS: NOTARY PUBLIC: A stenographer in the employ of Home Owners' Loan Corporation may be a Notary Public.

March 1, 1935 3-6-35

FILED
16

Mr. Woodson Cockrill
Executive Clerk
Executive Office
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date, with inclosure from Redick O'Bryan, which reads as follows:

> "I am attaching hereto a letter received from Hon. Redick O'Bryan, State Counsel for the Home Owners' Loan Corporation regarding the issuance of a Notary Public commission to a stenographer in the employ of the Home Owners' Loan Corporation.
>
> On the Notary Public application it states that no person can be appointed a Notary Public if they are holding an office of profit under the United States Government. Will you kindly furnish me an opinion as to whether or not a commission should be issued to Miss Appel?
>
> Kindly return Mr. O'Bryan's letter with the opinion."

Article XIV, Section 4, of the Missouri Constitution, provides as follows:

> "No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

Section 11738 R. S. Mo. 1929 provides how notaries are appointed, their term of office and qualifications. Said section reads as follows:

> "The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. Each such notary shall hold office for four years, but no person shall be appointed who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state. It shall be the duty of every such notary when he performs an official act outside his or her own county to state in his or her certificate that the county in which such act is performed adjoins the county within and for which he was appointed and commissioned."

Douer on John's American Notary, (4 ed.) page 1, paragraph 1, defines a 'notary' in the following manner:

> "A notary or notary public is an officer appointed by the executive or other appointing power under the laws of different states, having power generally to attest writings for the purpose of establishing their authenticity, to administer oaths, and to perform similar duties."

Page 3, paragraph 3, of the same work, has this to say of notaries in the United States,

> "In the United States, notaries are state officers, usually appointed by the governor. * * * * * "

What is an office of profit is well settled by reason and authority. Mechem on Public Officers, section 13, page 10, states:

> "An office to which salary, compensation or fees are attached is a lucrative office, or, as it is frequently called, an office of profit. The amount of the salary or compensation attached is not material. The amount attached is supposed to be an adequate compensation and fixes the character of the office as a lucrative one, or an office of profit."

In view of the above, we are of the opinion that a notary public holds an office of profit under this state. The question that must now be determined is, whether a stenographer in the employ of the Home Owners' Loan Corporation holds an office of profit under the United States. 22 Ruling Case Law, section 12, page 380, distinguishes between a public office and a public employment, as follows:

> "It is sometimes said that an office is a public charge or employment, but it frequently becomes necessary to distinguish between a public office and a public employment. The term 'employment' is the more comprehensive, and while an office is an employment, it does not follow that an employment is an office. Thus, when an employment is a continuing one, which is defined by rules prescribed by law, and not by contract, such an employment is an office, and the person who performs it is an officer.* * * * * * * *"

"*****But on the whole an officer is distinguished from the employee in the greater importance,dignity, and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the more enduring tenure, and in the fact that the duties of the position are prescribed by law. Furthermore, a mere employee does not have the duties or responsibilities of a public officer.

* * * * * * * * * * *

It may be stated as a general rule that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of these elements.* * * * * ** "

Section 18, page 384,of the same volume, makes the following distinction between an officer of the Federal Government and a mere employee,

"Under the constitution of the United States in order to constitute a person an officer of the federal government as distinguished from a mere employee, he must hold his place either by virtue of an appointment of the President, or of one of the courts, or of a head of a department authorized by law to make such appointment. Thus, a clerk appointed by the Secretary of the

> Treasury, who is a head of such a department, is a public officer, and the same is true of an engineer in the naval service appointed by the Secretary of the Navy. But the commissioner of pensions is not the head of a department such as is authorized to appoint officers, and therefore a surgeon appointed by him has been held not to be a public officer. And where there is no statute authorizing the Secretary of the Navy to appoint a paymaster's clerk, nor any act requiring his approval of such an appointment, and the regulations of the navy do not require any such appointment or approval, a paymaster's clerk is not an officer of the United States. Again, the merchant appraisers appointed as umpires in cases of dispute on the value of imported goods subject to customs duties cannot be considered as public officers, especially in view of the fact that the original appointment of one of them is made by the importer alone. * * * * * *"

In the case of Robertson v. Ellis County 84 S. W. 1097, 38 Tex. Civ. App. 146, the court said:

> "A 'public office' is the right, authority, and duty created and conferred by law by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public (quoting and adopting definition in Mechem on Public Officers, as approved in Kimbrough v. Barnett, 55 S.W. 120, 93 Tex.301). 'As said by Chief Justice Marshall, "although an office is an employment, it does not follow that every employment is an office." Mr. Mechem, in his work on Public Officers, says: "The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office

> involves a delegation to the individual of some of the sovereign functions or government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer." ' * * * * * * * * * * * *."

In Fekete v. City of East St. Louis 145 N. E. 693, the court stated:

> "******An officer of the United States is one who holds office by virtue of appointment by the President or by heads of departments authorized to make appointments. U. S. v. Mouat, 124 U. S. 303; 8 S.Ct.505; 31 L. Ed.463, citing U. S. v. Germaine 99 U. S. 508, 25 L. Ed. 482; 3 Cyc. 818.***"

The Supreme Court of Missouri, in the case of Hastings v. Jasper County 314 Mo. 1. c. 149, defines a public officer as follows:

> "A public office is defined to be 'the right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' (Mechem, Public Officers, 1; State ex rel. Walker v. Bus, 135 Mo. 325.)* * * * * * * * * * *"

CONCLUSION

In view of the foregoing authorities, it is the opinion of this department that a stenographer,in the employ of the Home Owners' Loan Corporation,does not hold an office of profit under the United States,but is merely an employee and therefore is not disqualified by reason of the provisions of Article XIV, Section 4, of the Constitution of Missouri, from holding the office of notary public in this state.

Respectfully submitted,

James L. HornBostel
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

JLH:JET:LC

(Letter,Redick O'Bryan Inclosed)

COUNTY TREASURER - Compensation for disbursing school moneys.

3-14

March 8, 1935.

FILED
16

Mr. E. S. Glatterbuck,
Treasurer of Calloway County,
Fulton, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of January 11, 1935, such request being in the following terms:

> "I am writing you for your interpretation of Section 9256 on page 6856 Rev. Stat. 1929 Vol. 2. The Co. Treas. shall be allowed such compensation for his services as the Co. Court may deem advisable, not to exceed one-half of one percent of all school moneys disbursed by him. This is the part I want your opinion on. If the Treas. is getting a stated salary is he entitled to the per cent on the school moneys he disburses with out the vote of the County Court? or do they set his salary and if there is nothing stated in regard to the school money is he entitled to get a per cent,? It seem that he is entitled to something for the disbursement of this fund not to exceed the one-half of one per cent and the court has the right to say what that shall be, but do they have a right to cut this out all together?
>
> Please let me hear from you in regard to this matter by Monday Jan. 14th. for this means a great deal to me, and I will meet the new Court to take this matter up with them at that time."

R. S. Missouri, 1929, Section 12138, which governs the compensation of county treasurers, provides as follows:

> "Unless otherwise provided by law, the county court shall allow the treasurer for his services under this article such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor."

That part of R. S. Missouri, 1929, Section 9266, which relates to the compensation of county treasurers for handling school moneys is as follows:

> " * * and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent of all school moneys disbursed by him, and to be paid out of the county treasury."

From these two statutes it is apparent that the compensation of a county treasurer is left largely in the discretion of the county court, both as to regular salary and as to compensation for handling school moneys. If there were any doubt about this discretion, it would be resolved by the case of State ex rel. Dietrich v. Daues, 318 Mo. 701, 287 S.W. 430 (1926) in which the Court, discussing the power of a county court under what is now Section 12138, quoted above, said:

> "It requires no citation of authority to show that the power to prescribe a salary as an incident to a public office is purely legislative in character. That power as respects the office of county treasurer the Legislature has delegated to the county court, the agency most familiar with the fiscal affairs and financial condition of the county, as well as the services required to be performed by the treasurer-which may vary in different counties and at different times in the same county. The only limitation upon the power is that the compensation allowed thereunder be such as may be deemed just and reasonable. What is just and reasonable in a given case is committed to the discretion of the county court and to it only. Its action in the exercise of that discretion is not subject to judicial review, for the simple reason that neither the statute which confers the discretion nor any other makes it so."

In the case of Sanderson v. Pike County, 195 Mo. 598, 93 S.W. 942 (1906) a county treasurer claimed that he was entitled to compensation for handling and disbursing school moneys to the extent of one-half of one percent of such moneys going through his hands, under the provisions of what is now R. S.

Missouri, 1929, Section 9286, quoted above, even though the county court had not made any order fixing his compensation with respect to such school moneys. The Court held that he was not so entitled and in the course of its opinion said:

> "This suit was brought upon the theory that under the provisions of section 9849, supra, the plaintiff was entitled to 'one-half of one per cent of all school moneys disbursed by him,' when, in fact, he was only entitled 'to such compensation for his services as the county court may deem advisable,' not exceeding that amount."

In 1933 a new Act was passed relating to the consolidation of offices of treasurer and collector in certain counties (Laws of 1933, page 336), in which Section 12130, quoted supra, was repealed and a new section enacted in lieu thereof. Other sections of Article 8 of Chapter 50 of R. S. Missouri, 1929, which relate to county treasurers were likewise repealed and new sections enacted in lieu thereof, as well as additional new sections, the effect of which in part was to consolidate the offices of the treasurer and collector in counties having under 40,000 inhabitants and not having township organization, under which classification Calloway County is included. Such new Act provides (Section 12132a) that in such counties the county collector shall perform the duties of county treasurer without receiving any additional compensation therefor, and therefore the new Section 12130 is not to be applicable to counties such as Calloway. However, the new statutory scheme enacted in 1933 is not to become effective until after the 1936 elections, as is specifically provided in the new Sections 12130 and 12132a, and therefore Section 12130 in the form in which it is found in the revised statutes of 1929 would remain operative until the sections to which the new section 12130 is linked, become operative, and therefore, for the purpose of your inquiry, the Act of 1933 may be disregarded, and need not be considered until after the 1936 elections.

In conclusion, it is our opinion that a county treasurer in a county having under 40,000 inhabitants and not under township organization, until after the 1936 general elections, is entitled to no compensation in addition to his salary on account of school moneys disbursed by him, in the absence of an order fixing some compensation on that account made by the county court, and that if the county court does make such an order, the amount of

compensation for such services is left to the discretion of the county court, provided it does not exceed one-half of one percent of all school moneys disbursed by such county treasurer.

Very truly yours,

EDWARD E. MILLER
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TAXATION AND REVENUE: Delinquent taxes to be paid with interest at legal rate of six per cent rather than ten per cent if taxpayer in bankruptcy.

March 28, 1935.

FILED
16

Hon. David R. Clevenger
Prosecuting Attorney
Platte County, Missouri
Platte City, Missouri

Dear Mr. Clevenger:

This office acknowledges receipt of your request for an opinion on the following subject:

"The Chicago, Rock Island and Pacific Railroad Company, which has a line through Platte City, failed to pay its taxes last year when due. I understand that the company is in the process of a receivership.

Recently they tendered to the Collector of Platte County the amount of such delinquent taxes (state and county) without any penalty, and insisted that he receive the same.

Our Collector has requested me to ask your opinion as to his liability to the state for such penalty should he accept such payment as tendered. His idea has been that he has no authority to accept payment of delinquent taxes without penalty without making himself personally liable therefor.

You may send your opinion on this matter either to Mr. John W. Walker, Collector of Platte County, or to this office."

I.

TRUSTEE IN BANKRUPTCY OF TAXPAYER NOT LIABLE FOR PENALTY.

The Chicago, Rock Island and Pacific Railroad Company is at present in Bankruptcy under the provisions of the recently enacted Reorganization Bankruptcy Law. The particular section allowing reorganization in bankruptcy of railroad companies is Section 205 of Title 11, U.S.C.A. This law was adopted March 3, 1933 and is designated also as C.204, Sec. 1, 47 Stat. 1474. The claims against this debtor are therefore governed by the General Bankruptcy Statutes. Section 93, Subdivision J of Title 11, U.S.C.A. provides:

> "Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfieture shall not be allowed, except for the amount of the pecuniary loss sustained by the Act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Accordingly, under the provisions of this section no penalties may be allowed against or required to be paid by the trustee or conservator. This is not true however and does not apply to interest or actual costs occasioned thereby. The question then confronting you is whether or not the charges denominated in your letter as "penalties" are penalties and forfeitures as contemplated by this federal statute.

The local property of all railroad companies is to be assessed locally as other property. Section 9025, R. S. Mo. 1929. Railroad taxes are delinquent January 1 of the year after they have become assessed and levied and

> "The company shall forfeit and pay in addition to the taxes with which said company may order charged on the taxbooks of such county, such penalty as is provided by law for the non-payment of other delinquent taxes."

Therefore, all delinquent railroad taxes are subject to the provisions of Section 9952, page 429, Laws of Missouri 1933, reading in part:

> Between the first of January and the first of July in the year 1934 and annually thereafter, and immediately upon the effective date of this act, the county collector shall make out and record, in a book to be provided for that purpose, a list of lands and lots, returned and remaining delinquent for taxes, including therein the delinquent taxes of all

> cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state returned delinquent to the county collector, separately stated, describing such lands or lots as the same are described in the tax books and said delinquent returns, as corrected under sections 9938 and 9942, and charging them with the amount of delinquent tax and naming the years delinquent, separately stated, and in addition thereto a penalty of ten per centum on such tax delinquent for the preceding year and an additional annual ten per centum on taxes for each year prior to the preceding year, and shall certify to the correctness thereof, with the date when the same was recorded, and sign the same by himself, or deputy, officially; provided however, if taxes are paid on land or lots delinquent for the preceding year at any time prior to sale thereof as in this act provided, the per centum of penalty added shall not exceed one per centum per month or fractional part thereof or ten per centum annually.* * * *"

While it is true that this charge of "Ten per centum" and "one per centum per month" is denominated in this Section as a penalty, the same sums are referred to in Section 9945 of the same bill, page 426, Laws of Missouri 1933, as follows:

> "* * *all taxes hereafter becoming delinquent shall bear <u>interest</u> until paid as provided by section 9952.* * *"

Various other provisions of our general tax law refer to this charge both as a penalty and as interest. However, our Supreme Court has definitely classified this charge as a "penalty", so far as the taxpayer is concerned. State ex rel. Cutcher vs. Koeln, 61 S. W. (2d) 750; State ex rel. McKittrick vs. Bair, 63 S. W. (2d) 64. Also, the United States Circuit Court of Appeals for the Eighth Circuit, in which Missouri lies, has, by obiter dictum, held such charge to be a penalty. Horn v. Boone County, Nebraska, 44 Fed. Rep. (2d) 920. In this decision the Court considered the case of Swarts vs. Hammer, 120 Fed. 256, 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060. The Court in construing the Swarts case stated, l. c. 921:

> "The referee had directed the payment of the tax, 'together with the accrued penalties and fees provided by law.' The District Court disapproved the allowance of the penalties and fees, and the Supreme Court in Swarts v. Hammer, supra, affirmed the District Court. We think this case not an authority in support of the contention of the appellant here. The Missouri Legislature having specifically declared the 10 per cent per annum to be a penalty, it is reasonable to suppose that such Legislature intended the charge to be subject to the application of the principles and rules applicable to penalties."

However, I believe that the same Court in the earlier case of Stanard vs. Dayton, Dayton vs. Stanard, 220 Fed. 441, has more properly construed the Swarts case. Of the Swarts case the Eighth Circuit Court of Appeals stated, l. c. 444:

> "In the case of Swarts v. Hammer, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060, it is said that the referee allowed a tax bill, 'together with the accrued penalties and fees provided by law.' On review the District Court affirmed the order as to the amount of taxes, but disapproved it as to penalties and fees. It does not appear that exception was taken to that portion of the order disallowing penalties and fees. Neither the Court of Appeals nor the Supreme Court was called upon to consider that question."

A reading of the reports of the Swarts case plainly indicates that the allowance or disallowance of the "penalties and interest" was not considered by the Appellate Court as a live issue in the case. This issue was swallowed up by the more potent question of the liability of property in the bankruptcy court's custody for taxes accruing, pending the disposition of the estate.

Be that as it may, in view of these decisions of our Supreme Court and of the Circuit Court of Appeals of this Circuit, it appears exceedingly doubtful that the Federal Court would hold this charge to be other than a penalty. The remaining question is what charge can be made by the State conceding that the statutory charge is a "penalty".

II.

TRUSTEE IS LIABLE FOR LEGAL INTEREST ON DELINQUENT TAXES.

One of the most oft cited cases in respect to liability of trustees in bankruptcy for taxes is that of People of New York vs. Jersawit, 68 L. Ed. 405, 263 U. S. 493. This case is found entitled In Re Ajax Dress Company in the lower court and is reported at 290 Fed. 950. The State of New York had filed a claim for franchise tax against the bankrupt and for interest at one per centum per month. Under a state law requiring delinquent to pay.

> "in addition to the amount of such tax, ten per centum of such amount, plus one per centum for each month the tax remained unpaid"

the United States Circuit Court of Appeals stated, l. c. 952:

> "So far as the state's second demand, for penalties and interest, is concerned, the matter is covered by our opinion in Re Menist, 290 Fed. 947, filed to-day. That decision relates to a claim for interest at 1 per cent. per month, made by the United States in respect of its demand for lawful and unpaid taxes; but whatever is there said is applicable with equal force to the demand of the state of New York, not only for 1 per cent. a month, but for what is confessedly a penalty and called by that name.
>
> Order affirmed, with costs."

In the Menist case the Court had stated, 290 Fed. l. c. 949:

> "A tax being then a preferred debt, neither interest nor any other derivative or appended claim can rise higher than the tax debt which gives it birth and being, and it is provided in respect of all debts 'owing to the United States, a state, a county, etc.' as a penalty, shall not be allowed, except for the amount of the pecuniary loss sustained in the proceeding out of which the penalty arose. Section 57j (Comp. St. Sec. 9641 (j)). It is a matter almost

too plain to require citation that an exaction may be a penalty without being called by that name. Fontenot v. Accardo (C.C.A.) 278 Fed. 871, at page 874. The question is often one of degree, for no one would doubt that, if the statutory rate for withholding a tax was 1 per cent. a day, the requirement would be treated as a penalty.

Subject to statutory limitation, the rate of interest or, what is the same thing, compensation for the use of money, is ordinarily fixed by agreement of parties. But in tax matters there is no such agreement; one party commands and the other must obey, and again subject to constitutional limitations the commanding party may impose any terms of payment that it pleases, and it makes no difference whether the price of delayed obedience is called interest, or penalty, or fine, or additional tax; every increase over the amount that satisfies the tax, if paid the moment it is levied, is merely an additional exercise of the power of the taxing authority.

Since in bankruptcy (and we are solely concerned with bankruptcy) the power of ascertaining the amount or legality of any tax is vested in the court (section 64a), and penalties are not to be allowed, except for the amount of pecuniary loss sustained by the delayed payment, the only question here is whether an exaction of 1 per cent. a month as the price of delay amounts to a penalty. As to nature of interest generally see Agency, etc., Co. v. AmericanCo. 258 Fed. 363, at page 372, 169 C. C.A. 379, 6 A.L.R. 1182. On the point at bar we are in accord with In re Ashland, etc., Co. (D. C.) 229 Fed. 829, and hold that, there being no evidence of any injury or damage to the government by the withholding of this tax, except that which flows from the nonpayment of a just debt, anything in excess of the legal rate of interest is to be treated as a penalty and not allowed.

> The point seems not to have been argued in Re Kallak (D. C.) 147 Fed. 276, in Re Scheidt (D. C.) 177 Fed. 599, or in Re Quinones, 39 Am. Bankr. R., 320; but in the implications of these cases we cannot concur. As the question here arises under the Bankruptcy Act, United States v. Guest, 143 Fed. 456, 74 C. C.A. 590, does not apply; there being no reason why a penalty, by whatever name called, may not be enforced against an individual, if properly expressed in agreement or statute.
>
> The question remains whether a tax demand, duly proved, should continue to draw interest at the legal rate after the filing of petition for adjudication. The general rule is, of course, that interest stops with petition filed (Sexton v. Drefus, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244), but a tax debt, due to any of the taxing authorities enumerated in section 64a, is not only a highly preferred debt, but the section contains specific directions that the trustee shall pay 'all taxes legally due and owing.' That means legally due and owing in accordance with the provisions of the Bankruptcy Act, and under that statute section 57j requires penalties due to the United States, or a state, etc., to be allowed to the extent of the pecuniary loss suffered. The loss continues as much after petition filed as before."

So it appears by combining these two decisions that it was the Circuit Court of Appeals' judgment that the State should receive interest at the legal rate of six per centum per annum on this tax regardless of the provisions of the taxing act. When this case reached the Supreme Court the decision in this respect was affirmed, the Court stating l. c. 496:

> "The courts below held that that this latter liability was a penalty (referring to the ten per cent plus one per cent per month) and therefore not to be allowed, but allowed 6 per cent upon the tax as apportioned, to the date of payment. The state says that it is entitled to the statutory interest or none."

Upon this the Court held, l. c. 497:

> "As the 1 per centum is more than the value of the use of the money, and is added by the statute to the 10 to make a single sum, it must be treated as part of one corpus and must fall with that. We presume that, in this event, the state does not object to receiving the simple interest allowed. That part of the order will stand."

So that it appears that the Supreme Court in this case held proper the allowance of legal interest on the tax claim irrespective of the fact that the taxing act did not provide for the payment of such interest in such amount.

Another Federal case of interest on this problem is In Re Ashland Emery and Corundum Company, 239 Fed. 829. In this case the State of New Jersey had made claim for franchise taxes due from the bankrupt together with "interest at the rate of one per cent for each month until paid." This claim precisely followed the State tax act and the question arose as to whether or not the interest provided for in the law should be allowed. The Court stated, l. c. 831:

> "The final question then is whether the 1 per cent per month is interest on the tax, or a penalty for nonpayment of it. That it is called interest in the statute is not, of course, conclusive upon the bankruptcy court, which will examine and decide the question for itself. New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284."

And in ordering the Referee to allow interest at six per cent on the face of the tax from its due date until it was paid stated l. c. 832:

> 'The test by which such determination is to be made in actions ex contractu is established.
>
> 'It may, we think, fairly be stated that, when a claimed disproportion has been asserted in actions at law, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach apparent on the face of the contract, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether bona fide to fix the damages or to stipulate the payment of an arbitrary sum as a penalty, by way of security.' White J., Sun Printing Association v. Moore, 183 U. S. 642, 672, 673, 22 Sup. Ct. 240, 252, (46 L. Ed. 366.)

There may be doubt under New Jersey v. Anderson, supra, whether this court is restricted in determining the question under discussion to the face of the statute.

Assuming, however, that it is, it seems to me plain, and I accordingly find, that 1 per cent. a month exceeds what is fairly required to make good loss to the state from mere delay in payment of the tax, and as to such excess is not interest, but constitutes a penalty imposed for failure to pay promptly. The actual damages sustained by the state of New Jersey from the delay are not obscure nor difficult to estimate. What the state lost was the use of the money. Its damages therefor are the commonest form known to the law, and the most certain of estimation. They are established by statute in New Jersey for individuals at 6 per cent. per annum. Gen. Stats. of N. J. p. 3704. It is difficult to see how, as damages, they can be larger in the case of the state.

"* * * It is sufficient to say that all damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages.' Waite, C.J., Loudon v. Taxing District, 104 U.S. 771, 774 (26 L. Ed. 923).

The sum here claimed is double the statutory interest and almost double the highest rate of interest which national banks are allowed to charge under United States statutes. Rev. Stats. U. S. Sec. 5197 (Comp. St. 1913, Sec. 9758). Nor is this imposition made for the purpose of reimbursing the state for expense incurred in collecting the tax." * * *

A similar holding is to be found in the case of In Re. Brown, 41 Fed. (2d) 238, a decision by the District Court of the Southern District of Ohio.

The case of Stanard vs. Dayton supra, found its way to the Supreme Court of the United States and is reported at 80 L. Ed. 1190, 241 U. S. 588. The Circuit Court of Appeals had held that the trustee was required to pay the amount of tax together with the penalty interest provided for by the State law, and upon review the Supreme Court reversed that part of the decree, only requiring the trustee to pay the legal rate, l. c. 1192:

> "And while we are of opinion that the certificate holders were entitled to interest upon the amounts paid, at the ordinary legal rate, applicable in the absence of an express contract, we think they were not entitled to the larger interest required to be paid on redemption from tax sales. They were not in a position to stand upon the terms of the redemption statute, for the sales were invalid, and the only recognition which they could ask was such as resulted from an application of equitable principles to their situation. The decree of the Circuit Courtof Appeals is modified to conform to what is here said respecting the allowance of interest. In other respects it is affirmed."

Following this decision our own United States Circuit Court of Appeals in the case of Horn vs. Boone County supra, held the trustee liable for ten per cent interest under the Nebraska law.

Section 2838 R. S. Missouri 1929, is in part as follows:

> "Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable," * * * "

By this decision six per cent interest per annum is allowable on all contracts in this state and under the foregoing decisions must be construed as being the minimum amount for which the trustee is liable.

Insofar as other charges are concerned such as collectors' commissions, clerks fees etc., it is difficult, if not impossible, to place these within the provisions of Subdivision J of Section 93, Title 11, U.S.C.A. as being penalties and forfeitures, as they are certainly compensations allowed others who are required to perform duties by virtue of the failure of the taxpayer to pay the tax when due, and if the acts have actually been performed, the costs allowed by law should be paid by the Trustee in Bankruptcy.

CONCLUSION.

It is therefore the opinion of this office that the Trustees of the Chicago, Rock Island and Pacific Railroad Company are liable to the State of Missouri as interest on delinquent taxes six per cent per annum on such taxes from the date of delinquency until paid.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

REWARDS:) Officers without this State entitled to a
) reward offered by officials of Missouri
SHERIFF:) for fugitives from this State.

10-31

October 14, 1935.

FILED
16

Mr. Woodson Cockrill
Secretary to the Governor
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of September 27, 1935, in which you request the opinion of this Department as to whether a reward may be legally paid to an officer of another state for arresting a fugitive from the State of Missouri. We quote from your letter as follows:

> "I am attaching hereto an application for a reward for the apprehension of a fugitive from justice. Am also attaching a copy of the reward that was issued.
>
> "We have received an opinion from your office concerning payment of rewards to peace officers of the State, and I respectfully request that you furnish me an opinion as to whether or not this reward should be paid. You will note the applicant for this reward is the Sheriff of Perry County, Illinois."

We have heretofore, as stated in your letter, rendered an opinion to you "that it is against the public policy of the State of Missouri for public officials to

receive a reward for the performance of their official duties and for which they receive fixed fees and salaries."

The above is undoubtedly the law and the policy in most all of the states of the Union.

There is a distinct difference, however, between the performance of an act performed <u>within</u> the scope of the officer's official duty and an act performed <u>without</u> the scope of his official duty.

In 54 C. J., 788, Section 32, it is said:

> "When an officer performs the services for which a reward is offered by acts outside the scope and line of duty, there is no rule of public policy which forbids his claiming the reward, hence he is entitled to it. Therefore, as they are without the scope of his duty he may ordinarily claim a reward for acts done outside of his territorial jurisdictions, such as those performed in another state, county, or outside of his city; or for the arrest of fugitives from another state."

In the case of Smith v. Vernon County, 188 Mo. 501, one of the early cases in Missouri on the subject, it was held that where an officer without the State of Missouri arrested a fugitive from this State, the court found that the mere fact that he was a policeman of another state, who in that state arrested a person for whose apprehension a county court in Missouri had offered a reward, was not deprived of his right to recover the reward by the fact of his official position. The court said he was under no legal duty to this State to make the arrest and that he could not receive compensation from

that state for it. His right to the reward is not to be defeated on the ground that a public officer can receive no extra statutory compensation for the performance of a legal duty.

Also, the Springfield Court of Appeals in the case of Davis v. Millsap, 159 Mo. App. 167, l. c. 169, said the following:

> "From an early day it has been established, and continues to this time, that an agreement to pay money to a sheriff or other public officer for doing what he ought to do, is void and against public policy. (34 Cyc. 753; Kick v. Merry, 23 Mo. 72; Smith v. Vernon Co., 188 Mo. 501, 87 S. W. 949; Bank v. Edmund, 81 N. E. 641, 11 L. R. A., N. S. 1170.)
>
> "On the other hand, the law has never declared that under no circumstances is an officer entitled to the reward. (Smith v. Vernon Co., supra; Cornwell v. St. Louis Transit Co., 100 Mo. App. 258, 73 S. W. 305; Gregg v. Pierce, 53 Barb. 387; Hogan v. Stophlet, 179 Ill. 150, 44 L. R. A. 809, 53 N. E. 604.)
>
> "The rule is correctly declared in Cromwell v. Transit Co., supra, as follows: 'Public policy forbids an officer from claiming a reward for performance of any act which is by law made part of his duty, but if an officer performs an act or renders extraordinary services, alike beyond and outside the limit of his ordinary official duty and for which a reward has been offered, he becomes entitled

to such additional remuneration and may lawfully make claim thereto without violation of the policy of the law.'

"In Meechem on Public Officers, section 885, it is said: 'Where a sheriff in reliance upon the offer of a reward, searches for a criminal who has escaped from his county, and captures him in another county, or follows a fugitive from justice and apprehends him in another state, he is entitled to the reward.'" (Italics ours)

It is, therefore, our opinion that under the facts as stated in the exhibits attached to your request for the opinion, the Sheriff of Perry County, Illinois, is entitled to the reward offered by the officials of this State.

We are returning herewith the exhibits.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG
Encs.

CIRCUIT CLERK: Entitled to fee of 75¢ for summoning petit jury for regular term of Circuit Court.

8-14

July 30, 1935.

FILED
17

Hon. Wallace V. Coleman,
Clerk of Circuit Court,
Jefferson County,
Hillsboro, Missouri.

Dear Sir:

This department is in receipt of your letter of July 1 wherein you make the following inquiry:

> "In preparing the summons for 24 regular jurors and 24 alternate jurors to serve at a regular term of court, the office of Clerk of Circuit Court is put to considerable amount of work for which I am unable to find in the Revised Statutes of Missouri, 1929, a section providing a fee for this act.
>
> "Please inform me if a Clerk of said court may claim compensation for performance of this duty."

Under Sec. 8758, R.S. Mo. 1929 it is your duty to issue the summons for the petit jurors, said section being as follows:

> "The names of the persons so drawn shall be recorded by the county clerk in the records of the county court, and he shall as soon thereafter as practicable deliver to the clerk of the court for which such jury is drawn a certificate thereof, who shall record the same in a book to be provided for that purpose. And

> the clerk of the court for which the jury is drawn shall immediately thereafter issue a summons to the sheriff of the county, directing him to summon the persons thus drawn as petit jurors to appear on such day of the term of such court as shall be named in such summons by the clerk of said court to serve as petit jurors; and it shall be the duty of the sheriff to make service of such process at least ten days before the first day of the term of court for which such persons are drawn, which summons shall be served by reading the same to the person so summoned or by leaving a copy of the summons at his usual place of abode with some member of the family over fifteen years of age, except in such cases as may be hereafter provided."

We have followed carefully the items of fees for circuit clerks under Sec. 11785, R.S. Mo. 1929 and we find no item which could be construed as entitling you to any fee for the summoning of a petit jury. However, Section 11787, R.S. Mo. 1929, which relates to "Fees of clerks of criminal courts", contains the following provision:

> "For a venire to summon a grand or traverse jury when one shall have been actually ordered and issued.....$.75",

which we believe is applicable to your question.

CONCLUSION

We are of the opinion that you as Clerk of the Circuit Court of Jefferson County are clerk of a court possessing criminal jurisdiction as contained in Section 11787, supra. You are therefore entitled to a fee of $.75 for summoning the petit (traverse) jury for the regular term of the Circuit Court.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

COSTS - State Highway Condemnation Cases.

12-3

November 30, 1935.

FILED
17

Mr. Wallace V. Coleman,
Clerk of the Circuit Court of
Jefferson County,
Hillsboro, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of October 29, 1935, such request being in the following terms:

> "Recently I was presented with a schedule pertaining to proper charges and fees in State Highway Condemnation cases.
>
> This schedule was set up by Mr. Wilkie B. Cunningham, Assistant Attorney for the State Highway Department.
>
> I agree with Mr. Cunningham on many of the items of costs which he discusses in this form, but with some of the items I differ.
>
> I am enclosing the schedule as I received it and I will appreciate an opinion from your department as to the authority of Mr. Cunningham's interpretation."

The memorandum which you sent us bears date of August 1, 1935, and is addressed as a memorandum to Mr. Stigall, and consists of seventeen mimeographed pages. We have examined such memorandum and have checked the statutes and cases cited therein and in our opinion such memorandum shows every evidence of careful and thorough investigation and preparation, and we find no material errors in the specific items of costs set out therein which would concern you in your official capacity. Of course, under the statutes Mr. Cunnyngham's rulings are not binding on circuit courts or clerks thereof, as the Legal Department of the State High-

Mr. Wallace V. Coleman,
Clerk of the Circuit Court of
Jefferson County,
Hillsboro, Missouri.

way Commission is not your legal adviser, but, on the other hand, neither is this Department, which is only authorized by statute to give formal opinions to certain designated officials of this State, of which a Clerk of the Circuit Court is not one (R.S. Mo., 1929, Section 11274). Consequently, this answer to your letter requesting an opinion on "the authority of Mr. Cunnyngham's interpretation" must be accepted with this qualification.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

TAXATION AND REVENUE - OCCUPATION TAX LAW: Applicability to boarding house keepers.

18

February 28, 1935.

FILED 18

Hon. Wallace Cooper,
Prosecuting Attorney of
Johnson County,
Warrensburg, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of February 15, 1935, such request being in the following terms:

> "I have had a number of inquiries from boarding house keepers as to their liability to pay the sales tax provided by Article 23, Chapter 59.
>
> Those making inquiry provide board for college students during about 10 months of the year and purchase all of their supplies at retail.
>
> I am of the opinion that these persons fall within the definition of "Sale at retail" as set out in paragraph (g) of section 10164a--1. However, I would like to have an opinion from your office on this matter."

Laws of 1933, Extra Session, page 155, the Act to which you refer in your letter, provides in Section 2 as follows:

> "For the privilege of a person engaging in the business of selling tangible personal property at retail a tax is hereby imposed upon such person at the rate of one-half of one per cent of the gross receipts of any such person from the sale of all tangible personal property sold in this state on and after the effective date of this act to and including December 31, 1935."

Section 1 defines "business" and "sale at retail" as follows:

> "The following words, terms and phrases when used in this act have the meanings ascribed to

them in this section, except where the context clearly indicates a different meaning:

* * *

(c) 'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect.

* * *

(g) 'Sale at retail' means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use of consumption and not for resale in any form as tangible personal property, for a valuable consideration."

These quotations from the Act indicate that a boarding house keeper would be required to make a return under the Act, which such person engaged in the business of serving meals with the object of making money would not be, for the purposes of the Act, in a materially different position from the proprietor of a restaurant or hotel, who, this office has ruled, is within the Act (opinion of the Attorney-General, dated February 1, 1934, on Occupation Tax Law of Missouri. House Bill No. 5, I, D (12) and (13)).

Attention is called, however, to the ruling just referred to with respect to hotels , which is as follows:

"(12) Hotels.

Hotels serving meals (American Plan) and not segregating the charge for the meals from room service, should not make returns of the gross receipts from such meals.

Where a hotel maintains a restaurant or dining room separate and distinct from its room service and makes separate and definite charges for meals served, the gross receipts from such meals are to be included in a return."

Under this ruling, if a boarding house keeper charged a certain amount for both room and board in a manner comparable to the method of charging of an American Plan hotel, no return would need to be made.

In conclusion, it is our opinion that boarding house keepers furnishing meals only, for the purpose of gain, would be required to make a return under the Occupation Tax Law of Mis-

souri (Laws of 1933, Extra Session, page 185), but that if charges are made by such person for combined room and board, without segregating the charge for the meals from the charge for the lodging, no return under the Act need be made for such charge.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

SCHOOLS: A school director who has paid a State and county t within one year preceding his election, although he owe other State and county taxes, is qualified unde the terms of the statute. A school director who ow property, although taxes are assessed against and pa by her mother out of the assets of her undivided inte in said property is qualified.

5-13

May 9, 1935.

FILED
18

Hon. Wallace Cooper
Prosecuting Attorney
Johnson County
Warrensburg, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office which reads as follows:

> "I have two problems concerning the qualifications of school directors on which I would like to have opinions from your office.
>
> "In the first case, the director, elected on April 2, 1935, paid 'a state and county tax' in the month of August, 1934, The tax paid at that time was a delinquent tax and had become due and payable prior to the year immediately preceding the date of the director's election. I ruled that the director elect had paid a state and county tax within the year immediately prior to his election and that it was not necessary for him to have paid all of his taxes prior to his election nor was it necessary for him to have paid a tax falling due within the year prior to his election.
>
> "In the second case, the director is the daughter of a widow. The father's estate has never been administered upon and the mother still controls his personal property. The girl who has been elected as a school director is a tenant in common in some real estate owned by

> her deceased father. She lives on this farm with her mother and the other tenants in common. The mother pays all the taxes on the land and personalty. The daughter also owns an automobile which was assessed to the mother and the tax was paid by the mother during the year preceding the daughter's election. I have ruled that the daughter is a tax payer within the meaning of the statute. She owns property, both realty and personalty, on which the taxes were paid during the year prior to her election. The taxes were paid with her knowledge and consent and, furthermore, paid out of assets in which she owns an undivided interest.
>
> "I shall appreciate an opinion on these problems at your earliest convenience."

We agree absolutely with your ruling on the above questions. Since however you have requested an official opinion from this office, we will answer your questions in the order in which you ask them.

I.

You do not state whether your questions relate to a city, town or consolidated district or to a common school district. The statutes, however, specifying the qualifications of a director in both common school districts and city, town and consolidated districts are similar; and both statutes provide that a director shall have paid a State and county tax within one year next preceding his election.

Section 9287, R. S. Mo. 1929, which is applicable to common school districts reads in part as follows:

> "The government and control of the district shall be vested in a board of directors composed of three members, who shall be citizens of the United States, resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding his, her or their election, ****".

The above section provides that a director shall have paid a State and county tax within one year next preceding his election or appointment. Said section does not provide that a director shall have paid all State and county taxes assessed against him or that he shall have paid the taxes assessed against him for the year preceding his election, and to so hold would be writing something in the statutes that is not there.

In State ex rel. Circuit Attorney v. Macklin, 41 Mo. App., loc. cit. 342, the Court said:

> "Nor is there any force in the argument that the taxes must be paid within each calendar year. The law simply requires that it shall be paid for two consecutive years, and not that it shall also be paid within those years. There is no ambiguity in the terms used and we cannot read them otherwise than they are written. Our duty is to declare and not to make the law. ****"

And further at loc. cit., pages 343 and 344, the Court stated:

> "Our conclusion is that the true construction of the phrase employed, 'who shall have paid a school tax within said city for two consecutive years immediately preceding his election,' is 'who shall have paid at any time preceding his election, a tax for the benefit of schools within said city for the two consecutive calendar years, next preceding the year of his election, assessed on property in which he has an interest subject to taxation, at the date of assessment or date of payment.' ****"

It is therefore the opinion of this office that a director who has paid at any time within one year preceding his election a State and county tax, although he may still owe other State and county taxes, has complied with the terms of the statute.

II.

In State ex rel. Circuit Attorney vs. Macklin, supra, the Court said at loc. cit. page 343:

> "While we are clear that the word tax, in the connection in which it is used in the law, means a tax or impost on the person's property, we are equally clear that an antecedent assessment, against the person himself, is not essential. A person is not relieved from paying taxes on property owned by him, simply because it is erroneously assessed to another, nor is he under any legal obligation whatever to pay a tax on realty in which he has no interest, simply because it is assessed to him. The assessment of a tax creates no debt in the ordinary sense of the term. City of Carondelet v. Picot, 38 Mo. 125, Peirce v. City of Boston, 3 Met. 520; Green v. Wood, 7 Ad. & Ell. N. S. 178. If a person owns an interest in property and pays a tax thereon, he pays his tax regardless of the fact to whom the property is assessed."

In the case of State ex inf. Bellamy v. Menengali, 307 Mo. loc. cit. page 447, the Court held that a married woman, who owned property which was assessed against her husband upon which he paid the taxes, is a taxpayer under the statute providing that a school director to be qualified must have paid a State and County tax within one year next preceding her election. In the above mentioned case, at loc. cit. pages 454 and 455, the Court said:

> "The undisputed evidence of both respondent and her husband, shows, that some of her personal property was included in the assessment list for 1920, and that she signed her husband's name thereto.
>
> "* * * * * * * * * * * * * * * * * * * *
>
> "It was shown without contradiction and without objection, by respondent's husband, that he paid the taxes on his property and that of his wife, mentioned in the assessment list, on December 22, 1921;

> and that he paid said taxes for the benefit of himself and wife. It appears from the evidence without question that the automobile mentioned in the list was assessed at $250; that respondent was the joint owner with her husband of the undivided one-half of same, and that the taxes were paid on this machine by respondent's husband for the benefit of both.
>
> *
>
> ***** Aside from the foregoing, the testimony of both respondent and her husband is clear to the effect that she was the owner of the personal property heretofore described in the assessment list.
>
> "We are cited in the respective briefs of counsel to text-books, and decisions outside this State, which throw very little light on the merits of the case. It is clear to us that no citation of authority is needed to sustain the action of the lower court in holding that respondent was qualified to hold the office in question. If any authority were needed, the able and unanswerable opinion of Rombauer, J., in State ex rel. Circuit Attorney v. Macklin, 41 Mo. App. at page 339 and following, settles the question and expresses our views of the subject. It fully sustains the action of the lower court. On page 343, Judge Rombauer concisely states our theory of the law in a case of this character, as follows:
>
> "'If a person owns an interest in property and pays a tax thereon, he pays <u>his</u> tax regardless of the fact to whom the property is assessed.'"

In view of the above, it is our opinion that a daughter who owns an undivided interest in real estate and also owns an automobile, all of which was assessed against her mother and on which her mother paid the taxes out of the assets

of which said daughter owns an undivided interest with the consent and knowledge of the daughter within one year preceding her election, is a taxpayer under the provisions of Section 9287, supra.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/afj

RECORDER: Cannot make abstract books with intention of engaging in abstract business after expiration of his term of office.

6-15

June 14, 1935.

FILED
18

Hon. Wallace Cooper
Prosecuting Attorney
Johnson County
Warrensburg, Missouri

Dear Sir:

This acknowledges receipt of your letter wherein you inquire as follows:

> "I would like to have an opinion from your office on Section 11570 R. S. Mo. 1929, as to whether or not that Section prohibits the Recorder of Deeds from making a set of abstract books either by himself or through an agent, with the intention of engaging in the abstract business after the expiration of his term of office."

Section 18 of Article II of the State Constitution has to do with the duties that officials are required to perform with respect to their office.

Section 11570 R. S. Missouri, 1929, was thereafter enacted by the Legislature and is as follows:

> "Every recorder of deeds or the deputy of any such officer, who shall engage in the business of making abstracts of instruments of record in his office affecting the title to lands, for profit or hire, or who shall furnish to any person or persons any written extract, excerpt, memoranda or copy of any such instrument of record, for profit or hire, otherwise than under and in pursuance of the statutes defining his duties as such officer and in his official capacity, duly authen-

> tication each extract, excerpt, memoranda or copy of every such instrument so furnished under the seal of his office, shall be deemed guilty of a misdemeanor and shall, upon conviction, be punished by a fine of not less than twenty nor more than fifty dollars."

"Profit" is defined in Webster's New International Dictionary as "Advancement; advantage, improvement, accession of good; valuable results; useful consequences; benefit; avail; gain." The synonym being "benefit, improvement, advancement, gain." We think the meaning of the word "profit" as used in the above act is synonymous with "benefits" or "advantage" or "gain."

What a person does through an agent he himself does, and the fact that he does this work through an agent does not change the rule.

CONCLUSION.

We are of the opinion that the above section means that the recorder, while he is such recorder, may not either personally or by his agent, compile a set of abstract books with the intention of engaging in the abstract business after the expiration of his term of office, and if he does do such he is amenable to the provisions of Section 11570 R. S. Missouri 1929.

Respectfully submitted,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
Acting Attorney General

DW:MM

APPROPRIATIONS: State University cannot spend appropriation in assisting another institution in caring for crippled children, but may care for them outside of Columbia.

12-14

December 9, 1935.

FILED
18

Honorable Leslie Cowan,
Secretary, University of Missouri,
Columbia, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "The University of Missouri has been requested by the Board of Trustees of the Georgia Brown Blosser Home for crippled children at Marshall, Missouri to pay from funds appropriated to the University by the 58th General Assembly of this State for Crippled Children's service, a part of the maintenance cost for the convalescent care of crippled children who have been in the University hospital at Columbia and have been or will be sent by the University hospital to the Blosser Home for convalescent care. The Blosser Home, which has a capacity of approximately forty patients, now has only three patients due to the fact that funds for the operation of the Home are extremely limited.
>
> "The Blosser Home has been supported in the past entirely from the proceeds of its private endowment but these proceeds for 1935 will be about $2000 less than the necessary expenses for 1935, and it appears that there will be a shortage of funds for 1936. Of course, as soon as general conditions improve and the proceeds from the endowment are sufficient to support the Home, there will probably be no need of further aid from the State.

"Since only children who have been treated in the Crippled Children's ward at the University hospital are eligible for admittance to and are admitted to the Blosser Home, the University officials are willing to have a portion of the State funds for Crippled Children work expended at the Blosser Home. The Crippled Children's ward at the University hospital is now full and though there are a number of children throughout the State who need and are entitled to aid according to the Crippled Children Act, they cannot be accepted by the University hospital until some of the present patients are either discharged or committed to the Blosser Home. Some of the children who have been at the hospital for some time and whose treatments are in an advanced stage could very well be taken care of by the Blosser Home, thus making room for new patients who are in great need of treatment but who cannot now be admitted to the University hospital in its present crowded condition. There is, at present, quite a large waiting list of such children.

"Before making any commitments to the trustees of the Blosser Home, the University first wishes to secure from your office an opinion on whether or not funds appropriated for the Crippled Children's service under the direction of the University can legally and properly be expended for the care and treatment of children committed to the Blosser Home.

"I desire to point out the fact that the administration of the Blosser Home is closely connected with the University Hospital at Columbia as it is provided in the will that new trustees for the Blosser Home are to be selected by the faculty of the School of Medicine at the University of Missouri. Furthermore I wish to call your attention to the fact that these children in the Blosser Home are under the complete medical charge of the faculty of the Medical

School of the University who pay regular visits to them and prescribe all treatments for them, also that the appointments of all nursing force are approved by the School of Medicine of the University.

"In order that you may have complete information concerning the problem involved I am enclosing an extract from the minutes of the Board of Curators wherein the will of Mrs. Georgia Brown Blosser was presented to the Board, and refer to you the Act of the 54th General Assembly whereby the Crippled Children's service was created, found in the Laws of Missouri 1927, pages 273 to 276, and to the Act of the 58th General Assembly, found in the Laws of Missouri 1935, page 67, whereby monies were appropriated for this service during 1935-36, and also to the Revised Statutes for 1929, Sections 9625 to 9664, governing the organization and administration of the University.

"Of course, if in your opinion, the University can expend a portion of the State appropriation for the maintenance of children sent from the University to the Blosser Home, such funds will be expended in accordance with the Act and will be reported on such forms as may be required by the State Auditor.

"We will appreciate receiving a prompt opinion from you since it is planned to expend some money at the Blosser Home during the present month, if the opinion is favorable."

Along with the same appears to be an excerpt from the records of the Board of Curators of the University of Missouri pertaining to their action with respect to the provisions of the will of the founder of the Blosser Home for Crippled Children at Marshall, Missouri, setting out Items 25, 26 and 27 of said will. These provisions of the will are quite lengthy and are not copied herein. Suffice it to say that it appears therefrom that under said will the Georgia Brown

Blosser Home for Crippled Children at Marshall, Missouri, does not belong to the University of Missouri. It is a charitable, benevolent, philanthropic and educational institution, not for pecuniary profit.

Under the terms of said will the Mercantile-Commerce Bank and Trust Company is designated as trustee, and $500,000 is bequeathed, and likewise certain real estate located in the City of Marshall, Missouri, is devised to said trustee and its successors in trust for the Georgia Brown Blosser Home for Crippled Children. The trustee is directed to use the net income and revenue derived from said trust estate to the use of said beneficiary for the general upkeep and perpetual existence of said beneficiary.

Subdivision 2 of Item 25 of said will contains the provision that certain named parties shall constitute the first Board of Directors

> "and that the faculty of the Medical School of Missouri State University shall select an additional person for each vacated membership of said association by the above-named persons caused by their death, resignation or for any other reason, and in addition thereto, the said faculty of the Medical School of the Missouri State University shall select nine other persons from time to time upon the death or resignation of any member of the association, an additional person to fill such vacated membership who with the members of the Board of Directors of said corporation shall constitute the membership of said association."

Subdivision 3 thereof, among other things, provides that if necessary steps to organize the corporation are not taken by the named Board of Directors within two years after the death of the testator,

> "then the said faculty of the Medical School of Missouri State University shall designate three or more of the persons selected by said faculty of the Medical School of the Missouri State University as members of said association, who shall proceed to take all necessary steps" to organize.

Article 5 of Chapter 125, R. S. Mo. 1929, makes certain provisions with respect to the rights and duties of the University of Missouri in caring for children under fifteen years of age who are afflicted with some deformation or are suffering from some malady as a result of such deformation, said law having been originally passed in 1927.

Section 14112 thereof, among other things, provides that under certain conditions the county court, with the consent of the person having the legal custody of such child,

> "shall order such child taken or sent to the hospital of the state university of Missouri for free surgical and medical treatment and hospital care."

Section 14113 thereof, among other things, provides:

> "It shall be the duty of the person in charge of the hospital of the state university, or other person designated by the authorities in control of said hospital, to provide for such child, if advisable, a cot or bed, or room in the hospital, and such person shall also designate the department of the state university hospital to which the patient shall be assigned for treatment. * * * * In any case where, under the provision of this article, a child has been committed to the university hospital and it has been determined by the hospital staff that such child may be equally well benefited as an out-patient, at the patient's home or elsewhere, through prescribed corrective exercises and treatments, said child, by proper orders and arrangements, may be given such corrective exercises and treatments at the child's home or elsewhere under the supervision and with the advice of the hospital staff, and if the child shall be at the university hospital at the time when such method of treatment is determined upon, the return of the child to the child's home or elsewhere shall be as provided for by section 14118 of this article."

Section 14117 thereof provides that

> "The curators of the university shall cause to be filed with the state auditor, a monthly report containing an itemized statement of the expenses charged against each patient received on certification of any county court",

and that the state auditor shall audit the same and, if found correct, shall issue a warrant payable to the state university, against the state treasurer for the net amount certified out of any funds appropriated for that purpose.

Section 14118 thereof, among other things, provides for the discharge of such patient by the superintendent, and

> "The university hospital may, in the discretion of the superintendent or other person designated by the authorities in control thereof, pay the actual, reasonable necessary expenses of returning the said patient to his home, and pay the actual reasonable and necessary expenses incurred in accompanying such patient to his home, and such expenses shall be itemized and verified, and presented to and allowed by the auditor of the state of Missouri in connection with the bills for hospital maintenance as hereinbefore provided."

Laws of Missouri, 1935, Section 2, page 67, appropriates $90,000 in the following words:

> "There is hereby appropriated out of the State Treasury, chargeable to the State Revenue Fund, the sum of Ninety Thousand Dollars ($90,000) for the work of the Crippled Children Service; Fifteen Thousand Dollars ($15,000.00) of which shall be for the purchase of and repair of equipment, and other necessary expenditures for the Crippled Children Service at the University, and Seventy-Five Thousand Dollars ($75,000.00) shall be for carrying into effect the provisions of Article 5, Chapter 125, R. S. 1929, relative to crippled children

> in this State to be administered by the Missouri State University, and the University of Missouri is hereby designated as the State Agency to cooperate with, to receive and expend allotments from, the appropriate department or bureau of the Federal Government that may be authorized to allot Federal funds for the care of crippled children."

It will be seen that Article 5 of Chapter 125 nowhere contemplates that the University shall function with respect to the treatment of such unfortunate children except at the University Hospital, unless it be in Section 14113, which says that if the hospital staff of the University shall determine that the child may be equally well benefitted "as an out-patient, at the patient's home or elsewhere, through prescribed corrective exercises and treatments", and that such child "may be given such corrective exercises and treatments at the child's home or elsewhere under the supervision and with the advice of the hospital staff."

Section 14118 limits the University in discharging such patients to the actual and necessary expenses of returning them to their homes.

Section 19 of Article 10 of the Constitution of Missouri is as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object."

4 C. J., page 1460, states the following:

> "An appropriation of funds is an authority from the legislature, given at the proper time and in legal form,

> to the proper officers, to apply sums of money, out of that which may be in the treasury in a given year, to specified objects or demands against the state; the act of the legislature in setting apart or assigning to a particular use a certain sum of money to be used in the payment of debts or dues from the state to its creditors; a setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money and no more for that object, and for no other."

Said cited reference further declares as to appropriation bills, the following:

> "Annual statutes by which the legislative branch of the government regulates the manner in which the public money voted at each session is to be applied to the various objects of expenditure."

In the case of Ristine v. State, 20 Ind. 328, 339, speaking of appropriations, is the following statement:

> "An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the Auditor is authorized to draw his warrant upon an appropriation, and the Treasurer is authorized to pay such warrant if he has appropriated money in the treasury."

Section 14115, R. S. Mo. 1929, provides that the court, evidently meaning the county court, may in its discretion, appoint some person to accompany such child, etc., and

> "Any person appointed by the court to accompany said child to or from the hospital, or to make an investigation and report on any of the questions involved in the information other than the physician making the examination, shall receive his actual necessary expenses incurred in making such investigation

> or trip. The physician appointed by the court to make the examination and report shall receive the sum of five dollars ($5.00) for each and every examination and report so made out of the county revenue as full compensation for such service."

This contemplates that these expenses shall be paid by the county court and not by the State University.

Section 14118 contemplates that the University shall, if it so desires, be only to the expense of sending the child to its home. Likewise, Section 14113 can contemplate no greater expense that the University may be required to incur or pay.

Section 14113, by providing that after the child has been taken into the University, the hospital staff may determine that the child may be equally well benefitted "as an out-patient, at the patient's home or elsewhere, through prescribed corrective exercises and treatments * * * at the child's home or elsewhere under the supervision and with the advice of the hospital staff", leaves the child as yet under the control of the person in charge of the hospital of the State University, or other person designated by the authorities in control of said hospital, although he may, after the proper findings by the hospital staff, be sent "elsewhere".

There is no provision in Article 5 of Chapter 125, R. S. 1929, prohibiting the University of Missouri from caring for such children after being so sent "elsewhere". The $75,000 appropriation states that it is "for carrying into effect the provisions of Article 5, Chapter 125, R. S. 1929, relative to crippled children in this State to be administered by the Missouri State University."

As long as such funds are being expended by the University for the purpose of the University carrying out the object of said Article 5, action by the University is not prohibited. It appears to us that it is not necessary that the field of activity of the University be limited to Columbia, but that such field may be enlarged to cover such other territory as the facts may reasonably justify, and in so doing the University is authorized to pay the board of such children so being cared for under the supervision and with the advice of the hospital staff.

The $75,000 appropriation made as set forth, supra, can properly be expended only for the purposes set forth in Article 5 of Chapter 125, supra. In effect, if the University

expends money in assisting the Georgia Brown Blosser Home for Crippled Children in taking care of such child, it is the Georgia Brown Blosser Home that is rendering the benefit to the child, it being aided therein by the University.

This narrows the inquiry as to whether the University may legally expend for another institution part of the appropriation made by the Legislature to the University.

This department has ruled in an opinion dated November 22, 1935, that the State Eleemosynary Board is not authorized to transfer funds from "D. Operation" to "C. Repairs and Replacements"; and has ruled in an opinion dated November 5, 1935, that such board has not the authority to transfer moneys from one classification of the appropriation to another classification, even with the consent of the Governor so to do; and in an opinion dated May 10, 1934, has ruled that State Hospital No. 2 has not the authority to divert its funds to State Hospital No. 1, although to assist in making a test, the result of which would be as beneficial to State Hospital No. 2 as it would be to State Hospital No. 1.

We give full faith and credit to the laudable aim prompting your inquiry and recognize the high purpose you seek to accomplish. However, our conclusion is that the law does not justify the transfer of any part of the above $75,000 appropriation from the University to the Georgia Brown Blosser Home for Crippled Children.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

LABOR DEPARTMENT: Department of Labor has no right to inspect hotels.

January 3, 1935.

FILED 19

Mrs. Mary Edna Cruzen,
Commissioner,
Labor and Industrial Inspection Dept.,
Jefferson City, Missouri.

Dear Mrs. Cruzen:

This is to acknowledge your letter as follows:

> "Does the State Labor Department have the authority to inspect hotels for sanitary and working conditions for the employees if the hotel does not have a restaurant connected with it?
>
> Section 13218 does not specify hotels but lists restaurants."

It is our opinion that your Department does not have authority to inspect hotels for sanitary and working conditions.

Article 7, Chapter 93, R. S. Mo. 1929, pertains to "Inspection of Hotels, Inns and Boarding Houses" and such power is vested in the Food and Drug Commissioner.

On July 10, 1933, this Department rendered you an opinion, which in part held:

> "In your 6th inquiry you desire a list of places to be inspected, as set forth in Section 13218 R. S. Mo. 1929, which Section has been quoted above and will not be quoted again at this place. The Section provides for an inspection of 'all factories, warehouses, office buildings, freight depots, machine shops,

garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops.' After the enumeration of the various places to be inspected the Section includes, 'all other manufacturing, mechanical and mercantile establishments and workshops.' It is the opinion of this Department that the Legislature intended that the places enumerated be subject to inspection and by such enumeration did not intend that every place where one or more employees may work would be subject to inspection. The places enumerated, however, cover practically all of the well-known places where employees work under such conditions as to require the protection of these statutes. We believe that unless the place sought to be inspected is a factory, warehouse, etc., or is a manufacturing, mechanical or mercantile establishment or workshop, that such places may not be inspected."

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

Labor & Industrial Inspection Department.

Printing of reqport under Sec. 13182, R. S. Mo. 1929, to be paid for out of appropriation made to State Labor Department.

January 4th
1 9 3 5

FILED
19

Hon. Mary Edna Cruzen, Commissioner,
Labor and Industrial Inspection Department,
Jefferson City, Missouri.

Dear Mrs. Cruzen:-

We have your letter of November 26th, 1934, in which an opinion is requested as follows:

> "Is the State Printing Department liable for the printing of the report under section 13182 of the Labor Laws, or should this printing be paid out of the appropriation made the State Labor Department?"

We regret that the pressure of work in this office has made it impossible to answer your letter at an earlier date.

Section 13182, Revised Statutes of Missouri, 1929, provides as follows:

> "Sec. 13182. Report, where printed--how paid for.--The Commissioner of labor and industrial inspection shall be authorized to have printed not to exceed three thousand copies of his annual report for general distribution, and all printing, binding, bulletins, blanks, stationery or map work shall be done under any contract which the state now has or shall have, and the expense thereof shall be audited and paid for in the same manner as for similar work for the state, out of the appropriation for the purchase of material, printing and publishing documents for the state."

The above quoted section means that the printing is to be done under one of the contracts made by the state in accordance with the provisions of Chapter 115, Revised Statutes of Missouri which chapter sets forth the law with regard to state printing and state publications. The printing is to be paid for out of the appropriation referred to at the end of the section. This appropriation is undoubtedly the appropriation which has been made for the

Department of Labor and Industrial Inspection, as will be seen from a reading of the two most recent appropriation acts for said department, i.e. Section 27-D, Laws 1933, page 80, and Section 7-D, Laws Ex.-Sess. 1933-34, page 10.

Furthermore, there is no general appropriation for state printing, but instead each department has an appropriation, as the ones referred to above, to take care of its own printing expenses in connection with its particular operation under our laws.

Very truly yours,

CHAS. M. HOWELL, Jr.
Assistant Attorney General

CMHJr:LC

APPROVED:

_____
Attorney General

LABOR DEPARTMENT
EMPLOYMENT AGENCIES — Charging a fee not required to file reports.

FILED
19

January 21, 1935.

Mrs. Mary Edna Cruzen, Commissioner
Labor and Industrial Inspection Department
Jefferson City, Missouri

Dear Madam:

We have your request of December 29, 1934 for an opinion upon the following:

> "Does the State Labor and Industrial Inspection Department have the authority to regulate fee charging employment agencies as set forth in Sections 13190 to 13193 inclusive R. S. Mo. 1929 by requiring reports and other information from them?"

We have made a very diligent study of the statutes involved in this matter and have examined other statutes relating to your department, but we are unable to find any statutory authority requiring employment agencies charging a fee to submit reports or other information to you.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

ROADS AND BRIDGES - Right of county court to change boundaries of road districts and to appoint no road overseers.

2-4

January 25, 1935.

FILED 19

Hon. W. H. Crockett,
Prosecuting Attorney Ralls County,
New London, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of December 17, 1934, such request being in the following terms:

"I am writing you at the request of the incoming County Court who desire to do away with Road Overseers, it seems. I told them that they might do as Marion County has done viz: divide the county into two districts but that they would have to wait until January 1936 in compliance with Section 7868. I am agreeing with the new court that a road overseer is like a fifth wheel to a wagon. Since we have large machinery the county is a small unit and the Highway Engineer can readily look after all the roads. The overseers simply ride the grader or tractor when the county outfit comes around to their district and charge per diem for being along.

I do not like to ask your opinion on something that is set out very plainly in the statute however.

Would the county court have any discretion about making appointments according to Section 7870?"

I

RIGHT OF COUNTY COURT TO ALTER ROAD DISTRICTS

R. S. Missouri, 1929, Section 7868, provides as follows:

"The county courts of all counties, other than those under township organization, shall, during the month of January, 1913, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be

> "numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

This provision, as you observe in your letter, plainly authorizes the county court of a county not under township organization and governed as to its roads by Article 3 of Chapter 42, in which the above section is found, during the month of January of every even numbered year, to change the boundaries of any road district, and, as there is no restriction on the county court as to the number of districts into which a county may be divided, providing the division makes the districts of suitable and convenient size, road mileage and taxable property, no objection would appear to having a county divided into two or even one road district, if circumstances warranted such a division.

II

NECESSITY OF ROAD OVERSEERS

R. S. Missouri, 1929, Section 7870, provides in part as follows:

> "All road overseers shall be appointed by the county court of the county at the February term of said court. * * * Such officers shall receive a compensation of not less than two nor more than three dollars per day for each day actually and necessarily employed as such overseer, to be fixed by the county court annually in the month of March, by order of record."

The first sentence of this section shows that road overseers can only come into being upon appointment by the county court, and there is no provision in the statutes requiring the county court to appoint any certain number of road overseers. From this section it would seem that the number of road overseers and their compensation is left in the discretion of the county court, provided, of course, that the county court makes its appointments on a fair consideration of the needs of road districts of the county. The tenure of office of road overseers likewise is not explicitly provided in the statutes, although it is indicated with some clearness by the part of Section 7870 above quoted, which shows that all road overseers are to be appointed at the February term of the county court, and their compensation fixed in the month of March by the county court, and since there is nothing in this section saying that these appointments shall be

made in any particular years (as for example the provision in Section 7868, above quoted, showing that the boundaries of road districts may be changed during January of 1918 and biennially in the same month thereafter), the inference seems justified that the terms of these road overseers are from year to year. This being the case, and the county court not being required to appoint any certain number of overseers, it follows that the county court, if it reasonably judged that no road overseers were necessary, could make a finding to this effect and not appoint any road overseers in any given February term for that year.

III

COUNTY HIGHWAY ENGINEER

R. S. Missouri, 1929, Section 8013, provides in part as follows:

> "The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county."

From this section it is noted that a failure of the county court of a county not under township organization, and governed as to its roads by Article 3 of Chapter 42, to appoint road overseers in a county where there was a county highway engineer, would still leave a public official under the statutory duty of supervising the roads of that county, and consequently would not create a situation where no person or group would have any direct responsibility for the maintenance of the roads of that county.

In conclusion it is our opinion that the county court of any county not under township organization, and governed as to its roads by Article 3 of Chapter 42, has authority, during the month of January in any even numbered year, to change the boundaries of any road district in that county, even though the change might result in the continued existence of only two road districts, and that such county court could, if the reasonable needs of the county justi-

fied such a step, fail to appoint any road overseers during the February term of such court in any year, thus in effect doing away with road overseers for that county for that year.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

COMMON CARRIER - If widow of former employee who died in service of common carrier be officer of state, county or municipal government, the common carrier is prohibited from issuing passes, either gratis or at a discount.

February 4, 1935.

FILED
19

Crane & Mersereau,
Attorneys at Law,
The A T & SF Railway Co.,
1900 Fidelity Bank Bldg.,
Kansas City, Missouri.

Gentlemen:

This department is in receipt of your letter of January 30 requesting an opinion as to the following state of facts:

> "Officials of our company are inquiring whether there is any state, county, city or commission regulation in Missouri which would prohibit the issuance of free transportation to the widows of former employes who died in railroad service, in instances where the widows are employed by state, county or city governments.
>
> We know of no such limitations on the authority conferred by R.S. Mo. 1929, Section 5155 (3), but shall greatly appreciate your advice in regard thereto."

The general section of the Public Service Commission Act having to do with the issuance of free transportation by common carriers is to be found in Section 5155 (3), which section provides in part as follows:

> "Nothing in this chapter shall be construed to prohibit the interchange of free or reduced transportation between common carriers of or for their officers, agents, employes, attorneys and surgeons,

> and the dependent members of their families, nor to prohibit any common carrier from carrying passengers or property free, with the object of providing relief in cases of general epidemic, pestilence or other calamitous visiation; ****."

The term "families" as used in the above statute is defined in a later portion of the same section to include "the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood, and minor children during minority, of persons who died while in the service of any such common carrier."

Thus, it would seem by reason of the above that a railroad corporation might very well render free transportation, or what is its equivalent, issue passes entitling the holder thereof to such free transportation to the widows of former employees who died in railroad service whatever might be the present position or occupation of these women.

However, Section 4360, R.S. Mo. 1929 is a further limitation on common carriers with respect to the right of rendering free transportation. That section provides:

> "No railroad or other transportation company shall grant or issue free passes or tickets, or passes or tickets at a discount, to members of the general assembly of the state of Missouri, or members of the state board of equalization, or any state, county or municipal officer. Any railroad or other transportation company violating the provisions of this section shall forfeit and pay for each offense the sum of two hundred dollars, which may be recovered in the name of the state in any court of competent jurisdiction, and shall be prosecuted by the prosecuting attorney of the county where the offense was committed, or the attorney general, and the amount recovered shall be paid into the county school fund of said county."

While unnecessary for the disposition of this problem, nevertheless, in order to fully complete the picture as painted by

our Legislature, we respectfully call attention to Section 4361, R.S. Mo. 1929, which provides:

> "Any officer, agent or employe of any railroad or other transportation company who shall send or deliver any free passes or tickets, or passes or tickets at a discount, to any member of the general assembly of the State of Missouri, or any member of the State Board of Equalization, or any state, judicial, county or municipal officer, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than fifty dollars nor more than five hundred dollars."

Section 4362, R.S. Mo. 1929 need not be here noticed as it has only to do with the penalties provided for those who, responding to human impulse, commit the crime (mayhap through surprise or by reason of the novelty of the situation) of accepting free transportation from a common carrier.

The latest enunciation by the Supreme Court of Missouri with respect to the interpretation of what constitutes a "public office" is to be found in an opinion rendered by Judge Atwood in the recent case of State v. Truman, 64 S.W. (2d) 105, l.c. 106, wherein it was said:

> "In Mechem on Public Officers, pp. 1 and 2, sec. 1, it is said: 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' We have approved this definition in State ex rel. Walker v. Bus, 135 Mo. 325, 331, 332, 36 S.W. 636, 33 L.R.A. 616, State ex rel. v. Hackmann, 300 Mo. 59, 254 S.W. 53, 55, and Hasting v. Jasper County, 314 Mo. 144, 282 S.W. 700, 701; and it appears to be in harmony with the great weight of authority."

CONCLUSION

In view of the foregoing, it is the opinion of this department that if a widow of a former employee who died while in the service of a common carrier be an officer of the State, County or municipal government, the common carrier would, by reason of Section 4360, supra, be prohibited from granting or issuing to her passes or tickets, whether these be issued gratis or at a discount.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

LABOR: What constitutes "conducting an employment agency"--
Deception in advertising a misdemeanor.

February 25, 1935.

FILED
19

Mrs. Mary Edna Cruzen
Commissioner
Labor and Industrial Inspection
Jefferson City, Missouri

Dear Mrs. Cruzen:

This is to acknowledge your letter as follows:

> "Has the department of Labor and Industrial Inspection the right to collect a fee for an employment service who advertises that if the employee will buy a truck they will furnish employment?
>
> For your further information I am attaching a letter hereto from the Better Business Bureau asking that I bring this matter to your attention."

The letter from the Better Business Bureau reads in part as follows:

> "In accordance with our telephone conversation of recent date, regarding practices of certain motor truck and trailer concerns advertising to sell trucks and trailers, promising to furnish employment to purchasers of such equipment, we are wondering if such concerns would not be engaging in the employment business.

"Typical advertisements appearing in local newspapers, read as follows: 'Can use several reliable truckers, who will buy 2-ton trucks or larger with our refrigerated trailer; will furnish permanent, good paying haul.'

"The advertisers promise the purchaser of truck or trailer equipment employment to be secured from some long distance trucking concern with which the advertiser has no connection. The advertiser makes arrangements with the trucking concern to employ the purchaser of the equipment in long distance hauling. In other words, there is a condition precedent to the securing of employment which is the purchasing of a truck or trailer. While the purchaser of the equipment is not obligated to pay a specified fee for the securing of the job, nevertheless the advertiser is compensated for such services because of the fact a sale is made of his equipment.

* * * * * *

"We shall appreciate it greatly if your office sees fit to ask for a ruling from the Attorney-General's office regarding this practice."

Section 13190, R. S. Mo. 1929, in part provides as follows:

"No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the state commissioner of labor and industrial inspection. * * *"

The right to charge a person a fee for operating an employment office must be derived from the statute and the test

for determining if one is operating an employment office depends upon the facts. We have so advised you in opinions dated April 7, 1934, and also on December 7, 1933. The opinion written to you on December 7, 1933, is analogous to the present inquiry and answers the question here under consideration. We quote from said opinion:

> "We believe before this concern would come within the statute that they must charge and accept a fee or compensation, either from the applicant seeking the employment or from the employer seeking the help. The applicant does not pay any fee to be placed with these concerns, nor does the employer pay any fee for the persons employed. For the $12.00 paid by the applicant each applicant receives a six weeks training course in salesmanship, which we do not believe would be considered a fee within the purview of the statute."

Assuming that you do not have a copy of this opinion in your files, we are attaching hereto copy.

The letter of the Better Business Bureau states, among other things:

> "This Bureau has received complaints against this type of advertising for the reason that individuals purchase the equipment, sign notes, finance it through finance companies, and find that the promised employment is not as represented, and as a result, their investment has not proved satisfactory."

Section 13194, R. S. Mo. 1929, which in part provides, and to which we invite your attention, reads as follows:

> "Every person who shall agree or promise or who shall advertise through the public press, or by letter, to furnish employment or situations to any person

> "or persons, and in pursuance of such advertisement, agreement or promise, shall receive any money, personal property or other valuable thing whatsoever, and who shall be guilty of any deception to any person * * * * * * shall be deemed guilty of a misdemeanor, and shall, on conviction, * * * * * *."

In State v. Timeus, 232 Mo. 177, l. c. 182, the Supreme Court of Missouri said, in discussing the above statute:

> "The statute is levelled against three classes of offenders: First: Every person who shall agree, promise or advertise to furnish employment to another, and in pursuance of the promise, agreement or advertisement, receive money, property or other valuable thing, and shall be guilty of any deception to the person applying * * * * * *."

And further,

> "If it was intended to charge the acts embraced within the first class, then one of the essential ingredients of the offense is that the defendant was guilty of deception to the person applying for the employment."

See also,

State v. Timeus, 160 Mo. App. 510.

CONCLUSION.

It is our opinion, from the facts stated in your letter, that said concerns are not conducting an employment agency.

However, if they are guilty of deception in advertising, even though not conducting an employment agency, then such could be prosecuted under Section 13194, supra.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG
Enc.

COUNTY SUP'T. OF SCHOOLS: It is not duty of candidates to furnish the ballots; it is optional with the county court to furnish the ballots and any form that is acceptable to board of directors and chairman and secretary of annual school meeting may be used; would be proper for county court to supply ballots providing same has been anticipated in estimate under County Budget Act; if county court should furnish ballots, members would not be personally liable.

March 23, 1935.

3-23-35

9341 D
7 E.R.

FILED
19

Hon. Joseph C. Crain,
Prosecuting Attorney,
Christian County,
Ozark, Missouri.

Dear Sir:

This department is in receipt of your letter of March 14 requesting information regarding the coming election of County Superintendent of Schools. Your letter is as follows:

> "In the coming school election to be held on April 2, 1935, there is to be elected a Superintendent of Schools for the county. There are two candidates for this office in Christian County and there has developed considerable controversy as to the printing of the ballot and the form thereof.
>
> One of the candidates insists that each candidate is to furnish his own ballots and that each candidate shall have a separate ballot. The other candidate prefers a common ballot with the name of both candidates thereon.
>
> I would like an opinion from your office on the following questions: (a) Is it the duty of the county to furnish ballots for this election of County Superintendent of Schools? If so, is it to be printed at the expense of the candidates for this office, or at the expense of the county? (b) Is there any official form of ballot for this election, or is it the duty of each candidate to furnish his own ballot if the candidates cannot agree on any form?

The office of County Superintendent of Schools is of statutory origin and we must therefore be guided solely by the statutes creating the office in the matter of the election of a person to that office. Section 9454, R.S. Mo. 1929 states in part:

> "There is hereby created the office of county superintendent of public schools in each and every county in the state; the qualified voters of the county shall elect said county superintendent at the annual district school meeting held on the first Tuesday in April, 1923, and every four years thereafter; ****"

Section 9455 is the guide for the election returns and the duty of the county clerk in connection therewith, and provides as follows:

> "At least ten days before the annual school meeting in any year when a county superintendent of public schools is to be elected, the clerk of the county court shall mail by registered letter to the president or clerk of the board of school directors of the various districts of the county a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, which tally sheets shall, so far as practical, conform to the form of poll books set out in section 10197, Article 2, Chapter 61, R.S. 1929, relating to general elections, and in making the returns of such election, the tally sheets shall be certified by the chairman and secretary of such annual school meeting and attested by the members of the board of directors of the district, who may be present. The voting for county superintendent shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and chairman and secretary of the annual school meeting to see that each ballot so cast is counted for the person receiving the same, and it is hereby made the duty of the

> chairman of the annual school meeting, within two days after such meeting, to transmit the tally sheets and all ballots, in person or by registered letter, to the clerk of the county court; such ballots to be in a sealed package, separate and apart from such tally sheets, such package being properly designated. It shall be the duty of the county clerk, within five days after the annual school meeting, to call to his assistance two justices of the peace or two qualified voters of the county, and cast up the vote and issue a commission to the person receiving the highest number of votes, for which commission he shall receive a fee of one dollar to be paid by the person commissioned. ****"

It is to be noted that in Section 9455, supra, it is the duty of the county clerk to mail by registered letter to the clerk of the board of school directors a tally sheet, which should conform to the form used in the poll books. As to the ballots the section states: "The voting *** shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is counted for the person receiving the same.****"

There is no statement in this section making it the duty of the county court, or the candidates themselves, to furnish the ballots, for the reason that it is made the mandatory duty of the officers in charge of the election to see that each ballot is counted for the person receiving the same; we therefore conclude that there is no special form of ballot required and that the officers in charge of the school district election may permit a voter to use any ballots which the officers in charge may select, The candidates themselves may offer a form of ballot, which, if accepted by the officers in charge of the school district election, might be used.

We cannot read anything in the statute which would prevent the county court, if it so desired, from supplying the ballots for the election, and in order to affect a uniform ballot, we believe it would be proper for the county court to supply the same, providing this has been anticipated in the estimate under the County Budget Act and especially Class 2 relating to costs of elections.

If the county court should furnish the ballots, we do not believe that it would involve them personally or make the members thereof in any wise personally liable. In other words, it is the opinion of this department that the county court may furnish the ballots if it so desires, or it may refuse to do so, the same being merely optional with them.

Under the statute creating the office of county superintendent of schools, there is no primary election, the election of a county superintendent of schools to be conducted along with and as a part of the annual school district meeting held in April, and the person receiving the highest number of votes, regardless of party affiliation, is declared elected to the office.

As stated above, we cannot read into the statute that any particular form of ballot is to be used. The duty of conducting the election in a legal manner is upon the members of the board of directors and the chairman and secretary of the school meeting. In the absence of fraud, it is the opinion of this department that the vote of any school district is legal regardless of the form of ballot, and again we say it is not the duty of the candidates to furnish the ballots. It is optional with the county court, if it desires so to do, to furnish the ballots and any form of ballot may be used so long as the same is acceptable to the members of the board of directors and the chairman and secretary of the annual school meeting.

We are enclosing herewith copy of an opinion recently rendered to the Hon. Mark Wilson, Prosecuting Attorney of Henry County, wherein the question of party platforms and tickets is discussed, and trust the same may be of benefit to you.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH
Encl-1

LABOR: Acceptance of Wagner-Peyser Law by Missouri does not require all of the Labor Department to come under federal supervision

6-21

June 20, 1935.

FILED
19

Mrs. Mary Edna Cruzen, Director,
Missouri State Employment Service,
Jefferson City, Missouri.

Dear Mrs. Cruzen:

This will acknowledge receipt of your inquiry which is as follows:

> "Does the acceptance of the Wagner-Peyser law by the State of Missouri have the effect of requiring that the administration of all public employment agencies, including the National Reemployment Service, beiin the control of the state through the Labor Commissioner."

Senate Bill No. 510, known as the Wagner-Peyser Act, Public No. 30, 73d Congress, 48 Stat. 113, among other things, provides:

> "Sec. 3. (a) It shall be the province and duty of the bureau to promote and develop a national system of employment offices for men, women, and juniors who are legally qualified to engage in gainful occupations, to maintain a veterans' service to be devoted to securing employment for veterans, to maintain a farm placement service, to maintain a public employment service for the District of Columbia and, in the manner hereinafter provided, to assist in establishing and maintaining systems of public employment offices in the several States and the political subdivisions thereof in which

> there shall be located a veterans' employment service. The bureau shall also assist in coordinating the public employment offices throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency, assisting them in meeting problems peculiar to their localities, promoting uniformity in their administrative and statistical procedure, furnishing and publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the several States."

Section 4 provides that in order for a state to obtain the benefits of the appropriation carried in the act, the state

> "shall, through its legislature, accept the provisions of this Act and designate or authorize the creation of a State agency vested with all powers necessary to cooperate with the United States Employment Service under this Act."

Section 5 provides, inter alia:

> "No payment shall be made in any year out of the amount of such appropriations apportioned to any State until an equal sum has been appropriated or otherwise made available for that year by the State, or by any agency thereof, including appropriations made by local subdivisions, for the purpose of maintaining public employment offices as a part of a State-controlled system of public employment offices."

Section 7 provides that the federal director, under the Act, shall have authority to inquire and ascertain whether the State has accepted the provisions of the Act and "designated or authorized the creation of an agency to cooperate", and what amounts have been made available by the "state and by any agency thereof, including appropriations made by local subdivisions, in compliance with the provisions of section 5 of this Act."

Section 8 provides that any State desiring to receive the benefits of the Act "shall, by the agency designated to cooperate with the United States Employment Service, submit to the director" certain detailed plans under the provisions of the Act, and that if the particular State has a board, department, etc., charged with the administration of laws for vocational rehabilitation, etc., such plans "shall include provision for cooperation between such board, department, or agency and the agency designated to cooperate with the United States Employment Service under this Act."

Section 9 provides that the State agency cooperating with the United States Employment Service shall make reports thereto as may be prescribed by the federal director. It further provides that it shall be the duty of the said director to "ascertain whether the system of public employment offices maintained in each State is conducted in accordance with the rules and regulations and the standards of efficiency prescribed by the director", etc., and that the director may revoke any further certificate on his determination that the cooperating State agency has not properly expended the moneys appropriated by either the federal government or the state and local communities under the Act.

Section 12 provides that

> "The director, with the approval of the Secretary of Labor, is hereby authorized to make such rules and regulations as may be necessary to carry out the provisions of this Act."

By the provisions of House Bill No. 54, which has been finally passed and signed by the Governor (without emergency clause), Missouri accepted the provisions of said federal Act.

Section 13187 thereof says:

> " 'The commissioner of labor and industrial inspection shall organize and establish in all cities in Missouri' of a certain size, and in such other cities, towns and villages 'as he may deem necessary, a free public employment bureau', etc."

We have set out somewhat in extenso the provisions of the federal Act establishing a national employment system, and it may be observed from its provisions that it is entirely consistent with the construction of its being only a part of the official machinery of the labor department, which works in conjunction with the State labor department insofar as its provisions go.

It nowhere states that all of the operations of the labor department of a State shall be under and administered by the State agency created to administer the provisions of the federal Act.

In fact, in Section 5 it states that certain things are to be done "as a part of the State-controlled system."

In Section 7 said Act provides that the federal director shall inquire and ascertain whether the State has "designated or authorized the creation of an agency to cooperate."

Section 9 speaks of the State agency cooperating with the federal agency as to certain things.

Under the provisions of Section 12 of the federal Act, the federal director, with the approval of the Secretary of Labor, is authorized to make rules and regulations that may be necessary to carry out the provisions of the Act.

Under that power so conferred, we are inclined to think that said authorities could promulgate a ruling requiring that the administration of all public employment agencies be in control of the State through the labor commissioner as a condition precedent to the granting or allocation of the federal moneys to this State under the Act.

Repeals by implication are not favored and courts, if possible, will construe prior and subsequent related acts to make both effective. State ex rel. Turner v. Penman, 282 S. W. 498, 220 Mo. App. 193.

If the federal Act in terms provided that the administration of all public employment agencies of the State should be under control of the state labor commissioner, it would be open to serious objections as going beyond the power of the federal government.

We think that said Act makes no attempt to do so, but merely provides, as it appropriately may, that if the particular State is going to be permitted to share in the federal moneys so appropriated, it shall come within the provisions of the Act, shall accept the provisions thereof, etc., and if it fails to do that, then the federal money will be withheld from such State.

The passage of the law by the State of Missouri known as House Bill No. 54 constitutes the State Department of Labor and Industrial Inspection the state agency of Missouri for the purpose of administering in conjunction with the federal officials the national reemployment Act.

CONCLUSION.

We are of the opinion that the acceptance by the State of Missouri of the provisions of the Wagner-Peyser Law does not have the effect of requiring that the administration of all public employment agencies shall be under the control of the State through the State Labor Commissioner.

Yours very truly,

DRAKE WATSON,
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
Acting Attorney General

DW:MM

Wagner-Peyser Bill does not require civil service for the Missouri State Employment Service.

August 15, 1935.

8.16

FILED
19

Mrs. Mary Edna Cruzen, Director,
Missouri State Employment Service,
Jefferson City, Missouri.

Dear Mrs. Cruzen:

This will acknowledge receipt of your inquiry, which is in part as follows:

> "Under the provision of the Wagner-Peyser Bill, can the Director of the United States Employment Service require the State of Missouri to accept the Merit System (or civil service) as a provision for appointment to the staff of the Missouri State Employment Service?"

In an opinion rendered you by this department under date of June 13, 1935, the provisions of Senate Bill No. 510, known as the Wagner-Peyser Act, Public No. 30, 73rd Congress, 48 Stat. 113 (hereinafter referred to as the Act), establishing a National Employment System, were taken up and discussed.

Section 4 provides that in order for a state to obtain the benefits of the appropriation carried in the act, the state "shall, through its legislature, accept the provisions of this Act and designate or authorize the creation of a state agency vested with all powers necessary to cooperate with the United States Employment Service under this Act."

By the provisions of House Bill No. 54, which has been finally passed and signed by the Governor (without an emergency clause), the State of Missouri accepted the provisions of said Act. Section 13188 thereof says:

> "The State of Missouri hereby accepts the provisions of the Act of Congress approved June 6, 1933, entitled 'An Act to provide for the establishment of national employment system and for cooperation with the states in the promotion of such system, and for other purposes.'"

Section 9 of the Act provides that the Director of the United States Employment Service may withhold benefits under the Act where the state fails to comply with his rules and regulations and standards of efficiency, thus:

> "Each state agency cooperating with the United States Employment Service under this Act shall make such reports concerning its operations and expenditures as shall be prescribed by the director. It shall be the duty of the director to ascertain whether the system of public employment offices maintained in each state is conducted in accordance with the rules and regulations and the standards of efficiency prescribed by the director in accordance with the provisions of this Act. The director may revoke any existing certificates or withhold any further certificate provided for in Section 7, whenever he shall determine, as to any state, that the cooperating state agency has not properly expended the moneys paid to it or the moneys herein required to be appropriated by such State, in accordance with plans approved under this Act."

Section 12 of the Act provides:

> "The director, with the approval of the Secretary of Labor, is hereby authorized to make such rules and regulations as may be necessary to carry out the provisions of this Act."

We assume from your inquiry that the Director, with the approval of the Secretary of Labor, adopted a rule requiring the use of the Merit System (or civil service) as an incident to appointment to state employment agencies affiliated with the United States Employment Service. Your question is whether, under the terms of the Wagner-Payser Act, the Director can require the State of Missouri to accept such rule.

This department requested the Attorney General of the United States to render us an opinion as to the validity of the regulation hereinunder consideration. We were, however, unable to obtain this opinion and it therefore becomes our duty to determine whether or not this regulation is within the scope of the Act.

Section 2 of the Wagner-Peyser Act provides in part as follows:

> "The Secretary of Labor is authorized, without regard to the civil service laws, to appoint and, without regard to the Classification Act of 1923, as amended, to fix the compensation of one or more assistant directors * * * *"

It will be seen from the very provisions of the Act itself that it was not the intention of Congress that the civil service laws should apply with reference to appointments under the Wagner-Peyser Act. Section 4 of the Act provides:

> "In order to obtain the benefits of appropriations apportioned under Section 5, a State shall, through its legislature, accept the provisions of this Act and designate or authorize the creation of a State agency vested with all powers necessary to cooperate with the United States Employment Service under this Act."

In view of this section of the Act, there can be no question but that the Missouri State Employment Service is a State agency and not a branch of the Federal Government.

While it is true that Sections 9 and 12 of the Act give to the Director of the United States Employment Service power to make regulations, this power does not have the effect of endowing the Director with the power to legislate or in any manner amend the Act.

In the case of International Railway Commission v. Davidson, 66 L. Ed. 341, Mr. Justice Brandeis, in passing on the power of the Secretary of the Treasury to make regulations, said:

> "Section 161 does not confer upon the Secretary any legislative power * * * A regulation to be valid, must be reasonable and must be consistent with law."

In the very recent case of Miller v. United States, 79 L. Ed. 478, Mr. Justice Sutherland said with respect to an administrative regulation:

> "It is invalid because not within the authority conferred by the statute upon the director * * * * to make regulations to carry out the purposes of the Act * * * The only authority conferred, or which could be conferred by the statute, is to make regulations to carry out the purposes of the Act--not to amend it."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the Director of the United States Employment Service, under the authority conferred upon him by the Wagner-Peyser Act, does not have the power to require the State of Missouri to accept the Merit System (or civil service) as a provision for appointment to the staff of the Missouri State Employment Service.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH.AB

NOTARIES PUBLIC: Notaries public are not precluded from taking acknowledgments for applicants to the Old Age Assistance Board, even though such Notary be a member of the Board.

8-29

August 29, 1935

FILED
19

Hon. Joseph C. Crain
Prosecuting Attorney
Ozark, Missouri

Dear Sir:

This department is in receipt of your letter of August 20 wherein you make the following inquiry:

> "A member of the Old-Age Pension committee of this County has requested me to ask your opinion as to whether or not she, being a member of the Old-Age Pension Commission of this County would be entitled to use her notarial seal in making out affidavits contained in the applications for such pensions, and charge therefor."

The section dealing with the general powers and duties of a notary public is 11739 Revised Statutes Missouri 1929, which is as follows:

> "They may administer oaths and affirmations in all matters incident or belonging to the exercise of their notarial offices. They may receive the proof or acknowledgment of all instruments of writing relating to commerce and navigation, take and certify relinquishments of dower and conveyances of real estate of married women; the proof or acknowledgment of deeds, conveyances, powers of attorney and other instruments of writing, in like

> cases and in the same manner and with like effect as clerks of courts of record are authorized by law; take and certify depositions and affidavits and administer oaths and affirmations, and take and perpetuate the testimony of witnesses, in like cases and in like manner as justices of the peace are authorized by law; make declarations and protests, and certify the truth thereof under their official seal, concerning all matters by them done by virtue of their offices, and shall have all the power and perform all the duties of register of boatmen."

There is no provision in the above section which would prohibit a member of the County Old Age Assistance Board from acknowledging affidavits in connection with applications for old age pensions.

While the law recognizes a notary public as a public officer, the Constitution and statutes appear to exempt notaries public from the provisions relating to a person holding two offices. This is especially true in Section 18 of Article IX of the Constitution, likewise, Section 12 of Article IV.

In the case of Wood v. City of Kansas City 162 Mo. 303, it was held that a clerk in a municipal office was not estopped from claiming fees for services rendered as a notary public, by having received his compensation in his employment as clerk, and that in the absence of any agreement to the contrary a city is not entitled to fees for services rendered by its employee as a notary public during the city's office hours.

CONCLUSION

The act of administering oaths, applying seal and charging a fee therefor is separate and distinct from the duties of the members of the County Old Age Assistance Board. It is the opinion of this department that there

is no legal prohibition which would prohibit said member in carrying out the rights and duties as a notary public, regardless of the fact that she is a member of the Board to which the applicant has filed application for old age assistance.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

OWN:LC

MO. STATE EMPLOYMENT SERVICE: No prohibition against using state money for legitimate expenses without reference to whether such expended sums are on concurrent basis with Federal matched expenditures for given period.

8-29

August 29, 1935.

FILED
29

Mrs. Mary Edna Cruzen, Director,
Missouri State Employment Service,
303 Capitol Building,
Jefferson City, Missouri.

Dear Mrs. Cruzen:

This department is in receipt of your letter of August 22 regarding the construction of Sections 29 and 29A, Laws of Missouri, 1935, page 101, and Section 13189, Laws of Missouri, 1935, page 288.

We have studied the provisions of these sections as passed by the 58th General Assembly of the State of Missouri and do not find in them any command of the Legislature that the state, local and federal funds be expended concurrently.

While it is true that the $50,000 appropriated in Section 29 heretofore referred to was appropriated for the purpose of maintaining employment offices in conjunction with aid from the Federal Government, there is, nevertheless, in our opinion, no prohibition contained therein against the expending of the state money for the purpose of maintaining employment offices and meeting current legitimate expenditures and payrolls of these offices without reference to whether such expended sums are on a concurrent basis with Federal matched expenditures for a given month or period.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH

HOTELS:) An apartment hotel, having 10 or more rooms held out to the public to be a place where sleeping accommodations arenfurnished for pay, comes withing meaning of Sec. 13091, R.S. 1929, and is liable for inspection fee.

STATE BOARD OF HEALTH:)

October 10, 1935. 1012

FILED 19

Mr. Robt. A. Cummins
The State Board of Health of Missouri
Jefferson City, Missouri

Dear Sir:

This will acknowledge your letter of recent date requesting an opinion from this office which reads as follows:

> "In order that the inspectors of this department may deal properly with certain types of apartment hotels with reference to inspection and collection of license fees, we should be pleased to have your office render an opinion on Section 13091, R. S. Missouri 1929, with a view of answering the question as to whether or not an apartment hotel such as the one represented by the enclosed letter will come under the above section.
>
> "We are enclosing for your information a letter just received from the Park Lane Apartment Hotel in Kansas City, in whose case we desire to render a fair and just treatment on the matter of hotel license fee."

Your attention is directed to Section 13091, of R. S. Mo. 1929, relating to buildings that are defined as being hotels. Said section reads as follows:

> "That every building or other structure kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which ten or more rooms are furnished for the accommodation of such guests, whether with or without meals, shall for the purpose of this article be deemed a hotel, and upon proper application the food and drug commissioner shall issue to such above described business a license to conduct a hotel: Provided, that it shall be unlawful for the owner of any such building or other structure to lease or let the same to be used as a hotel until the same has been inspected and approved by the food and drug commissioner."

It is plain from the reading of the above section of the statute that every building or structure kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transients or permanent guests, in which ten or more rooms are furnished for the accommodation of such guests, with or without meals, shall be deemed a hotel.

Under the provisions of Section 13094, R. S. Mo. 1929, the parlor, dining room, kitchen and office shall be construed to mean guest rooms. The rooms aforementioned shall be included for the purpose of determining whether a building or structure has ten or more rooms for the accommodation of guests.

The term "apartment hotel", in recent years, has literally become a misnomer inasmuch as, in the beginning, an apartment hotel meant a place where separate and individual apartments were leased or rented without housekeeping facilities. To-day, apartment hotels furnish accommodations for persons desiring to have cooking facilities and for those who do not care for such facilities. If apartment hotels furnish accommodations to persons who are transients or permanent guests with housekeeping and non-housekeeping facilities, the operator of an apartment hotel would come within the purview of Section 13091, supra, provided there be ten or more rooms in the building or structure.

CONCLUSION.

It is the opinion of this department that apartment hotels renting and leasing apartments with non-housekeeping and housekeeping facilities to permanent or transient guests, which apartment hotel has ten or more rooms kept, used, maintained, advertised or held out to the public, to be a place where sleeping accommodations are furnished for pay, shall be deemed a hotel within the meaning of Section 13091, supra.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

TAXATION: Real estate not exempt from taxation, although income used for purely charitable purposes.

10-30

October 28, 1935

FILED
19

Mr. Walter A. Craven
Secretary
Masonic Bodies
Excelsior Springs, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of October 15 in which you request an opinion of this Department on the question therein submitted, which letter is as follows:

> "Our Lodge through the will of one of its members came into possession of various properties, among them a business building in this city.
>
> In his will he specified that all property be placed in endowment fund and only the income from such endowment was to be used for maintenance or upkeep of the Cemetery, the land for which he had purchased and gave to the Lodge.
>
> Following his will, all rents from this property goes into the maintenance fund of the Masonic Cemetery and no part of it reaches the Lodge for use in any other manner.
>
> The County Court of this, Clay County, claim because the property is income property, not used for Masonic Lodge, it is subject to taxes, and we have been paying these taxes, which amount to approximately $170.00 per year. We do not, however, agree with this position

> because the funds are used for benevolent, charitable and cemetery purposes (cemetery such as described herein)
>
> I wish you would write us just the situation as to the application of the laws governing such interests, and if your conclusions are favorable, inform the County Court that this property may be removed from taxable real estate.
>
> With all good wishes, I am."

We also have before us the Will mentioned in your letter, namely, the will of William E. Steck, dated July 12, 1928, and a certain contract entered into October 18, 1926, by and between the aforesaid William E. Steck and Clay Lodge No. 207, A. F. & A. M., Excelsior Springs, Missouri.

From the above instruments and your letter we assume that the above Lodge, or its trustees, has the title to various properties and a business building in Excelsior Springs, Missouri; that the income derived from said properties are, under the terms of the last will and testament, to be used for the maintenance and upkeep of the Masonic Cemetery created by the aforesaid Steck, and which we may assume for the purposes of this opinion to be "for purposes purely charitable."

The question then is whether or not real estate, owned by the lodge or its trustees mentioned above, which is rented out and the income of which is used for the maintenance and upkeep of the cemetery aforesaid, is exempt from taxation. In arriving at a correct solution of this matter we must look to the Constitution of Missouri and the statutes relating to tax exemptions and the construction of same as given by our courts. Section 6, Article X of the Missouri Constitution provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the

> limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law.".

And the pertinent parts of Section 9743, R. S. Mo. 1929, which follows almost the precise language of Section 6, Article X, provides as follows:

> "The following subjects are exempt from taxation:
>
> * * * * * * * * * * * * * * * * * * *
>
> sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

In the construction of laws exempting property from taxation there is one cardinal principle that stands out, and that is that such provisions of the constitution and statutes must be strictly construed.

In the case of State ex rel. St. Louis Y. M. C. A. v. Gehner 11 S. W. (2d) 30, l. c. 34, the Missouri Supreme Court, in a leading case on this subject, said the following:

> "Taxation is a sovereign right of the state, and the abandonment of the right to

exercise it can never be presumed; but the intention to abandon it must appear in the most clear and unequivocal terms,as was twice said by this court in early decisions and reiterated in later decisions.Lexington v.Aull,30 Mo.loc.cit.487; Pacific Railroad v. Cass County,53 Mo.loc.cit.27. 'An exemption from taxation must be clear and unambiguous and should not be created by implication.' Scotland County v.Railroad Co.65 Mo.134; State ex rel. v. Arnold, 136 Mo. loc. cit. 450, 38 S. W. 79.

'In the construction of laws exempting property from taxation it is a cardinal principle that they must be strictly construed. As a rule all property is liable to taxation, exemption, the exception,and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. It is in no case to be assumed that the law intends to release any particular property from this obligation; and no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption.' Fitterer v. Crawford,157 Mo. loc. cit. 58, 57 S. W. 533, 50 L. R. A. 191.

'As the burden of taxation ordinarily should fall upon all persons alike, when one claims an exemption therefrom he must be able to point to the law granting such immunity and it must be clear and unambiguous.' Kansas Exposition Driving Park v. Kansas City, 174 Mo. loc. cit. 433, 74 S. W. 981.

'Such statute and constitutional provisions are construed with strictness and most strongly against those claiming the exemption.' Beach on Public Corp.par.1443; Dillon on Munic. Corp.(3rd Ed.) par.776, and cases cited; 1 Burroughs on Taxation,sec. 70; 1 Desty on Taxation,p.108; Cooley on Taxation, pp.204, 205.

And very recently this court, by Walker,J.,

> said:'The policy of our law,constitutional and statutory,is that no property than that enumerated shall be exempt from taxation.' State ex rel.Globe-Democrat Pub.Co. v.Gehner,316 Mo.696,294 S.W.loc.cit.1018.
>
> 'A grant of exemption from taxation is never presumed;on the contrary,in all cases of doubt as to the legislative intention,or as to the inclusion of particular property within the terms of the statute,the presumption is in favor of the taxing power,and the burden is on the claimant to establish clearly his right to exemption.' 37 Cye.of Law,p.891;Galloway v. Memphis,116 Tenn.loc.cit.736,94 S.W.75;Willard v.Pike,59 Vt.218,9 A.907.
>
> We might multiply these citations, by quoting from the decisions of other courts of last resort and other text-books, but all would be to the same effect."

The doctrine announced in this case was reaffirmed in the case of St.Louis Y.M.C.A. v. Gehner 47 S.W.(2d) 776, 81 A.L.R.1449.

The fundamental principles relating to tax exemptions are well stated in the above cases, and with these fundamental principles in mind we approach your question.

In Cooley on Taxation, Vol.2,(4th Ed.) Section 686,page 1434, in discussing tax exemptions where the income of the property is used for some charitable purposes,is stated the following:

> "In case of charitable, religious, educational and other like institutions where the statute bases the exemption from taxation on the use of the property for the exempt purposes, it often happens that the association leases to others a part of the building or a separate building or a part of the land, or that it receives an income from money invested or from property otherwise used as a source of profit outside of and independent of its regular line of work. The question then

> arises as to what is the effect thereof on the existing exemption of property used for the purposes of the association. Of course, much importance is to be given to the precise wording of the exemption statute. Generally, the provision exempts only property 'used' or 'exclusively used' for the enumerated purposes; and in several states the governing provision expressly excepts property used for profit by including only property 'not leased or otherwise used with a view to profit.' If the exemption is based on ownership, by virtue of the wording of the governing provision, a different question arises. But if the statute makes the exemption depend upon the use of the property, then the general rule is that the exception does not apply to property rented out to others by the exempt association or to other property held or used by it merely as a source of revenue, except that a mere occasional renting out, not interfering with the primary use of the property by the lessor, does not affect the exemption, and that sometimes the statute is sufficiently broad in its terms to include revenue and income."

In this connection it is to be noted that Section 6, Article X, of our Constitution, says in part,

> "* * * * * * Lots in incorporated cities or towns, or within one mile of the limits of such city or town, to an extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; "

In the case of Y. M. C. A. v. Douglas County 52 L. R. A. 123, 63 N. W. 924, it is held that,

> "To hold that property rented for business purposes is exempt when the rentals or main income therefrom are used exclusively for religious, charitable or educational purposes, is extending the operation of the law further than is warranted by the language used. There is a clear and well defined distinction between the use of property and the use of the income derived therefrom."

And in the case of United Brethren v. Forsythe 120 S. E. 626, in a note, 50 L. R. A. (n.s.) 1211, it is said:

> "And a house and lot owned by a religious corporation, but rented out as a restaurant are not exempt from taxation as property used exclusively for religious, charitable or educational purposes; although the corporation applies the rent received for such purposes."

The rule is stated in 61 C. J., page 461, Section 518, as follows:

> "Under constitutional and statutory provisions which in varying terms make charitable use of property essential to its exemption, it is ordinarily held that where property owned by charitable institutions is rented to third persons or otherwise employed as a source of profit, it is not exempt despite application of the income to charitable purposes, * * * * "

In a note under the case of People of the State of Illinois, ex rel. v. Wither's Home, 143 N. E. 414, 34 A. L. R. 628, l. c. 659, it is stated:

> "By the great weight of authority a charitable institution is not entitled to an exemption from taxation on property which it leases out or holds for revenue, although the funds derived in this manner are devoted to charitable purposes." (And cases are therein cited from a great many states of the Union.)

And in the case of State of West Virginia v. McDowell Lodge A. F. & A. M. 123 S. E. 561, 38 A. L. R. 31, l. c. 34, it is said:

> "While it must be borne in mind that the decisions of other jurisdictions are largely influenced by their constitutional and statutory provisions, it is quite generally held that where property belonging to a charitable institution is rented out or otherwise employed as a source of profit to the institution, it is not sufficient to save that property from taxation because the rent or income is devoted exclusively to charitable purposes; the exemption is generally held to apply to the property which is actually used and occupied for the charitable purposes for which the institution is organized." (Cases cited thereunder.)

Coming now to the construction given Article X, Section 6, by our courts, the Supreme Court of Missouri said in the case of Fitterer v. Crawford, 157 Mo. 51, page 63:

> "It is upon the condition that the property is 'used exclusively for purely charitable purposes,' that

it is exempted from taxation. It must be remembered that it is not exempted from taxation simply because it belongs to the Masonic lodge, but because of its exclusive use by the lodge for charitable purposes. Now as to the third story there can be no question as to its use for such purposes, but as to the other stories, and the ground, they are not so used. And being parts of the same building, and belonging to the same party, it could not be parceled out, and thus assessed and taxed, so as to bring that part of it, 'used exclusively for charitable purposes' within that provision of the statute which exempts such property from taxation. Nor do we think that merely applying the rents received from the first and second stories to the extinguishment of the debt incurred in the construction of the Masonic lodge building, is 'using the building exclusively for purely charitable purposes,' within the meaning of the statute. There is a very material difference between the 'use of a building exclusively for purely charitable purposes,' and renting it out, and then applying the proceeds arising therefrom to such purposes. To rent out a building is not to use it within the meaning of the statute, but in order to use it, it must be occupied or made use of. Moreover, by leasing the property the lodge becomes the competitor of all persons having property to rent for similar purposes, and the plain and obvious meaning of the statute is that such property shall not be exempt from taxation."

The above case was followed and approved in the case of State ex rel. v. Y. M. C. A. 259 Mo. 233, wherein a Y. M. C. A. building was held to be not exempt from taxation where a portion of the building was rented out for

commercial purposes, notwithstanding the income derived therefrom was used by the organization for charitable purposes.

From the above and foregoing and the construction given our constitution and the statutes enacted in conformity therewith, by the Supreme Court of Missouri, and the great weight of the authority from other states construing similar constitutional provisions and statutes, it is our opinion that the real estate and buildings owned by the lodge mentioned in your letter, or the trustees under the will mentioned, are not exempt from taxation although the income therefrom is used for purely charitable purposes, namely, the maintenance and upkeep of the Masonic Cemetery.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

CRH:LC

INCOME TAXES: Laws of Missouri 1935, page 408 does not apply.

10-31

October 30, 1935.

FILED
19

Cullen, Fauntleroy & Edwards,
Attorneys at Law,
506 Olive Street,
St. Louis, Missouri.

Gentlemen:

This department is in receipt of your letter of October 26 requesting an opinion as follows:

"The undersigned represent Berenece W. Eddy, Executrix of the Estate of H.W. Eddy, deceased, to whom W.F. Baumann, Collector of Revenue, St. Louis, has sent bill for 1932 tax assessed against 1931 income in the amount of $270.21, plus interest in the sum of $108.08 and collector's commission in the sum of $5.40, or an aggregate bill of $383.69.

"An agent of the Estate talked to Mr. Whitney of the State Income Tax Office and was informed that the interest, as set out in the statement was correct.

"Section 10136, Revised Statutes, 1929, as amended and which became effective August 24, 1931, provides: 'All taxpayers who become delinquent shall have the same penalties assessed against them as in the case of personal property taxes * * *'.

"We therefore cannot understand why the estate is not entitled to the benefits as provided by the Laws of 1935, page 408, which would permit the computation of interest and penalties only after December 31st, 1934.

"If it is proper we shall greatly appreciate an expression from you so that the estate may pay the amount which is legally due."

This department has ruled in an opinion dated November 12, 1934, on a similar matter respecting Laws of Missouri, Extra Session 1933-34, page 166, which provides:

> "That all penalties and interest on personal and real estate taxes, delinquent for the year 1932 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid,"

that House Bill No. 124, as set out above, did not apply to drainage district assessments, the theory of the opinion being to the effect that drainage district assessments were not within the phrase "personal and real estate taxes".

Section 10136, R.S. Mo. 1929 provides:

> "All taxes assessed on account of incomes shall become delinquent on the second day of June, where assessments are required to be made and certified to by the assessor prior to April 30, and subsequent to March 15, in all other cases taxes assessed on account of income, shall become delinquent thirty days after the tax book is required by law to be delivered to the collector; and all taxpayers who become delinquent, shall have the same penalties assessed against them as in the case of personal property taxes and suit shall be brought and the taxes collected in the same manner as delinquent personal taxes."

This section was amended by the General Assembly in 1935 (Laws of Mo. 1935, page 410) as follows:

> "All taxes assessed on account of incomes shall become delinquent on the second day of June, where assessments are required to be made and certified to by the assessor prior to April 30, and subsequent to March 15; in all other cases taxes assessed on account of income, shall become delinquent thirty days after the tax book is required by law to be delivered to the collector; within thirty (30) days

> after such delinquency the collector shall certify the names of the delinquent taxpayers to the State Auditor and the State Auditor shall, within sixty (60) days thereafter, certify the names of any individuals, associations, joint stock companies, syndicates, co-partnerships, corporations, receivers, trustees, conservators, or other officers appointed by any state or federal court, from whom such tax is due, to the Attorney General, and suit shall be instituted in any court of competent jurisdiction by the Attorney General or by the Prosecuting Attorney of the county at the direction of the Attorney General, in the name of the State, to recover such tax and enforce the lien therefor, and service may be had on both residents and non-residents in the same manner as provided by law in civil actions. The same penalties shall be assessed against such delinquent taxpayers as in the case of personal property taxes, except where different penalties are provided for by an act of the 56th General Assembly, and shown in the Laws of Missouri, 1931, at pages 365 to 375, both inclusive."

The General Assembly in 1935 passed a law relating to the payment of delinquent and back taxes, which provides as follows (Laws of Missouri, 1935, page 408):

> "That all penalties and interest on personal and real estate taxes, delinquent for the year 1934 and prior years shall be computed after December 31st, 1934 on the same penalty and interest basis as the taxes delinquent for the year 1934 until paid."

The question presented at this time is whether or not income taxes can be properly included within the phrase "personal and real estate taxes". In 61 Corpus Juris, Section 2306 an income tax is defined as follows:

> "An income tax is a 'special' tax, in the sense that it has peculiar and distinguishing characteristics, and is out of the ordinary; and it is a state tax, rather than a local tax, where it is made applicable to all inhabitants of the state and the power to assess and collect it has not been delegated to counties or municipalities but is retained by the state. * * * An income tax is to be distinguished from an inheritance, legacy or estate tax, and also from a sales tax, which has been said to be its antithesis. Property, franchise, or occupation taxes on corporations measured by their earnings or receipts, taxes upon moneys in hand or in bank, although derived from income, and taxes upon moneys received or receivable, considered as personal estate, are not income taxes, but are to be distinguished therefrom."

Black, in his work on Income Taxation (3 Ed.), page 41, Section 36, says:

> "A tax on incomes is not a tax on property, and a tax on property does not embrace incomes..... For the same reason a tax laid on incomes is different from a tax laid on the property out of which the income arises, and although a statute may tax land at a different rate from that imposed on incomes, it is not therefore in conflict with a constitutional provision that taxation on all species of property must be uniform."

In the early case of Glasgow v. Rowse, 43 Mo. 479, l.c. 491, the Court said:

> "The income tax was uniform and equal as to the classes upon whom it operated; it did not come within the meaning of the term 'property' as used and designated in the constitution, and I think it was not in conflict with any provision of that instrument."

In the more recent case of Wire Co. v. Wollbrinck, 275 Mo. 339, the Court said:

> "Neither are the revenues proposed by the present act measured by Section 8 of Article 10, since that provision also relates to the limitation 'of the tax on property', which term, as has been shown, whenever used in the clauses of the Constitution, does not embrace incomes. Indeed, the only contention of the learned brief for appellant as to the application of Sections 6, 7 and 8 of Article 10, is predicated upon the theory (which has been shown to be untenable under the settled construction of that term in this State) that the word 'property' does embrace incomes."

CONCLUSION

In view of the foregoing, it is the opinion of this department that Laws of Missouri, 1935, page 408, relating to the payment of delinquent and back taxes does not apply to income taxes, and that said section does not in any way abate the penalties and interest provided for in Section 10136, R.S. Mo. 1929, or as provided for in Section 10136 as amended in 1935.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

Construction of Section 13214.

11-14

November 13, 1935.

FILED
19

Mrs. Mary Edna Cruzen
Commissioner of Labor
Jefferson City, Missouri

Dear Miss Cruzen:

This Department is in receipt of your letter of October 10, with reference to Section 13214 R. S. Missouri 1929.

The penalties provided for in this Section are for the benefit of the employee only and may be recovered only in a civil action brought by said employee, and it is our opinion that the Commissioner of Labor has no authority to bring suit to enforce the penalties as provided by that section.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:MH

County Farm Bureau: County Court cannot make appropriation for Agricultural Extension Service for two years instead of three as set forth in statutes.

12-21

December 20, 1935.

FILED
19

Mr. J.W. Crouch, President,
Clinton County Farm Bureau,
Lathrop, Missouri.

Dear Sir:

This department is in receipt of your letter of December 16 wherein you make the following inquiry:

> "As President of the Clinton County Farm Bureau, I accompanied a committee which petitioned the Honorable County Court of Clinton County, for an appropriation for the support of the Agricultural Extension Service as authorized by Section 12135 to 12142, Revised Statutes of Missouri, 1919.
>
> "In accordance with said statutes mentioned above, the committee asked for a three year appropriation. The Court informed the committee that it would be willing to grant a two year appropriation but not a three year appropriation.
>
> "The committee was requested by the Court to determine whether or not it would be within the jurisdiction of the court to appropriate for a period of two years instead of three years as set forth in the above mentioned statutes. * * * * "

Section 12616, R.S. Mo. 1929 empowers the County Court to appropriate money for the support of county farm organizations, and is as follows:

> "For the purpose of promoting the public welfare by assisting in the general betterment of farm and home practices and conditions, the county court of any county is hereby authorized and empowered to appropriate out of the general funds of the county such sums as it may deem proper for the support of county farm organizations and to pay out such moneys under the conditions hereinafter specified."

Section 12618, R.S. Mo. 1929 specifies the objects for which the county farm bureau may be organized and Section 12619, R.S. Mo. 1929 directs the expenditure of the funds. Section 12623, R.S. Mo. 1929 states the length of time for which appropriations may be made and provides as follows:

> "County courts appropriating funds under this article shall make such appropriation for a period of not less than three years nor more than four. Any county court may, on petition or on its own initiative, appropriate funds in support of a county farm bureau prior to the final completion of the bureau organization, but no money shall be paid out until the county farm bureau shall have met the conditions set forth in section 12619 of this article."

In the above section you will note that the County Court appropriating funds shall make such appropriations for a period of not less than three years nor more than four years. We can offer no logical reason why the Legislature should see fit to compel the County Court to make the appropriation for a period of three years unless it is that a county farm bureau, to obtain effective results must be organized at least for three years.

The question arises, is the word "shall" as used in the section mandatory or directory. In the case of Vale v. Messenger, 184 I. 553, the Court said:

> "The word 'shall' in a statute is presumed to be used in a mandatory sense."

In the case of Foley v. City of Orange, 103 N.J.A. 743, the Court said:

> "In a statute prescribing the exercise of the powers of municipal government, the word 'shall' is imperative and imports absolute obligation, unless a different meaning is conclusively required by the context."

In the case of McDunn v. Roundy, 191 I. 976, the Court said:

> "The word 'shall', when addressed to public officials, is mandatory."

CONCLUSION

In view of the foregoing, it is the opinion of this department that by using the word "shall" in Section 12623, supra, the Legislature made it mandatory for the county courts of this state, in the event county farm organizations are formed, to appropriate for a period of not less than three years; hence, the County Court of Clinton County cannot make an appropriation for two years instead of three.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

ROADS AND BRIDGES - Right of commissioners of special road districts incorporated under Article 10, Chapter 42, R. S. Missouri, 1929, to receive compensation as road overseers.

2-2

January 26, 1935.

Hon. Elliott M. Dampf,
Prosecuting Attorney,
Cole County,
Jefferson City, Mo.

FILED
20

Dear Sir:

A request for an opinion has been received from you under date of January 3, 1935, such request being in the following terms:

> "Will you kindly give me your opinion as to whether road commissioners of Special Road Districts - Benefit Assessments in Counties not under Township Organization, organized under Section 8061, Revised Statutes of Missouri, 1929, may receive pay for acting as Road Overseers, under Section 8065, Revised Statutes of Missouri, 1929 or if they are prohibited from receiving pay due to being elected as Commissioners."

As we understand your question, it is whether because such commissioners of special road districts organized under Article 10 of Chapter 42 of the 1929 statutes are by Section 8065 thereof given "all the power, rights and authority conferred by law upon road overseers,", they are therefore to receive the compensation authorized by law to be paid to road overseers.

That part of Section 8065 above quoted means, in our opinion, that while such commissioners have all the powers of road overseers, they exercise these powers as commissioners, and that they do not exercise them as overseers, i.e. when persons are designated commissioners of special road districts under that Article, they do not, becuuse they are given by Section 8065 the powers of road overseers, hold two separate offices, and do some acts as commissioners and some acts as road overseers, but everything they do is as commissioners, including the exercise of powers and the performance of duties identical to those conferred and imposed by law on road overseers. Nor would it seem to us proper that a person who has been selected as a commissioner should be designated and appointed by the county court as a road overseer, because such commissioner having all the powers of a road overseer by virtue of his office as commissioner, to des-

ignate him also an overseer would give him no new powers. Our construction of Section 8065 is borne out by Section 7870, relating to the appointment, qualification and compensation of road overseers, which allows them to receive compensation "for each day actually and necessarily employed as such overseer", and there would be no necessity for employing a person as overseer who had by virtue of his office as commissioner all the powers that could be conferred on him as an overseer. Thus, a commissioner under Article 10 performs all his services in connection with roads as commissioner, and the law provides that he shall receive no compensation for those services.

Section 8079 fixes the compensation of commissioners under such Article 10, providing therefor as follows:

> "Commissioners of road districts incorporated under this article shall receive no compensation for their services, but shall be paid any and all expenses they may incur in transacting business of the district, including reasonable attorney's fees."

The fact that commissioners of special road districts incorporated under Article 10 of Chapter 42 are given all the powers conferred by law on road overseers (compare also Sections 8065 and 7876) indicates, and the complete absence of any provision for overseers for districts incorporated under Article 10 confirms the indication, that in road districts incorporated under Article 10 no road overseers are contemplated, and, therefore, the provisions for the compensation of road overseers, contained in Article 3 of Chapter 42 (Section 7870) are inapplicable to districts incorporated under Article 10. Any other conclusion would mean that there might be both commissioners and overseers in one district who would have almost identical powers, and this conflict and duplication of duties would cause great confusion. Not only would expediency and harmony between the various articles of Chapter 42 be served by the construction that we make, but also certain language in Article 10 shows that apparently this construction was in the minds of the General Assembly when it enacted Article 10. Thus, in Section 8066 it is provided that the Commissioners of special road districts incorporated under Article 10 shall, with respect to the poll tax, "perform the duties, * * * that are imposed by law upon road overseers * * * in road districts that are not incorporated;", showing that apparently one scheme was envisaged for unincorporated road districts, and another for those incorporated under Article 10, in the former of which road overseers were to be responsible for road matters and in the latter of which the special commissioners were to be so responsible.

3. Hon. Elliott M. Dampf,
Prosecuting Attorney, Cole County. January 26, 1935.

In conclusion it is our opinion that road overseers of special road districts incorporated under Article 10 of Chapter 42, R. S. Missouri, 1929, are not road overseers ex-officio, could not properly be appointed to serve as road overseers while holding the office of commissioner, and could not legally be entitled to the compensation authorized by law for road overseers.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TAXATION AND REVENUE - Income Taxes: (1) Exemption of county employee or elective officer; (2) deductibility of campaign expenses.

Original

February 6, 1935

Hon. Elliott M. Dampf,
Prosecuting Attorney,
Cole County,
Jefferson City, Mo.

FILED
20

Dear Sir:

A request for an opinion has been received from you under date of January 21, 1935, such request being in the following terms:

> "Will you kindly give your opinion as to whether an employee or elective officer of the County must pay the State Income Tax.
>
> If said employee or elective officer of a county must pay said income tax, then is he allowed to deduct the amount paid in campaign expenses."

I

LIABILITY OF COUNTY EMPLOYEE OR ELECTIVE OFFICER TO PAY STATE INCOME TAX

R. S. Missouri, 1929, Section 10117, as amended by Laws of 1931, page 363, defines incomes (on which a tax is imposed by Section 10115, as amended by Laws of 1931, page 365) as follows:

> "Income shall include gains, profits, and earnings derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid; * * *"

Sections 10118, 10119, 10120 and 10122 provide for various exemptions and deductions, which impliedly exclude exemptions and deductions not named therein. The only provision in any of these sections which might bear on the question under consideration is paragraph 5 of Section 10119 which exempts "the compensation of public officers for public service where the taxation thereof would be repugnant to the constitution." However, it will be noted that it requires a constitutional repugnance to the tax on such an income to

make it exempt, and we have been unable to discover any such repugnance.

II

DEDUCTIBILITY OF CAMPAIGN EXPENSES OF COUNTY ELECTIVE OFFICER

The reasoning under paragraph I supra, is likewise applicable to the deductibility of campaign expenses, since such expenses are not specifically allowed as a deduction by any of the statutes aforesaid. Although the question of such deductibility has not been before the courts of this State, the problem has been raised in connection with Federal income taxes in at least two instances, in which it was ruled adversely to the tax-payer, and the similarity between the Missouri and the Federal income tax laws furnishes a persuasive analogy. In one instance Senator David A. Reed attempted to deduct amounts paid to campaign committees when he was a candidate for public office, but it was held by the Board of Tax Appeals that this was not a proper deduction under Section 214 (a) (1) of Revenue Act of 1921, 13 B.T.A. 513.

The Treasury Department has made a similar ruling, to the effect that a congressman cannot deduct campaign expenses, on the theory that they are personal expenses which are not deductible. (O.D. 864. C.B.June,1921,page 211).

In conclusion, it is our opinion that (1) the fact that income is received by an employee or elective officer of a county of this State for discharging the duties of such office, does not make such income exempt from taxation under the Missouri Income Tax Law, and (2) campaign expenses of such officer are not a proper deduction under the Missouri Income Tax Law.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

ROAD DISTRICTS:- Where land is removed from one district and
TAXATION: attached to another, the question as to which district taxes are payable for any year is determined by the fact as to which district the land was a part of at the time the levy was made.

February 6, 1935.

FILED
20

Mr. Elliott M. Dampf,
Prosecuting Attorney of Cole County,
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

> "On February 20th, 1934, you advised me by opinion that the County Court could dissolve part of one road district, and that another special road district could take in that part dissolved by the said County Court.
>
> "Would appreciate your advice now as to whether the part of the special road district that was dissolved, should pay their taxes for 1934 to the old district, or to the one that they were taken in."

You state that a part of one road district was removed from district called A, for convenience, and attached to district called B, for convenience, and inquire whether or not the taxes for 1934 on the land in question shall be payable to district A or district B.

It is a matter of common knowledge, of course, that the assessment of the land in question for the taxes for 1934 is made on June 1, 1933. That assessment is for the purpose of determining the valuation of the property upon which the levy is afterwards made. The levy is made after the assessment has been made and, according to Section 8067, R. S.Mo. 1929, the levy for the district in question is made as follows:

> "The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, general taxes on property taxable in the district, and shall also have power and authority

and be its duty to levy special taxes for the purpose of paying the interest on bonds when it falls due and to create a sinking fund sufficient to pay the principal of such bonds at maturity; and, whenever such commissioners shall, at any time between the first day of January and the first day of March of any year, file with the clerk of the county court a written statement that they have levied such tax, and stating the amount of the levy for each hundred dollars assessed valuation, the county clerk, in making out the tax books for such year shall charge all property taxable in such district with such tax, and such tax shall be collected as county taxes are collected. Whenever it shall be made to appear to the state auditor that the board of commissioners has failed or neglected to comply with this section in making provision for the payment of interest on and the principal of bonds issued it shall be the duty of the state auditor, on or before the first day of May, to perform and discharge the duties of the board of commissioners in so far as it is its duty to levy special taxes for the purpose of paying the interest on and the principal of bonds issued."

As we view the situation, it is not the time of making the assessment or valuation that determines to whom the taxes are due, but the taxes are to be determined by where the land is located at the time that the levy is made. The levy made by the district is the act which creates the indebtedness between the individual property owner and the district.

You do not state in your inquiry the time that the land in question was lost by the old district and acquired by the new district. Such fact being unknown, in order to solve your problem you must determine to which district the land belonged at the time the levy was actually made. If the land was part of district A at the time the levy was made by district A, then it is our opinion that the taxes for 1934 are payable to the old district. On the other hand, if the land in question was a part of district B at the time the levy was made by district B, then we conclude that the taxes for 1934 are payable to district B.

It is our opinion, therefore, that the answer to your inquiry depends upon the fact as to whether or not the land in question was a part of district A or district B at the time that the levy for the 1934 taxes was actually made. If it was a part of district A at the time of the actual levy, then we are of the opinion that the taxes go for the benefit of district A. On the other hand, if the land in question had been incorporated into and was a part of district B at the time that the levy was made for the 1934 taxes by district B, then the taxes on the land in question are payable to district B, or the new district.

Very truly yours,

FRANK W. HAYES,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

FWH:S

OATH: (Not necessary to uplift hand to swear
(or to make an affidavit
AFFIDAVIT: (Essential requirements of oath.

3-22

FILED
20

March 20, 1935

Honorable Elliott M. Dampf
Prosecuting Attorney Cole County
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of March 8, in which you request the opinion of this department upon the question therein submitted. Your letter is as follows:

> "Will you kindly give me your opinion as to whether it is necessary for a person to lift his hand and make oath to a statement before he can be prosecuted for making a false affidavit, or if it is merely necessary that he sign said affidavit in the presence of the notary public. The late cases in point are 330 Mo. 1195 lc and 327 Mo. 1199 lc."

Your question is, "whether it is necessary for a person to lift his hand and make oath to a statement before he can be prosecuted", and we presume you have reference to a prosecution under Section 3882 R. S. Mo. 1929, which is as follows:

> "Every person who shall willfully, corruptly and falsely, before any officer authorized to administer oaths, under oath or affirmation, voluntarily make any false certificate, affidavit or statement of any nature, for any purpose, shall be deemed guilty of a misdemeanor, and shall upon conviction be punished by imprisonment in the county jail not less

than six months, or by fine not less than five hundred dollars."

In the case of State v. Privitt 327 Mo. 1194, l. c. 1199, the Supreme Court said the following:

"As is said in 48 Corpus Juris,855, to constitute a valid oath there must be, in the presence of a person authorized to administer it, an unequivocal act by which affiant consciously takes upon himself the obligation of an oath. This declaration of Corpus Juris is a paraphrase of words used by the New York Court of Appeals in the case of O'Reilly v. People, 86 N. Y. 154, 40 Am. R. 525, 10 Abb.N. Cas. 53, in which it was held that the mere delivery of an affidavit, signed by the person presenting it to the officer for his certificate, without more, is not such an act as to constitute an oath. It is true that, by uniform decisions of our courts and by our statutes, no set formula is required to constitute an oath or to impose the obligation of an oath. Our statute, Section 1722, Revised Statutes 1929, provides that:

'In all cases in which an oath or affirmation is required or authorized by law, every person swearing, affirming or declaring, in whatever form, shall be deemed to have been lawfully sworn, and to be guilty of perjury for corruptly and falsely swearing, affirming or declaring, in the same manner as if he had sworn by laying his hand on the gospels and kissing them.'

But the statute itself clearly implies some form of oath or affirmation, some unequivocal act by which the affiant takes upon himself the obligation of an oath. * * * * *.

To the same effect as our statute, we read in 2 Corpus Juris, 337, that:
'Either oath or affirmation is sufficient. In fact no particular ceremony

> is necessary and it is only required that something be done in the presence of the officer which is understood by both the officer and the affiant to constitute the act of swearing.' "

And the Missouri Supreme Court, in State v. Tull 62 S. W. (2nd) 389, l. c. 391, said the following:

> "In the Privitt Case we said that 'by uniform decisions of our courts and by our statutes, no set formula is required to constitute an oath or to impose the obligation of an oath';and, quoting from 2 Corpus Juris, p.338, sec.49: '* * * No particular ceremony is necessary and it is only required that something be done in the presence of the officer which is understood by both the officer and the affiant to constitute the act of swearing.' There must be some unequivocal act by which the affiant consciously takes upon himself the obligation of an oath. 48 C. J. p. 855,sec.77,and see cases in note. But it need not be evidenced by any set formula. The Minnesota Supreme Court said: 'The particular formality with which an oath is administered has never been regarded in this state as of great importance. The essential thing is that the party taking the oath shall go through some declaration,or formality, before the officer which indicates to him that the applicant consciously asserts or affirms the truth of the fact to which he gives testimony.' * * * * * *"

A very clear and concise statement of the law of the necessary requirements in taking an oath is set forth in the case of McCain et al. v. Bonner 122 Ga. 842, l. c. 846, 51 S.E. 36, l. c. 38,

> "The mere handing to an officer authorized to administer oaths of an affidavit previously signed by one who is recited therein

as having been duly sworn,and in whose presence the officer signed the jurat without administering a formal oath,has been held not to amount to the administration of an oath. O'Reilly v. People, 86 N.Y.154, 40 Am.Rep. 525. In a transaction of this character there is no unequivocal and present declaration or act on the part of the affiant by which he consciously takes upon himself the obligation of an oath. If, however, the affiant, at the time of tendering the affidavit to the officer, uses language signifying that he consciously takes upon himself the obligation of an oath, and the officer so understands, and immediately signs the jurat,this will amount to such a concurrence of act and intention as will constitute a legal swearing. The acts of the officer and of the affiant must be concurrent,and must conclusively indicate that it was the purpose of the one to administer and the other to take the oath, in order to make a valid affidavit. When an affiant presents to the officer an affidavit previously signed by him, with the statement that he is familiar with its contents, that what is therein contained is true,and that he swears to the same, and the officer immediately, on the faith of such declaration,affixes his official signature to the jurat, this conduct would not only indicate that the affiant understood he was taking an oath, but also that the officer likewise so understood, and, by presently signing the jurat, evidenced his intention to administer an oath. It is not necessary that the oath administered should be formal. What the law requires is that 'there must be, in the presence of the officer, something done whereby the person to be bound consciously takes upon himself the obligation of an oath.' 2 Bish. Cr.Law, sec.1018. 'It is not essential * * * that affiant should hold up his hand and swear, in order to make his act an oath, but it is sufficient if both affiant and the officer understand that what is done is all that is necessary to complete the act of swearing."

And in the case of State v. Ruskin, 56 A. L. R. 403, 159 N. E. 568, quoting from 21 Ruling Case Law 257, the court said the following:

> "21 R. C. L. 257: 'To make a valid oath on the falsity of which perjury may be charged there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act, by which the affiant consciously takes on himself the obligation of an oath. The underlying principle evidently is that whenever the attention of the person who comes up to swear is called to the fact that the statement is not a mere asseveration, but must be sworn to, and in recognition of this he is asked to do some corporal act, and does it, this is a statement under oath - and this, without kissing any book, or raising his hand, or doing any religious act.' Ram v. King 51 Can. S. C. 392, 26 D. L. R. 267, Ann. Cas.1916A 494; Curry v. Rex, 48 Can. S. C. 532, 15 D. L.R. 347, Ann. Cas. 1914B, 591; State v. Day, 108 Minn. 121, 121 N. W. 611; 85 Am. Dec. 489, note; Cronk v. People, 131 Ill. 56, 22 N. E. 862."

CONCLUSION

It is, therefore, the opinion of this department that no particular form of administering an oath is necessary under the laws of Missouri, whereby one may be prosecuted for making a false affidavit, but there must be, in the presence of the officer, something done whereby the person to be bound consciously takes upon himself the obligation of an oath, and it is not absolutely essential that the affiant lift his hand. However, the

uplifting of the hand is formal enough to make an oath legal and binding.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:LC

CITIES OF THE THIRD CLASS: Chief of Police may attain authority of Constable to serve State process and collect constable fees in a particular case, but not generally so.

March 22, 1935. 3-21

FILED 20

Honorable Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

Your request for an opinion as of March 7, 1934, is as follows:

> "Will you kindly give me your opinion as to whether the Chief of Police of Jefferson City, as ex-officio constable, has the power and authority to serve state warrants and to make a return on the same, in criminal cases? Also whether he has the right to receive the fee on serving said warrants?

As to your request, there can be no doubt but that the Legislature was authorized to create the office of City Marshal, for cities of the first class for Missouri Constitution, and provide for his fees and compensation.

Article IX, Section 14, of the Missouri Constitution provides:

> "Except as otherwise directed by this Consitution, the General Assembly shall provide for the election or appointment of such other county, township and municipal officers as public convenience may require; and their terms of office and duties shall be prescribed by law; but no term of office shall exceed four years."

Section 6723 R. S. Mo. 1929, provides for the election of marshal and reads as follows:

> "The following officers shall be elected by the qualified voters of the city, and shall hold their offices for two years, and until their successors are duly elected and qualified, to-wit: A mayor, marshal, attorney, police judge, assessor, collector and treasurer. The attorney shall be a person learned in the law."

Thus we see that the office is a creation of the Legislature and as such all of the authority and power of the city marshal must be founded upon legislative act or necessarily incident to performing the duties of said office.

Article X, Section 20, of the Missouri Constitution provides:

> "The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town or other municipal corporation, shall be applied to the purposes for which they were obtained, or to the repayment of such debt or liability, and not otherwise."

In Givens v. Daviess County, 107 Mo. 603 l. c. 608; 17 S. W. 998, the Court said:

> "A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creation of law, and as an incident to the office."

In Lamar Township v. City of Lamar, 261 Mo. 171; 169 S. W. 12, l. c. 15, the Court said:

> "Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way

> they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. * * * * In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

Section 6752 R. S. Mo. 1929, makes the City Marshal the Chief of Police, and outlines some of his duties as follows:

> "The marshal shall be chief of police, and shall have power at all times to make or order an arrest with proper process, for any offense against the laws of the city, and keep the offender in the city prison or other proper place to prevent his escape, until a trial can be had before the proper officer, unless such offender shall give a good and sufficient bond for his appearance for trial. The marshal shall also have power to make arrests without process in all cases in which any offense against the laws of the city shall be committed in his presence. He shall collect all fines assessed in the police court, and pay the same into the city treasury."

Section 6757 R. S. Mo. gives him power to execute city warrants from the police judge and make him a consevator of the peace within the city limits, in the following language:

> "The marshal shall, in the discharge of his duty, be subject to the orders of the mayor only; the assistant marshal and policemen shall, in the discharge of their duties, be subject to the orders of the mayor

> and marshal only. The marshal assistant marshal and policemen shall have power to serve and execute all warrants, subpoenas, writs, or other process, issued by the police judge of the city, at any place within the limits of the county within which the city is located. The marshal, assistant marshal and all policemen of the city shall be consevators of the peace, and shall be active and vigilant in the preservation of good order within the city."

When the marshal finds occasion to be acting as ex-officio constable, then he has power to perform all duties which a constable could legally perform in the same premises. If the constable in the premises could "serve a state warrant and make a return on same," so could the marshal acting as ex-officio constable.

There can be no doubt but what a constable has statutory powers and duties in the premises because Section 11756 R. S. Mo. 1929, provides:

> "Constables may serve warrants, writs of attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties."

Section 6766 R. S. Mo. 1929, provides as follows:

> "The police judge shall be <u>ex-offico</u> a justice of the peace within the limits of the city, with jurisdiction as to crimes and misdemeanors, but shall have no jurisdiction to hear or determine civil matters. The marshal, or in his absence the assistant marshal or any regular policeman, shall be <u>ex-officio</u> a constable to wait upon the police judge when acting as a justice of the peace."

Section 6767 R. S. Mo. 1929, should be construed with Section 6766, supra, for it also provides a circumstance where the police judge must act as justice of the peace or call in a justice of the peace in which case it is also the duty of the marshal to act as ex-officio constable. If he prodeed with the case as a justice of the peace, then it becomes the duty of the marshal to wait on the Court as a constable. Said Section provides:

> "If, in the progress of any trial before the police judge, it shall appear that the accused ought to be put upon his trial for an offense against the criminal laws of the state and not cognizable before him as police judge, he shall immediately stop all further proceedings before him as police judge, and shall cause the complaint to be made before himself as a justice of the peace, or before some other justice of the peace, and the accused shall thereupon be proceeded against in the manner provided by general law. The police judge and marshal, when acting as justice of the peace and constable respectively, shall be entitled to receive therefor the same fees allowed by law for such services."

CONCLUSION.

It is the opinion of this office that the Chief of Police of Jefferson City, as ex-officio constable, has the power within the limits of Cole County to serve State warrants and make a return on the same. He is not to considerhimself at all times with powers of an ex-officio constable, because the Statute limits this ex-officio capacity to serve and return State warrants to where he is waiting on the police judge when the police judge is acting as a justice of the peace. The Statutes provide for only one occasion

where the police judge, by virtue of said office, can act as a justice of the peace, and concurrent with that occasion goes the right of the Chief of Police to act with powers of a constable. If the Legislature intended the Chief of Police to be ex-officio constable at all times, ~~they~~ it would have said so.

It is our further opinion that where the Chief of Police has legally performed his office as ex-officio constable, as allowed by Statute, he is in that case entitled to the same fee for serving and returning said warrant as a constable would have been entitled had the charge been filed before a Justice of the Peace in fact. The Legislature has so provided.

Respectfully submitted

WM. ORR SAWYERS;
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

LOTTERY - Giving away house and lot by chance to purchasers of other vacant lots is a lottery.

4-3

April 2, 1935.

FILED 20

Honorable Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

We have your request of March 30, 1935 for an opinion, which request is as follows:

"Will you please furnish this office with an opinion as whether or not the following proposition would be in violation of our laws governing gambling and lotteries.

"A person owns thirty nine lots, all of which are surveyed and platted showing size and location so that same may be viewed by the purchasers, the lot being numbered as shown on the plat thereof. Upon one lot there is a residence building, which said lot is not to be sold, but is to be given to one of the purchasers owning one of the lots sold. The lots the purchasers will receive a deed to, will be determined by a drawing. The purchaser of each lot will be given a contract and warranty deed to one of the lots sold and the particular lot to be determined by drawing a number corresponding to the lot numbered as shown on plat. After the lots are drawn, each and every one of the purchasers will be entitled to draw on the lot upon which the residence is situated without further cost.

The lots are to be sold for three hundred dollars each, within a certain definite time, and the purchased money together with the contract and deed is to be held in escrow in one of our banks. If the full number of lots to be sold are not disposed of within this definite time, as may be set out in the contract, the purchaser's money is to returned to him upon his return of the contract to the seller or his agent. It is to be set out in the contracts that a certain number of these lots are to be sold at a certain price within a certain time, and that the purchaser and holder of one or more lots under the contract will have a chance to draw the lot upon which the residence is situated, the drawing to be held publicly, and at a certain time and place."

In answer to your letter, we refer you to Section 4314, R. S. Mo. 1929, which reads as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less

than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

There are three essential elements necessary to constitute an act a felony under the above statute: (1) prize, (2) chance, (3) consideration. State v. Emmerson, 1 S. W. (2d) 109.

From your letter, it is apparent that the prize is a lot with a residence building which is to be given away to the holder of the lucky numbered ticket; that the chance is shown by the fact that only one holder out of the lots to be sold will be the one to receive the lot with the residence building on it, and the consideration is purchase of a lot for $300.00, which entitled the party to a drawing for the prize.

In this connection, we are enclosing herewith a copy of an opinion holding that the "Bank Night", as conducted by theaters, is a violation of the lottery law, that certain "gift enterprises" constitute a lottery, that the operation of various "sportsman machines", "whiffle boards", and other similar devices are forms of gambling prohibited under the above lottery statute.

It is, therefore, the opinion of this office that the purported lottery as outlined in your letter is in violation of the felony statute above cited.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

COUNTY BOARD OF EQUALIZATION: Can only assess omitted property for the current year.

4-10

April 9, 1935.

FILED 20

Hon. Barker Davis
Prosecuting Attorney
Lewis County
Canton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office, which reads as follows:

> "Will you please furnish me with opinion as to whether county board of equalization can, under Section 9816, Revised Statutes 1929, make assessment of additional property for five years back or just for the current year.
>
> "My board will be in session again the first of next week and I will greatly appreciate hearing from you by next Tuesday if you can conveniently get me answer by that time."

Section 9816, R. S. Mo. 1929, reads in part as follows:

> "The county board of equalization, at its annual meeting in each year, in addition to the powers now conferred by law, shall have authority to assess and equalize the value of any property that may have been omitted from the assessor's books, then under examination by said board, and in case said board shall add any property, real or personal, to said assessor's books, it shall cause notice

> in writing to be served upon the owner of such property, stating the kind and class of property and the value fixed thereon by said board, and naming the time and place, not less than five days thereafter, when and where such owner may appear before said board and show cause why said assessment should not be made. ****."

The Supreme Court, in the case of State ex rel. v. Pulliam, 233 Mo. 229, loc. cit. page 234, in passing upon the identical question about which you asked, said:

> "III. The attempted addition of property for 1904 was invalid for the reason that neither in the Act of 1903, nor elsewhere, is there power given to the board of equalization to add for assessment property omitted for any year prior to the then current year. The Act of 1903 provides that the board shall have power to 'assess and equalize the value of any property that may have been omitted from the assessor's books then under examination by said board.' This plainly refers to the books for the current year only, as they are the only ones 'under examination by said board.'"

In view of the above, it is our opinion that the county board of equalization, under the provisions of Section 9816, supra, can only assess property that may have been omitted from the assessor's books for the current year and cannot assess said omitted property for prior years.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/afj

COUNTY BUDGET LAW: (1) An officer may not exceed amount estimated for office supplies; (2) Auditing of an account and allowing of same by county court does not constitute a judgment and does not entitle Clerk to a fee of 30¢ for entering same.

5-7

April 24, 1935.

FILED
20

Hon. Elliott M. Dampf,
Prosecuting Attorney,
Cole County,
Jefferson City, Mo.

Dear Sir:

This department is in receipt of your request for an opinion dated March 28, 1935, same being as follows:

> "Would like an opinion regarding the Budget Law of the County in 'Laws of Missouri 1933'.
>
> As an example, the County Clerk places the amount of $500.00 for his office for supplies. Before the end of the year this amount was consumed and it became absolutely necessary that we have a record book. Would he be allowed to go over his budget to purchase same?
>
> Would also appreciate an opinion as to what constitutes a judgment in a County Court, or when does the County Court act in a judiciary capacity? Would the allowing of an account by the County Court be considered a judgment?
>
> Section 11781, R.S. 1929 states a fee for County Clerk as follows: 'For entering every judgment.....30¢'"

A County officer may not exceed the amount estimated for office supplies

In the Classification of Expenditures, under Section 2 of the County Budget Act, Class 4 provides as follows:

> "The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under Class six."

If the record book in question had been included in the original estimate of the county clerk, it would have come within the terms of this class.

Section 3 of the County Budget Act (Laws of Mo. 1933, p. 342) contains the provision, "also he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under Class 4 and 6." Section 8 of the County Budget Act (page 345) makes it the duty of the county court to go over and revise the estimate and amend the same in such a way as to promote efficiency and economy in county government. The county court also has the right to alter or change any estimate and give the officer the opportunity to be heard. It then becomes the duty of the county court to forthwith enter the estimate on the record of the county court and to approve the same.

The section above referred to does not contain any provision for changing or altering the budget to meet the condition such as you present after the estimate is on file and the copy is sent by registered mail to the State Auditor.

Section 6 of the County Budget Act (Laws of Mo. 1933 p. 344) contains the provision that "Not later than the 15th day of January of each year, every officer who expects to claim pay for services or to receive supplies to be paid for from county funds shall submit to the county clerk the information hereinafter specified". Section 7 sets forth the form to be executed by the officer, and contains this provision: "Each item of supplies shall be listed separately, giving quantity and estimated unit price."

As stated before, there is no provision in the County Budget Act for remedying an error made or for failure to properly estimate the amount of supplies needed. It is the duty of the county court to sacredly preserve the priority of the five classes, the purpose of the whole act being to promote efficiency and economy in county government. Such provision being absent, we are therefore of the opinion that the county clerk cannot exceed the amount estimated in his budget. This conclusion is further strengthened by the provision contained in Section 8 of the County Budget Act (page 346), which is as follows:

> "Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

II.

<u>The auditing of an account and allowing of the same by the county court does not constitute a judgment and would not entitle the County Clerk to a fee of 30¢ for the entering of same.</u>

As to your question regarding what constitutes a judgment of the county court, we must consider what the Supreme Court has said on this subject. In the case of Spindle v. Hyde, 247 Mo. 32, the Court said (l.c. 52):

> " * * *a judgment is but the conclusion in a syllogism having for its major and minor premises the issues raised by the pleadings and the proofs thereon. A judgment is the sentence of the law upon the record. * * * "

In the case of Orchard v. Wright-Dalton-Bell Anchor Store Co., 225 Mo. 414, the Court said:

> "* * * A 'judgment' is the decision

> or sentence and law pronounced by a court or other competent tribunal on the matter contained in the record. It is the final consideration and determination of a court of competent jurisdiction on the matters submitted to it. It includes an order of the probate court on an administrator to pay over a sum of money, or to sell property belonging to the estate to pay debts."

And again, in the case of McManus v. Muench, 217 Mo. 124, the Court said: "A judgment is the sentence of the law upon the record; the application of the law to the facts and pleadings."

Sec. 11781, R.S. Mo. 1929, being the general section under which the county clerk is entitled to fees for his office says among other things, "for entering every judgment...$.30." You desire to know whether or not the auditing and allowing of accounts constitutes a judgment such as would entitle a county clerk to a fee of $.30. Section 12161, R.S. Mo. 1929 sets out the duty of the county clerk with reference to accounts, and is as follows:

> "It shall be the duty of the clerk of the county court: First, to keep regular accounts between the treasurer and the county, charging him therein with all moneys paid into the treasury, and crediting him with the amount he may have disbursed between the periods of his respective settlements with the court; second, to keep just accounts between the county and all persons, bodies politic and corporate, chargeable with moneys payable into the county treasury, or that may become entitled to receive moneys therefrom; third, to file and preserve in his office all accounts, vouchers and other papers pertaining to the settlement of any account to which the county shall be a party, copies whereof, certified under the hand and seal of the clerk, shall be admitted in evidence in all courts of law and elsewhere; fourth, to issue warrants on the treasury for all moneys ordered to be paid by the court, keep an abstract thereof, present the same to the county court at every regular term, balance and exhibit the accounts kept by him as often as required by the court, and keep his books and papers at all times ready for the inspection

of the same, or any judge thereof."

There is no provision in the above section for any fees for the county clerk in carrying out his duties under said section, nor does the general section, 11781, R.S. Mo. 1929 contain any provision for the payment of fees to the county clerk for carrying out his duties under Section 12161; therefore, as stated in your letter, the only method by which the county clerk might charge a fee insofar as accounts are concerned, is to treat the same as a judgment, which we will next consider.

In the case of Sanitary Company v. Laclede County, 307 Mo. 10, the Court, in discussing the function of the county court in auditing and allowing claims, said (l.c.16):

> "Defendant apparently contends that Section 2589 has made such provision otherwise. The function of the county court is merely to audit and settle claims and demands against the county. (Section 2574) A claim against a county is not technically a suit at all. (Gammon v. Lafayette County, supra) If a claim is presented to the county court and allowed, well and good. If it is rejected, the claimant may appeal to the circuit court. There is no language in Section 2589 which may fairly be construed as constituting rejection of a demand against a county by the county court a final adjudication of defendant's right to recover against the county."

The same subject matter is treated in the case of State ex rel v. Diemer, 255 Mo. 336, wherein the Court said (l.c. 351):

> "In the allowance of claims against a county or in settling with county officers, county courts do not act so strictly as a court, or in the performance of a judicial function, that their allowance or disallowance of a claim is res adjudicata. Something of substance might be said in favor of the contrary theory,

> but at an early day this court considered our statutes and announced the doctrine, on the reason of the thing and because of a good public policy, that county courts in the allowance of claims, as in settling with officers, acted as a mere public board of audit, as ministerial, administrative or fiscal agents for the county and not strictly as a court, hence we have uniformly refused to apply the doctrine of res adjudicata to their orders allowing or disallowing claims against the county, or to their settlements with county officers. That doctrine has always been adhered to and must be accepted as settled."

One of the earlier cases on this subject is that of Reppy v. Jefferson County, 47 Mo. 66. In that case the Court said (l.c. 68):

> "Defendant's counsel first contend that the rejection of the claim is a judgment; that the plaintiff is concluded by it, and cannot prosecute in the Circuit Court. This claim is wholly untenable. The County Court, in auditing claims against the county, is but its fiscal agent, and not a judicial body. It represents the county, and in the numerous prosecutions against it, from the earliest times, it has never been held that a rejected claim was res adjudicata. (Phelps County v. Bishop, 46 Mo. 68). The idea that a disallowance of a claim operated as a judgment against the claimant has arisen in part from the fact that an appeal is allowed from such action. This, however, is but a statutory mode of bringing the county into the Circuit Court without original process, and the claimant may avail himself of it or commence suit."

CONCLUSION

The decisions quoted above appear to be unanimous to the effect that the county court, in auditing and allowing an account, acts as a ministerial, administrative or fiscal agent for the county and not strictly as a court; hence, it is the opinion of this department that the auditing and allowing of an account by the county court does not constitute a judgment for which the clerk is entitled to a fee of $.30.

Referring to the definitions as contained in the first part of this opinion in regard to judgments, it is our opinion that to constitute a judgment in the county court, it would be necessary that pleadings or petitions be filed in conformity with some statute, or an action be brought in the county court wherein it would become the duty of the county court to pass judgment on same. Then and in that event, the findings would constitute a judgment for which the clerk would be entitled to the fee of $.30.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

COUNTY FUNDS: Transferring of county funds from one fund to another

June 27, 1935

FILED 20

Hon. Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter dated June 24, 1935 as follows:

> "I would like to know whether a county court can transfer the money in the sinking fund to another fund, or whether the money can be used for another purpose, such as the building of a new jail."

Your letter does not contain sufficient facts upon which we can intelligently base an opinion. A request for an opinion should contain facts so that nothing is assumed when answering same. Hence, we only answer your letter by citing you the applicable statutes and court decisions on the transferring of from one fund to another, as you have not apprised us as to what sinking fund it is intended to transfer the money from, or whether or not the money in said sinking fund is no longer needed for the purpose for which it was raised, so that we can not assume these two major premises in writing this opinion.

There are two statutes in Missouri that bear on the question of transferring of funds and same being in pari materia, to-wit, Sections 12167 and 12168 R. S. Mo. 1929.

Section 12167, supra, provides as follows:

"Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose fow which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

Section 12168, supra, provides as follows:

"Nothing in the preceding section shall be construed to authorize any county court to transfer or consolidate any funds not otherwise provided for by law, excepting balances of funds of which the objects of their creation are and have been fully satisfied."

The above sections were before the Supreme Court (en banc) for consideration on a question similar to the one contained in your request in the case of Decker v. Diemer 229 Mo. 296. We quote from said decision beginning at page 335:

"Learned counsel for appellants maintain that there were only three ways to create a fund for building a courthouse - one, a sale of bonds voted by the people; another, by direct tax voted by the people - both as provided by the Constitution; the other, a petition by the prosecuting attorney and the county court to the circuit court and an order by that court adjudging the levy necessary and lawful under the Cottey Act. Contra, counsel for the respondents maintain that there is still another legal way, viz., under the provisions of Revised Statutes

1899, sections 6723 to 6729 inclusive, supra,(these two sections 12167-12168, respectively, R. S. Mo. 1929) the provisions of which we have hereinbefore set forth. They say that if the county has the money it need not borrow or levy special taxes by a vote of the people, but may act sensibly by using its funds on hand for such legitimate county purpose. At this point counsel cross swords on another proposition, viz.: Respondents go a step further and say that surpluses, not used or needed for the purpose for which the funds were apportioned and appropriated by the county court from year to year, may be gathered into a courthouse fund and such aggregation may be construed as the 'sufficient funds in the county treasury for that purpose' mentioned in section 6723. Counsel for appellants deny that. They say that such funds are 'sacred' and must be carried forward from year to year to be used as originally appropriated so that the so-called surplus should be used to reduce the current tax levy for county purposes and not for building a courthouse. In this connection by virtue of diverse interpretations, both sides confidently rely on the statutes relating to the transfer of funds,* * * *"

* *

"We shall not write the law so that county courts may make excessive levies for county purposes for the very purpose of evading the statutes and creating a surplus to build a courthouse,thereby, under the seeming forms of law, evading the spirit and intent of the law. We have already disposed of the features of this case in that particular, and shall proceed to determine the question now up by assuming that the levies were honestly made from year to year, and that the surpluses were honestly accumulated as indicated.

The bald question then is: May a county court transfer a surplus and divert it from a fund, having a designated and given purpose, to another legitimate county purpose, by force and reason of the satisfaction of the original use or purpose. We answer that question in the affirmative. * * * *."

* *

"We are further of the opinion that when all warrants and debts properly chargeable to a fund in any one year are paid and provided for, the residue of such fund is a 'surplus' within the purview of the transfer sections. Is not the building of a courthouse as legitimate as any other county purpose? Are bonds so desirable that the people of a Missouri county must bond themselves when bonds are not necessary, or go without a courthouse? Must they levy special taxes when they have the means in the treasury to avoid such special levy? Running like a thread through the statutes is the idea of as low a rate of taxation as is compatible with the welfare of the people, and the other idea that the county's business must be done for cash. All these ideas are conserved by the holding made."

See also State ex rel.v.Appleby 136 Mo.408, Holloway v. Howell County 240 Mo. 601.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JLH:LC

INTOXICATING LIQUOR: The Liquor Control Act does not prohibit the sale of set-ups.

7-17

July 16, 1935.

FILE 20

Honorable Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "Will you kindly advise the undersigned if it is a violation of the law for a person holding a 5% beer license to serve set-ups on the premises used for selling 5% beer."

There is no provision under the Liquor Control Act prohibiting the serving of set-ups on the premises covered by licenses to sell malt liquor not in excess of 5% by weight. However, the Supervisor of Liquor Control may, under the Act, make rules and regulations governing the sale of set-ups used in the preparation of drinks.

It is the opinion of this Department that it would not be a violation of the Liquor Control Act for a person to serve set-ups on the premises licensed for the sale of 5% beer.

Respectfully submitted.

APPROVED:

RUSSELL C. STONE
Assistant Attorney General.

ROY McKITTRICK
Attorney General.

RCS:H

SHERIFFS--PROBATE COURTS--JURORS: Duty of Sheriff to attend Probate Court and certain fees payable to the Sheriff and Jurors for services rendered.

8-14

August 12, 1935.

FILED 20

Honorable Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

Your request for an opinion dated July 29th, is as follows:

> "Will you please furnish this office with an opinion as to what pay a juror is entitled in serving on a jury in the Probate Court either in a hearing on a demand or an insanity case.
>
> "Will you also furnish an opinion on the fees allowed the Sheriff for serving jurors in the Probate Court; also for ppening Probate Court.
>
> "Please bear in mind that although Probate Court has a regular term, it does not have a regular jury. The juries are selected as needed. The regular term of the Probate Court begins on the second Monday of February, May, August and November, and as a rule, nun for fifteen or twenty days. Is the Sheriff entitled to pay for opening Court each day during the regular term, if so, how much?

The Probate Court in Missouri is a Court of Record, for Section 2045, R. S. Mo. 1929, provides:

> "A probate court, which shall be a court ofrecord, and consists of one judge, is hereby established in the city of St. Louis, and in every county in this state."

Where a demand in Probate Court is being pressed against an estate for allowances, it is within the power of either party to demand a jury trial for Section 200 R. S. Mo. 1929, provides:

> "If the demand or set-off do not exceed twenty dollars, or if neither party require a jury, the court may decide on the validity of such demand."

Section 201, R. S. Mo. 1929, also provides:

> "If the demand or set-off exceed twenty dollars, and either party require a jury, one shall be immediately summoned, and the trial shall be conducted in a summary manner, without form of pleading."

The Probate Court has power to order the sheriff to summons a jury, for Section 8772 R. S. Mo. 1929, provides:

> "All courts, other than those heretofore named, in which juries may be required for the trial of any cause, may order the sheriff or other proper officer to summon a sufficient number of jurors as occasion may require."

We fail to find any Statute making it the sheriff's duty to open Probate Court. You state that there are four terms of Probate Court in each year, and it is the statutory duty of the sheriff to act in attendance, open all Courts of Record at every term thereof. Section 11518 R. S. Mo. 1929, provides in part as follows:

> "* * * *he shall attend upon all courts of record at every term, * * * *."

Again in Section 1870 R. S. Mo. 1929, the Legislature provided:

> "The several sheriffs shall attend each court held in their counties,

> except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

Where a sanity hearing in Probate Court is being conducted, it is the duty of the Probate Court to order a jury when requested, and Section 448 R. S. Mo. 1929, provides:

> "If information in writing, verified by the informant on his best information and belief, be given to the Probate court that any person in its county is an idiot, lunatic or person of unsound mind, and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a jury; Provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

In the case of Gammon v. Lafayette County, 76 Mo. 675, l. c. 676, the Supreme Court said:

> "The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for service he is required to perform as a public officer, he has no claim upon the State for compensation for such service."

The sheriff's fees for attending at every term of Probate Court, pursuant to the law requiring him to attend, are found in Section 11789 R. S. Mo. 1929, which provides in part:

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day. . . . . $3.00."

The jurors' fees for serving on a jury in Probate Court is found in Section 11797 R. S. Mo. 1929, which provides in part:

"For each person summoned, attending and reporting to any court of record, per day, except as otherwise provided by law. . . . . $1.00."

The Sheriff's fee for summoning a jury in Probate Court is found in Section 11789 R. S. Mo. 1929, which provided in part:

"For summoning a standing jury. .$8.40."

CONCLUSION.

The Probate Court in Missouri is a Court of Record with jurisdiction over Jury Trials in demand cases and in insanity hearings. The parties have a statutory right to present their cause to a jury. It is the Sheriff's duty to summons a jury when ordered by the Court, and to attend at each term of Probate Court and also to execute all orders of said Court except where the Statutes have directed otherwise. Those who render statutory service to the Probate Court, such as serving on a jury, serving the summons on prospective jurors, attending the terms of Court and executing the orders of the Court are duty bound to perform their statutory services. For their services they are entitled only to such fees as the Legislature has provided.

Any person summoned attending and reporting for jury service in Probate Court is entitled to the per diem fee of $1.00.

The sheriff's fees for attending each term of Probate Court is $3.00 per day for every day his attendance is re-

quired and service rendered. We cannot find where the Legislature has provided the sheriff a fee for opening Probate Court, as stated in your request.

The sheriff's fee for summoning a standing jury in Probate Court is $8.40.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

BOARD OF BARBER EXAMINERS: May employ ministerial assistants.

g. 210

August 22, 1935.

FILED
20

Hon. J. Frank Davis, President
Barbers' State Board of Examiners
618 R. A. Long Building
Kansas City, Missouri

Dear Mr. Davis:

Acknowledgment is made of your oral request for an opinion of this office relative to the power of the Board to employ assistants so as to make possible the enforcement by the Board of Chapter 103 R. S. Missouri 1929. You called particular attention to the rules and regulations which have been promulgated by the Board with the approval of the State Board of Health, consisting of some fourteen rules, directed to the maintenance of sanitary conditions in barber shops, having in view the elimination as far as possible of contagious and infectious diseases. You have also directed attention to House Bill 177 adopted by the 58th General Assembly and approved by the Governor to become affective August 27, 1935. This House Bill is a reenactment of Section 13524, eliminating the proviso heretofore attached to that section and reading:

> "Provided this chapter shall not apply to cities or towns in this state which now have or hereafter may have a population of less than five thousand inhabitants."

It is very apparent that by the elimination of this proviso this Chapter has become general and will be effective throughout the State of Missouri in every village, town and city, placing barbers in some eleven hundred additional communities under the jurisdiction of the Board. Having these preliminary facts in mind we shall direct our attention to the solution of the question.

An examination of Chapter 103 reveals that there is no specific statutory authority for the hiring of any deputies

and assistants or employees of any kind or character other than one stenographer whose salary shall be One Hundred Dollars per month. Section 13524.

This being the case we must turn to the general provisions of this act to determine if possible whether or not the duties placed upon the Board are such as may reasonably require the employment of assistants. Section 13523 provides in part:

> "A board of examiners, to consist of three persons, citizens of this state for at least three years prior to their appointment, is hereby created to carry out the purposes and to enforce the provisions of this chapter.* * * * Said board shall, with the approval of the state board of health, prescribe such sanitary rules as it may deem necessary, with particular reference to the precautions necessary to be employed to prevent the creating and spreading of infectious or contagious diseases. A copy of such rules shall be furnished each person to whom a certificate of registration or permit is granted.* * *"

Section 13534 provides that it shall be a misdemeanor to violate any provision of the Chapter "and the board shall proceed against all such persons."

Generally speaking, this Chapter makes it unlawful to follow the occupation of barber in this State wihhout a certificate of registration. Section 13522.

It is required that four public examinations be held each year after due newspaper notice. Section 13526.

The Board is required to collect the sum of Two Dollars per year from each barber practicing his occupation upon application duly made. Section 13527.

Section 13528 prescribes the qualifications of applicants for examination and requires the Board to examine on designated subjects and admit those qualifying.

The Board is required to keep a register of all apprentices and to license those barber schools which are qualified. Section 13529.

The Board must furnish certificate of registration to all those entitled thereto which must be kept in the place of business. Section 13530.

The Board is authorized to revoke certificates of registration upon the conditions enumerated. Section 13532.

Thus we see many duties are imposed upon the Board which is composed of three members. They are required to enforce the rules and regulations and the statutory provisions respecting the operations of barbers. It would appear that without question this is a super human assignment for three men. The Legislature placing these numerous and varied duties must have realized the impossibility of performance solely through the activities of the members of the Board. Assistance of some kind or character is an absolute necessity for the efficient administration of the law. While it is true that the discretionary functions of the Board such, as the admitting of new practitioners to registration and the revocation of the certificates for cause may not be delegated to others, still that is but a small portion of the duties which are placed upon the board by this law, and it is a recognized rule of law that ministerial duties may be delegated to others.

In the case of State ex rel. Bybee vs. Hackmann, 207 S. W. 64, the Supreme Court En Banc had for determination the authority of the State Board of Equalization to employ a stenographer to assist them in the performing of their statutory duties. In this case the Court in authorizing the employing and paying of such assistants stated, l. c. 65:

> "Has the state board of equalization authority under the law to employ a stenographer at the expense of the state? If such board of equalization (hereinafter, for brevity, called simply the board) has any such authority, this authority must be bottomed on some statute. For it is fundamental that no officer in this state can pay out the money of the state, except pursuant to statutory authority authorizing and warranting such payment. Lamar Tp. vs. Lamar, 261 Mo. 171, 169 S. W. 12, Ann. Cas. 1918D, 740. But it is also well-settled, if not fundamental, law that, whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual is conferred by implication. Hannibal, etc., Railroad v. County Court, 36 Mo. 303; Walker v. Linn Co., 74 Mo. 650; Sheidley v. Lynch, 95 Mo. 487, 8 S. W. 434.
>
> So much being true, it is urged that, since the statute which defines the duties of the board provides that it may 'take all evidence it may deem necessary,' it follows by necessary implication that a stenographer may be employed to take and transcribe the evidence which the board deems necessary to be taken. We think this contention must be sustained," * * *

This ruling is affirmed in the case of State ex rel. Meals vs. Hackman, 217 S. W. 271.

Another application of this rule is found in the case of Heman Construction Company vs. Loevy, 179 Mo. 455. In this case the plaintiff had instituted action on a special tax bill which the plaintiff contended was void because the President of Public Works did not personally compute and levy the tax. The ordinance and charter provisions provided:

> "the president of the Board of Public Improvements shall compute the cost thereof and levy and assess the same as a special tax against each lot of ground chargeable therewith* * *and shall make out and certify to the Comptroller, on behalf of the contractor, bills of such costs and assessment accordingly,* * *".

The President of the Board did not make the calculations on which the tax bill in question was made out, did not know the cost of the work or the frontage to be taxed, did not figure out how much the Defendant's property was liable for, but all of such work was done by one of his appointees, l. c. 461. The Court stated l. c. 467:

> "The work that was done by the clerk was not an unlawful delegation of power of the president to the clerk. The work done by the clerk consisted of the physical act of writing the tax bill, and the doing of a very simple sum in arithmetic. The sum required to be done was this: the cost of the work amounting to $19,328.65 was to be distributed against each lot of property abutting the improvement in the proportion that the frontage of each lot bore to the total frontage of all the property abutting the improvement. The ordinance itself prescribed that the cost should be so distributed. The total frontage of all the property abutting the improvement was 4932.57 feet and the total frontage of the defendant's property was 32.50 feet. Hence the sum to be done was what is

$$\frac{32.50}{4932.57} \text{ of } \$19,328.65?$$

> Any school boy could do that sum. When the clerk did the figuring and wrote out the result on a sheet of paper, it did not constitute a special tax bill. But the

instant the president of the board signed his name to the paper, it became a special tax bill, and everything written above his name became his official act, no matter who had written it.

In the very nature of things this must be true, especially as to an office like that of president of the Board of Public Improvements in a large city like St. Louis, where, in addition to his other manifold duties, he has to issue annually more special tax bills than he could write out by himself. To illustrate: In addition to all improvement tax bills, section 29 of article 6 of the city charter provides for sprinkling all the streets of St. Louis, and assessing the cost thereof against all property fronting or bordering on the streets sprinkled, in the proportion that each lot bears to the total frontage of all lots that border upon the streets sprinkled. Practically this requires a special tax bill to be issued every year against every lot in the city. It is apparent that no officer could reasonably be expected to compute, assess and levy and make out all the tax bills that are necessary for this purpose alone, even if he had no other duties to perform. The framers of the law knew no man could do all such work personally, and they must have intended a sensible and rational and practical construction to be placed upon the law, and to have anticipated that the courts could not follow the letter of the law, if it madd the law impossible of execution, but would construe the law according to its spirit and purpose."

So in the instant case the framers of the Barber Board Act knew that three men could not do all of the work required of them personally, and they must have intended that a sensible and rational construction be placed upon the act. Especially must this be true in view of the recent enactment of the 58th General Assembly greatly extending the duties of the members of the board in increasing the scope of their work.

While we believe that under the foregoing authorities we may correctly reach the conclusion that the legislature intended that the Board of Barber Examiners employ such assistants as is necessary, we believe that there are additional reasons for our view of the legislative intention.

The first appropriation made to the Board of Barber Examiners was made by the 53rd General Assembly as found at page 44, Laws of Missouri 1925. This appropriation reads as follows:

> "There is hereby appropriated out of the state treasury, chargeable to the moneys collected by the state board of barber examiners the sum of twenty-four thousand ($24,000.00) dollars to defray the expenses of salaries of the members of the board, the pay of deputies, the pay of one stenographer at a salary of $100.00 per month, traveling expenses, rent, office expense and all other expense incident to the enforcement of the law relating to the inspection of barbers, for the years 1925 and 1926."

Every year thereafter the appropriation to the Board of Barber Examiners has included an item for deputy barber examiners. For example see Laws of Missouri 1929, page 30, Laws of Missouri 1931, page 117, Laws of Missouri 1933, page 92. It is to be noted that the 1933 legislature appropriated but $8.550.00 for the payment of per diem of the board members, necessary employees, stenographers and deputy barber examiners.

However, in view of the expansion of the jurisdiction of the Board of Barber Examiners the 58th General Assembly appropriated $29,000.00 "for the per diem of the board members and other necessary employees and the salaries of stenographer and deputy barber examiners." This figure was reduced by the Governor to $24,000.00.

This is substantial evidence that the Legislature realized the additional duties placed upon the Board by the change of the act in 1935, making provision for the payment of additional employees which would be required for the efficient enforcement of the Act of the Board of Barber Examiners. It is of course axiomatic that legislative construction is persuasive in the interpretation of any substantive enactment and we believe that the legislature has plainly indicated that this act is to be given a reasonable and practical interpretation in view of the duties imposed, and that such interpretation permits and authorizes the employment by the Board of Barber Examiners of a sufficent number of employees to efficiently carry on the duties imposed.

CONCLUSION.

It is therefore the opinion of this office that the Board of Barber Examiners is authorized and empowered to employ a sufficient number of ministerial assistants to enable the Board to efficiently and economically enforce the provisions of Chapter 103 R. S. Missouri 1929.

Respectfully submitted

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
Acting Attorney General

HGW:MM

SALES TAX: When country clubs serve rooms, meals and drinks strictly to their members and not to the general public, such sales are not taxable if the club itself conducts the selling of the rooms, meals and drinks; if same are sold in the name of the club by private individuals for profit, such sales are taxable.

September 11, 1935

FILED
20

Honorable Joseph T. Davis
Attorney at Law
Boatmen's Bank Building
St. Louis, Missouri

Dear Sir:

This department is in recept of your letter of August 28 requesting an opinion as to whether or not the Sales Tax Act, which became effective on August 27, 1935, applies to private country clubs. The second paragraph of your letter, which contains your precise question is as follows:

> "The strictly private country clubs located in St. Louis County are organized under the Pro Forma Decree Statute of this State, or are voluntary trusts. All of these clubs are operated for the social and athletic benefits of members, without gain, benefit or advantage of a financial, economic or pecuniary profit. The club does not furnish or sell any of its services, rooms, meals or drinks to the public, and is in no wise engaged in any business in which the public can participate or be served. All of its privileges and facilities are confined exclusively to its regular, subscribing and bona fide members, in which no non-member can participate except as a guest of such member, and even then cannot participate except on the account of such member. In other words, a non-member of such a club cannot purchase any rights, privileges, services, meals or drinks in or upon the premises of such club for any consideration whatsoever."

We note you refer to the fact that most country clubs are organized under a Pro Forma Decree and state that "all of these

clubs are operated for the social and athletic benefits of members, without gain, benefit or advantage of a financial, economic or pecuniary profit." Sec. 1 of the Sales Tax Act, subsection (c) (Laws of Mo. 1935, p. 413-414) defines "business" as follows:

> "'Business', includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect and the classification of which business is of such character as to be subject to the terms of this Act. The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitue engaging in business, within the meaning of this act."

We interpret the above section to mean that it is not an essential element that the business so engaged in be organized for gain, benefit or advantage in such a manner as to profit financially or economically, or that a pecuniary profit be the object. On the other hand, if the business be not organized for the purpose of gain or profit financially but a benefit or advantage be the object or the result of the organization, then, we construe such business to be within the terms of the Act.

Sec. 1, subsection (a) of the Act (Laws of Mo. 1935, p. 413) defines "person" as follows:

> "'Person' includes any individual, firm, co-partnership, joint adventure, association, corporations, municipal or private, estate, trust, business trust, receiver, syndicate or any other group or comination acting as a unit, and the plural as well as the singular number."

It is our opinion that the words "or any other group or combination acting as a unit" cover country clubs and other organizations organized by a Pro Forma Decree.

Having determined that private country clubs come within the term "business", we shall next consider whether or not the Act imposing the equivalent of 1% sales tax actually imposes the same on private country clubs. Sec. 2, subsection (i) (Laws of Mo. 1935, p. 416) provides:

> "A tax equivalent to one per cent. (1%) of the amount of sales or charges for all rooms, meals and drinks furnished at any hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist cabin, tourist camp or other place in which rooms, meals or drinks are regularly served to the public."

Section 2 of the Act places a tax equivalent to 1% of the price paid or charged on the sale of all tangible personal property. Under subsection (e) of Sec. 1 the term "sale at retail" is defined; when tangible personal property is sold for resale, such sale is not considered a sale at retail. The Act also contains certain definite specific, denominated and enumerated lines of business which do not sell tangible personal property but which render certain services, substances and things.

We are at a loss to understand why the Legislature saw fit to include meals and drinks in subsection (1) supra, as the selling of meals and drinks unquestionably constitutes sales of tangible personal property. It is not a service such as the furnishing of rooms in hotels, taverns "or other places in which rooms, meals or drinks are regularly served to the public."

You state that meals, drinks and rooms are served exclusively to the members--that the public generally may not participate or purchase meals, rooms or drinks from the club; therefore, it cannot be said that rooms, meals or drinks are regularly served to the public. It is therefore the opinion of this department that when rooms, meals and drinks are served exclusively to bona fide members of a private country club, such sales are not subject to the 1% tax.

In arriving at this conclusion we are not unmindful of the decision in the case of State ex inf. v. Missouri Athletic and St. Louis Clubs, 261 Mo. 576, wherein Judge Walker, in discussing the question of the Missouri Athletic and St. Louis Clubs being eligible to obtain an intoxicating liquor license, said:

> "In view of the statute (Sec. 7188, R.S. 1909) declaring that 'no person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons, either at retail or in the original package, without

> taking out a license as a dramshop-keeper,' it is unlawful for an incorporated social or athletic club, without first obtaining a license as a dramshop-keeper, to dispense liquors to its members at a price paid or to be paid, whether for profit or otherwise."

The section under consideration in that case was a general one which placed no qualifications on the seller of the intoxicating liquor, while in the instant case the rooms, meals and drinks in question must be regularly served to the public in order to be taxed. This, the private clubs are not doing, according to your statement--the rooms, meals and drinks are only served to the members of the club and not to the general public.

We proceed to the next question which arises in this connection, i.e., if the members do not pay the tax, who is the user or consumer liable for the tax? Under the terms of the Act a sale of services is not defined, and as heretofore stated, there is no exemption for a resale as is the case with tangible personal property. It must be conceded that if rental of rooms "not regularly served to the public" is not subject to the tax, then the item of rooms passes out of the question and the State does not derive any tax from any one for such rooms.

At first blush there appears to be a conflict in the terms of sub-section (a) of Sec. 2, which relates to the tax of 1% on the price paid or charged for a sale of tangible personal property, and subsection (l), which we have construed to be a special section relating solely to the taxing of sales or charges for meals and drinks furnished in any hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist camp, or other place in which rooms, meals or drinks are regularly served to the public, because subsection (a) is a general section, dealing with every sale of tangible personal property wherein the same is not made for resale, while as we have stated before, subsection (l) appears to deal definitely with the question of the items of meals and drinks when regularly served to the public by the public by the businesses mentioned in subsection (l), regardless of the fact that same may be independent of and take precedence over subsection (a).

We further conclude that when the meals and drinks are not served by the various lines of business enumerated in subsection (1), they are subject to subsection (a) because they are tangible personal property; in either event the tax is the same and is imposed in the same manner in both sections.

We are of the opinion that when a sale is made to the club of meals and drinks (not to the individual members of the club), said club is the user and consumer, and becomes liable as purchaser for the tax. The members of the club, we think, correspond to members of a family, household or private boarding house, and hence the meals (groceries) and drinks are subject to payment of the tax at the time of purchase by the club.

In arriving at this conclusion, we have assumed that the members or officials of the club conduct or have under their personal supervision the selling of rooms, meals and drinks. If the rooms, meals and drinks are sold in the name of the club but said selling is conducted as a business by a private individual who makes a profit from the sales to the members, then, in that event, sales of rooms, meals and drinks to the members would be taxable.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

DEEDS: Condition of deed not broken by building jail.

COLE COUNTY COURT HOUSE - JAIL:

10-2

September 30, 1935.

FILED
20

Honorable Elliott M. Dampf,
Prosecuting Attorney,
Cole County,
Jefferson City, Missouri.

Dear Sir:

Replying to your letter of recent date which is as follows:

> "Will you please render an opinion on the following: Land was deeded to the County for the purpose of constructing a Court House on same. In this deed was a reversionary clause which stated that the property was to revert back to the heirs on the condition that the property was used for a purpose other than the site for the County Court House. Would the building of a county jail adjoining the county court house cause the property to revert to the heirs?"

the same being supplemented by a certified copy of the deed recorded in Book B at page 131 of the Recorder's office of Cole County, Missouri, it will be noted that the conveyance from Robert W. Wells to the County of Cole of the property therein described has a provision in it as follows:

> "The said parcel of ground to be added to lot three hundred & fifty one & together with said lot 351 to make a site for a Court house for the several courts of said County of Cole forever--and it is herein expressly provided and the said parcel of ground herein described is granted to said County upon the express condition that if the same be

> not appropriated, and used for the purpose aforesaid as herein before expressed, then & in that case the said parcel of ground is to revert to me or my heirs--and I the said Robert W. Wells & my heirs executors & administrators shall, forever warrant & defend said parcel of land subject to the provisions, & limitations & reservations herein expressed, to the said County of Cole, forever."

In the case of Bolling v. Mayor of Petersburg, 8 Leigh (8 Va.) 224, the court dealt with a similar situation to the one raised by your inquiry. At page 231, quoting from the opinion, is the following:

> "After describing the piece of land conveyed as that whereon now stand the courthouse and jail, the use and purposes are afterwards mentioned in the following language: 'Which said piece of land is hereby given, granted and conveyed, in consideration of the said courthouse and jail having been built thereupon, and in consideration also that the said courthouse and jail, and the judiciary proceedings of the said town, shall be continued to be kept and held upon the said premises.' The grantor also covenants with the said mayor, aldermen and commonalty and their successors, and it is expressed to be the true intent and meaning of the parties, that the said corporate body, 'for the use of said town,' shall quietly and peaceably hold and enjoy the said piece of land, 'so long as the judicial proceedings of the said town shall continue to be held thereupon.' Then follows finally a proviso, that 'in case it shall ever so happen that the judicial proceedings of the said town shall be discontinued to be held and kept upon the said piece or acre of land, and shall be removed, and held and continued permanently at some other place, in such case such piece of land to reinvest in the said

Robert Bolling, his heirs and assigns, as though this indenture had never been made.'

"Here then is a conveyance in fee for the use of the town, for the purpose of having the courthouse and jail on the lot conveyed, and that the judicial proceedings may be permanently held there; with a covenant for quiet enjoyment so long as the judicial proceedings are held there, and with one only condition annexed, which is, that whenever the judicial proceedings cease to be held there, and are permanently held at some other place, then the lot shall reinvest in the grantor or his heirs.

"The terms of the conveyance have been complied with; the courthouse and the jail are on the lot, and the judicial proceedings are still held there; the condition is not broken, and the reinvestiture cannot take place.

"But the complaint is that the appellees have applied a portion of the ground to objects inconsistent with the grant: that they have laid it off into building lots, which they have let out to individuals on long leases, and have thereby acquired considerable profit to the corporation, not intended by the grant. This complaint is, I think, entirely without foundation. There appears to be abundance of room, on the acre of land, both for the new tenements and for the courthouse and jail. The judicial proceedings are carried on there with perfect convenience, and the buildings erected do not interfere with the full enjoyment of the rights vested in the people of the town by the grant. They do not complain that they are restricted in the full exercise of their rights. Whilst the condition on which the corporation hold the lot is not broken, they hold complete dominion over it, and may use it in any way that they think best for the use of the town."

In the case of Jackson v. Pike, 9 Cowen (9 N. Y.) 69, a deed had a provision in it

> "that the said parties of the first part, as well for and in consideration of accommodating the said parties of the second part with a proper and convenient site for erecting a court house and jail for said county, as for increasing the value of property owned by the said parties of the first part, adjacent to the hereby granted premises, have given, granted," etc.

At page 72 the court says:

> "But it is further contended that there was an implied condition in this deed, that the premises should be used for no other purpose but for the erection of a court house and jail. If that be admitted, does it follow that the building a stable upon the lot for the accommodation of the jailer, works a forfeiture of the grant? I think not. The grant must have a reasonable construction. Two acres were not necessary to erect a house upon, less than a hundred feet square. What then becomes of the balance of the two acres? They are no doubt appurtenant to the court house and jail. The jailer must have a place to reside. He must have the usual conveniences for a family, and the necessary out houses; and I should think he might have the use of the other ground for a garden, or any other purpose not inconsistent with the grant. It does not follow that those grounds are to lie waste.
>
> "But, in my judgment, an occupation of the premises in the ordinary mode of occupying village lots, is not inconsistent with the grant."

In the case of City of St. Louis v. Wiggins Ferry Co., 88 Mo. 615, where the provisions of a deed were under discussion, the court says this, l. c. 619:

> "The same author says the construction of a deed as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the subject and spirit of the contract."

There the court was dealing with the legal effect of the violation of an agreement

> "'that one-half of the wharfage collected annually shall be expended on the wharf north of Cherry street,' etc., the expenditures only to be made on those parts relinquished by the first parties, or to which the city shall otherwise acquire a right for wharf purposes."

It will be observed that the provisions of the deed by which this property is conveyed to Cole County are "to make a site for a court house for the several courts of said County of Cole forever." It would seem that so long as the property therein conveyed is the place whereon stands the court house for the several courts of said county, that the requirements of the grantor are complied with.

The provisions in the deed must be given a reasonable meaning and interpretation and construction. Stripped of all but the naked technical, literal provisions, it may justifiably be said that the grantor intended that only one, two or three court rooms be erected on said property and maintained for the "several courts of said County of Cole forever", but such a view as that would be an unreasonable one.

Jails, in the more modern methods of building, are now a part of the court house and very frequently built in the upper portion thereof. It is for the public welfare and increases the efficiency of the court house that the jail be either built in and as a part of the court house building or in close proximity thereto. There is no provision in said deed stating that if a jail is built on said property, the property shall thereupon, and because of that, revert. As is said in the Virginia case quoted, supra, the purposes of the

establishment and maintenance on this site of a court house are served, and the fact that there may be some land on the plot deeded which is not required for the maintenance of the court house site does not mean that said extra land may not be used for other reasonable purposes.

CONCLUSION

It is our opinion that the building of a county jail adjoining the county court house and on the property described in the deed recorded in Book B at page 131 of the Recorder's office of Cole County would not be a violation of the terms and reservations contained in said deed, and would not be grounds for the heirs of Robert W. Wells successfully maintaining a suit for the recovery of said property.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

TAXATION: Delinquent taxes of cities of the fourth class.

10-21

October 17, 1935.

FILED
20

Honorable Ray Y. Davis
Collector of Revenue
Polk County
Bolivar, Missouri

Dear Mr. Davis:

Acknowledgment is made of your request of October 11, 1935, for an opinion of this office on the following matter:

> "I would like to have an opinion from you on whether or not it is my duty to include city taxes in sale of land for taxes.
>
> The city is a city of the fourth class."

In an opinion of this office dated August 8, 1933, to the State Tax Commission, we fully discussed the subject of your inquiry and reached the following conclusion:

> "It is therefore the opinion of the office that Senate Bill 94 is applicable to Cities of the Third and Fourth Classes insofar as it is prescribing the method and manner of the collection and enforcement of the payment of the taxes, but any proceedings had relating thereto are to be conducted by the city collector consistent with the requirements of Articles 4 and 5 of Chapter 38, 1929 Revision."

We herewith enclose to you a copy of that portion of the opinion dealing with the duty of collectors respecting the taxes due cities of the third and fourth classes.

CONCLUSION.

In view of the foregoing, it is the opinion of this office that you as County Collector of Polk County, are not required to include city taxes of a city of the fourth class in your list of delinquent lands and lots to be sold by you for delinquent state and county taxes.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM
Enclosure.

TAXATION: Property of Hannibal-LaGrange College not exempt.

11-18

November 12, 1935.

FILED 20

Honorable Barker Davis,
Prosecuting Attorney,
Lewis County,
Canton, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

> "Will you please furnish me an opinion as to whether the County of Lewis can assess, levy and collect all State and County Taxes on real estate owned in said county by Hannibal-LaGrange College of Hannibal, Marion County, Missouri.
>
> "The Acts incorporating La Grange College, formerly at La Grange, Lewis County, Missouri, are: 'An Act Incorporating LaGrange Male and Female College, March 12, 1859.' and Laws of Missouri 1871, charter approved March 30, 1872.
>
> "The present college and owner of real estate in question was formed by merger under Sections 5020 to 5023, inclusive, Revised Statutes of Missouri, 1929, Certificate from Secretary of State, dated September 22, 1928.
>
> "The real estate involved in this county consists of land and buildings (formerly used and occupied by LaGrange

College) at La Grange, Missouri, a city in this county under special charter, several houses in said city and farms in this county.

"This property has been assessed and carried for taxation as other property since 1928, and as it is delinquent is being advertised under present law, and my County Collector is asking for my opinion on this question."

Laws of Missouri, 1871-2, page 226, provides:

"Section 1. That an act entitled 'An act to incorporate LaGrange Male and Female College, at LaGrange, in Lewis county,' approved March 12, A. D. 1859, be amended by the addition of a new section, to be numbered section 13, and to read as follows: Section 13. That for the purpose of creating an endowment for said corporation, the proceeds of which shall be used and applied in good faith to the purposes of education, and for no other purpose, the said corporation may acquire, hold and possess any real or personal property, not exceeding the value of two hundred thousand dollars, exempt from taxation for any purpose whatsoever, except for state revenue and state indebtedness.

"Section 2. This act shall take effect and be in force from and after its passage.

"Approved March 30, 1872."

At the time this statute was enacted the Constitution of Missouri adopted in 1865 was in effect. Section 16 of Article XI of this Constitution provides:

> "No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state."

By reason of this provision of our Constitution as it stood at that time, only the property of public schools might be exempted from taxation.

In the case of Cook v. School District No. 12, 21 Pac. 496, the court said:

> "A public school is one that derives its support in whole or in part from moneys raised by taxation."

In the very early case of St. Joseph's Church v. Assessors of Taxes, 12 R. I. 19, the court said:

> "The lots and buildings in question belong to St. Joseph's Church, a Roman Catholic Church in the city of Providence, which has been incorporated under the laws of the State, in its corporate capacity, and is held and used by the church exclusively for its parochial schools. The lots and buildings were purchased with moneys contributed for the purpose of establishing the schools, and the schools are maintained by contributions given from time to time to the officers of the church for their maintenance. The schools are gratuitously opened to all, without distinction of sect, who desire the education which they furnish. They are, however, managed and controlled exclusively by the officers of the church. The petitioners claim that they are 'free public schools,' and as such entitle the lots and buildings where they are established to exemption from taxation under the clause of cap. 533 above recited. And undoubtedly if they are 'free public

> schools' in the sense in which those words are there used, the claim is just.
>
> "We think they are not free public schools in that sense. The statutes of the State contain frequent mention of public schools, and, uniformly, where the words occur, they signify the schools which are established, maintained, and regulated under the statute laws of the State. See Gen. Stat. R. I. cap. 47, sec. 1; cap. 53, Secs. 8, 9 and 22; cap. 58, Secs. 1, 10, and 13. We think the words were intended to have the same meaning in the statute under which the exemption is claimed. Such statutes are strictly construed."

In view of the foregoing, it is the opinion of this department that the Hannibal-LaGrange College is not a public school within the meaning of the Constitution of 1865. It therefore follows that the exemption provided for in Laws of Missouri, 1871-2, page 226, is unconstitutional and void.

If the property of this College is to be exempted from taxation, therefore, it must be by reason of the Constitution of 1875. Sections 6 and 7 of Article X of our Constitution provide:

> "Section 6. The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies;

> Provided, That such exemptions shall be only by general law.
>
> "Section 7. All laws exempting property from taxation, other than the property above enumerated, shall be void."

Conforming to Section 6 of Article X of the Constitution, the Legislature of Missouri enacted a law in reference to exemptions of property from taxation. This section (Section 9743, R. S. Mo. 1929) provides as follows:

> "The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; third, lands and other property belonging to this state; fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; fifth, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the only exemptions from state, county or local taxation that may be granted to the Hannibal-LaGrange College are as follows: Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for educational purposes, or for purposes purely charitable.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:HR

TAXATION: Certificate Holder not entitled to possession until expiration of one year or longer from date of sale.

December 6, 1935.

12-6

FILED
20

Honorable W. M. Dawes
Presiding Judge
Oxly, Missouri

Dear Judge Dawes:

Acknowledgment is herewith made of your communication of November 25, 1935, wherein you request an opinion of this office on the following matter:

> "I am writing you for your opinion of Section 9954a in regard to getting possession of land purchased at land sale. Would I have to wait one year before I take possession if no one is living on the place or looking after it. Also Sec. 9956c. Can I get pay for improvements I put on the place right away or do I have to wait one year before I can improve the place and get pay for it if the land is redeemed."

I.

CERTIFICATE HOLDER ENTITLED TO POSSESSION AFTER ONE YEAR IF HOME NOT A HOMESTEAD.

Section 9954a, page 434, Laws of Missouri 1933, provides:

> "The purchaser of any tract or lot of land at sale for delinquent taxes, homesteads excepted, shall at any time after one year from the date of sale be entitled to the immediate possession of the premises so purchased during the redemption period provided for in this act, unless sooner redeemed;* * *"

The rights of a holder of a certificate of purchase are only those provided for by law. The certificate holder obtains no title whatsoever to the property by virtue of the certificate and under the Missouri law obtains only a conditional right to a deed. Having no title to the property any right to possession must be specifically set forth in the law. By virtue of the foregoing provision the holder of the certificate of purchase is entitled to possession of the property after the expiration of one year from the date of sale, provided that the property is not a homestead. In the event the property is a homestead his right to possession does not exist until a deed is obtained pursuant to the other provisions of this law. As seen from the foregoing quoted section the right to possession does not depend upon whether the property is occupied or unoccupied and therefore the fact that it is unoccupied does not give rise to any right to possession. As a matter of law your rights under your certificate of purchase are to be determined solely by the Jones-Munger Act and cannot be extended by implication to include those rights and powers which vest only in the owner.

CONCLUSION.

It is therefore the conclusion of this office that a holder of a certificate of purchase has no right to possession of the property covered by the certificate until the expiration of one year after the date of sale, provided that in the event the property is the homestead of the taxpayer the certificate holder has no right to possession until a deed is obtained as provided by the Jones-Munger law.

II.

CERTIFICATE HOLDER CANNOT CLAIM REIMBURSEMENTS FOR IMPROVEMENTS ON PROPERTY MADE DURING REDEMPTION PERIOD.

We have heretofore had occasion to pass upon this identical question and under date of December 6, 1935, this office rendered an opinion to the Honorable Gilbert Barlow, Prosecuting Attorney of Harrison County, Missouri, wherein the following conclusion was reached:

"In view of the foregoing it is the opinion of this office that the certificate holder cannot recover compensation for improvements made on the property covered by the certificate of purchase, which improvements are made immediately after the purchase and before two years from the date of sale."

We herewith enclose to you a copy of that opinion for your information and trust that you find it fully answers your question.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM
Enclosure.

TAXATION: Authority of Collector to employ attorney to assist in collection of delinquent personal property taxes.

December 10, 1935. 12-10

FILED 20

Honorable Ray Y. Davis
Collector of Revenue
Polk County
Bolivar, Missouri

Dear Mr. Davis:

Acknowledgment is herewith made of your request for an opinion of this office reading as follows:

> "I am making a strenuous effort to collect back personal taxes and it has come to where I'll have to file suit on some large taxes. Under the new law how shall I appoint a tax attorney and how will the tax attorney get pay for his labors? The Prosecuting Attorney thinks that the old law regarding this matter has been repealed."

In your request, you asked an additional question but as you have withdrawn the additional inquiry, we shall confine our remarks to the above proposition.

On January 8, 1935, this office rendered an opinion to Jones and Wesner, Attorneys for the Collector of Pettis County, in which it was concluded that:

> "* * * *delinquent personal taxes should be collected under the provisions of Section 9940 R. S. Missouri 1929, and that into such section there should be incorporated that part of Section 9952 R. S. Mo. 1929 which reads:

'and for the purpose of collecting such tax and prosecuting suits for taxes under this article, the collector shall have power with the approval of the county court* * * *to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed etc.;* * * *'"

I am enclosing to you a copy of that opinion, and direct your attention to the latter part thereof which deals specifically with that question.

It is therefore our opinion that you are authorized to appoint a delinquent personal tax attorney, with the approval of the county court, and that such attorney will receive as compensation for his services such compensation as may be agreed upon and incorporated in the order of the County Court approving the appointment of the tax attorney, which shall not exceed the sum of ten per cent of the amount actually collected and paid into the treasury.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

HGW:MM
MM.

NEWSPAPERS: Newspaper must be published in county for one year, regularly and consecutively, before it can accept legal publications.

1-21

January 17, 1935.

FILED
21

Hon. D. B. Deem,
Judge of Probate Court,
Poplar Bluff, Mo.

Dear Sir:

This department is in receipt of your letter of December 15 wherein you make the following inquiry relating to newspapers:

> "A newspaper, the Bernie Newsboy, of Bernie, Stoddard County, has been published a number of years and has a general circulation in Southeast Missouri, including Butler County.
>
> Recently, it has moved to Poplar Bluff, Missouri and changed its name to "The Butler County Leader", but still retains its mailing list. Can legal advertisements such as mentioned in Sec. 13775, R.S. be published legally in this paper, until after it has been in Butler County one year?"

Section 13775, Laws of Mo. 1931, p. 303 provides as follows:

> "All public advertisements and orders of publication required by law to be made, and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication;

> shall have been published regularly and consecutively for a period of one year; shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for a subscription for a definite period of time. Provided that when a public notice required by law to be published once a week for a given number of weeks, shall be published in a daily, triweekly or weekly newspaper, the notice shall appear once a week on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this act. All laws or parts of laws in conflict with this section, except sections 13777, 13778, 13779, 7631, 7632 and 7633, Revised Statutes of Missouri, 1929, are hereby repealed."

By the terms of the above section it is necessary that the newspaper "shall have been published regularly and consecutively for a period of one year". The statute was first amended in 1927. Prior to that the section applicable was Section 10403, R.S. Mo. 1919, which provided:

> "All advertisements and orders of publication required by law to be made shall be published in some newspaper published and circulated in the county in which the proceedings are had, to which such advertisements and orders of publication shall pertain, if there be one, and if there be no newspaper published in such county, then in some newspaper published the most convenient thereto, having a circulation therein, unless otherwise provided by law."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the element making it necessary to publish the newspaper in the county for one year was the precise object of the amendment. We are further of the opinion that the newspaper

must be published regularly and consecutively for one year before it may accept legal notices, advertising and legal publications.

We are enclosing herewith copy of an opinion rendered by this department on November 2, 1933 to Mr. E.T. Barnes of Brashear, Missouri which bears on this subject, which we trust will be helpful to you.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

SALES TAX: Tangible personal property used in connection with dental work where labor is principal charge not subject to tax; dental supplies sold in original form, not for resale, are taxable.

8-27

August 27, 1935.

FILED
21

Mr. C.W. Digges, Secretary,
Missouri State Dental Association,
Exchange National Bank Building,
Columbia, Missouri.

Dear Sir:

This department is in receipt of your letter of August 23 wherein you request an opinion as to House Bill No. 198, same being an emergency measure placing a 1% tax on all sales of tangible personal property and services, as it affects the dental profession. Your letter is as follows:

> "At the request of Dr. Virgil Loeb, the President of the Missouri State Dental Association, I am writing to ask you to give your opinion on the sales tax as it affects the dentist."

The Act undertakes to impose a tax equivalent to 1% of the purchase price on every sale at retail and places a tax equivalent to 1% on the receipts from certain services. The services on which the tax is imposed are enumerated in Sec. 2, Laws of Mo. 1935, p. 415, and in the services enumerated no profession is included. Therefore, if the Act affects the dental profession, said profession must come within the terms of the section referring to the sale of tangible personal property, i.e., Sec. 2, division (a), Laws of Mo. 1935, p. 415, which is as follows:

> "Upon every retail sale in this state of tangible personal property a tax equivalent to one (1) per cent. of the purchase price paid or charged, or in case such sale involves the

> exchange of property, a tax equivalent to one (1) per cent. of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange."

Sec. 1 of said Act, subdivision (e) defines "Sale at Retail" as follows:

> "'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration."

Bearing in mind that dentists, as well as physicians and veterinarians, receive practically all their compensation from work which they are able to do because of their skill and learning, the tangible personal property used in connection therewith being negligible, we are of the opinion that when false plates, teeth, bridge work, etc. are sold wherein the principal charge is for the labor and skill, such sales are not taxable.

When dental supplies are sold, from a stock kept on hand, in the original form, the same would constitute a sale of tangible personal property and the gross receipts therefrom would be subject to the 1% tax, providing same are not sold for resale. Likewise, gold, silver, cement, etc. used for fillings and bridge work when sold in their original form, not for resale, would be subject to the tax. However, as stated above, when such articles are used in connection with the dental work wherein the principal charge is for the labor performed, they are not subject to the tax.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

OWN:AH

COUNTY BUDGET ACT: Budget for County Extension Agent's office refused in final make up by county court and later desired to be allowed may be taken care of by transferring surplus in any class to succeeding class until it eventually get to Class 5 and paid therefrom.

March 7, 1935. 3-14

FILED 22

Hon. Elvin S. Douglas,
Prosecuting Attorney,
Polk County,
Bolivar, Missouri.

Dear Sir:

This department is in receipt of your letter of February 8 wherein you present certain facts and request an opinion from this department regarding the same, to-wit:

> "We have had the following question arise in our county: In due time the County Agent, Mr. Rubottom submitted to the county court his estimate of expenses for his office which have been paid in the past by the county, which would not exceed $420.00. At or before the February term of court the county court went over estimates submitted by the respective officers of the county, and revised some of them, etc. as the county budget law provides, and then finally approved the budget as it was made up by the court, entered its approval of record, filed copies in the Treasurer's office and the State Auditor's office as the Budget Law requires. Warrants have since been issued and paid.
>
> However, in its final makeup the Court refused to allow any funds in the budget for the county extension agent's office, and his estimate was not included in the budget.
>
> The court has since decided that they would like to allow some sum not exceeding $420.00 for that office. As made up, estimated expenditures in the budget lack $2,000.00 of being as much as the county's

> net anticipated revenue. In other words, this county's net anticipated revenue for 1935 is $2,000.00 more than estimated expenditures for that time.
>
> I have advised the court that since they have finally approved the budget, filed it as required by law, and issued warrants, that it is now too late for them to amend the budget by adding new items of estimated expenditures.
>
> I would appreciate the opinion of your department on this matter. Our county has a population of less than 50,000."

It appears from your letter that the officers, on or before the 15th day of January, 1935 performed their duties under the County Budget Act as contained in Section 3 thereof; likewise, the County Clerk performed his duties under Section 4. We assume that the county court met at the regular February term and carried out the provisions of Section 8, (Laws of Mo. 1933, p. 345), which is as follows:

> "It is hereby made the first duty of the county court at its regular February term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein. After the county court shall have revised the estimate it shall be the duty of the clerk of said court forthwith to enter such revised estimate on the record of the said court and the court shall forthwith enter thereon its approval. The county clerk shall within five days after the date of approval of such budget estimate, file a certified copy thereof with the county treasurer, taking his receipt therefor, and he shall also forward a certified copy thereof to the state auditor by registered mail. The county treasurer shall not pay nor enter protest on any

> warrant for the current year until such budget estimate shall have been so filed. (This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand). If any county treasurer shall pay or enter for protest any warrant before the budget estimate shall have been filed, as by this act provided, he shall be liable on his official bond for such act. Immediately upon receipt of the estimated budget the state auditor shall send to the county clerk his receipt therefor by registered mail.
>
> Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

If the county court had not approved the budget estimate and the same had not been filed in the office of the county treasurer and a copy forwarded to the State Auditor, we would be of the opinion that the budget could yet be amended and revised as we assume the county court has adjourned meetings or terms from one regular term to the next.

The $420.00 which you mention may be paid out of any funds in Class 6, as this class is very broad and elastic in its terms; however, we conclude that Polk County is probably in the same condition as most of the other counties in the state, i.e., there are no funds in Class 6. If the $420.00 in question is allotted to the County Extension Agent's Office for the purpose of office expense, it is our opinion that since the budget lacks $2,000.00 of being as much as the net anticipated revenue, said sum might be paid out of Class 5.

It is evident that the aim of the Legislature in passing the County Budget Act was to promote efficiency and economy in county government. The statutes covering the County Budget Act are more or less directory--not mandatory; however, you will note in Section 8, supra, the provision "any order of the county court *** directing the issuance of any warrant contrary to any provision of this act shall be void *** and any county clerk, county treasurer, or other officer participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

In Section 1 of the County Budget Act (Laws of Mo. 1933, page 340) it is made the duty of the county court to classify expenditures and to sacredly preserve the priorities, as contained in the classes. This, we consider to be the outstanding feature of the County Budget Act. Therefore, we draw this inference, and offer the following as a suggestion, believing that the same will not violate the spirit of the Act:

If the five classes enumerated in the Budget Act have been adequately provided for and if at any time it can be ascertained that any one of the classes will have a surplus at the close of the fiscal year, that surplus may be transferred to any succeeding class and may eventually be transferred to Classes 5 or 6 and thereby become funds which may be used in taking care of the $420.00 mentioned in your letter.

We offer this method merely as a possibility with the injunction that the priorities of the classes be sacredly preserved before this method be used. This solution would appear to be practical and probably due to the fact, that as you state in your letter, the anticipated revenue is $2,000 more than the estimated expenditures for the year.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

(1)
CIRCUIT CLERK: An action to recover shortage of circuit clerk which occurred more than three years prior to date Statute of Limitations began to run is barred by Statute of Limitations.
(2) Circuit clerk who has failed to pay all money for which he is accountable is ineligible to hold any office of trust or profit in this state.

5-15

May 13, 1935.

FILED
22

Hon. Elvin S. Douglas,
Prosecuting Attorney,
Polk County,
Bolivar, Missouri.

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "Mr. Jesse House has sued this County (Polk) for $1041.67 alleged to be back pay that he is entitled to but has not been paid, as Circuit Clerk of the county for the term beginning January 1st, 1931 and expiring December 31st, 1934.
>
> "This suit is brought on the theory that when he went into office the salary he was entitled to was figured on a population in this county of 38,110, which was figured by multiplying the presidential vote in 1928 by 5; but that after the election in 1932, multiplying the presidential of that year by 5 the population of the county would exceed 40,000. That during his four year term he was paid a salary of $2,000.00 based on population of less than 40,000, when in fact for the last twenty-five months of his term he was entitled to a salary of $2500.00 per year because the population after the election in 1932 was in excess of 40,000.
>
> "I have studied the decision of the Supreme Court in the case of State ex rel. vs. Hamilton, 282 Mo. 608, 260 S.W. 466, and apparently Mr. House is entitled to judgment

for the back salary. However, I have always thought that the Supreme Court is wrong in deciding that case as it does, and our County Court wants the Supreme Court to have another chance at the question before it pays him.

"In connection with his claim for salary we have this situation in his office. On May 5th, 1931, The Farmers State Bank of Bolivar failed and Mr. House had on deposit as Circuit Clerk about $1259.00. Soon afterward he stood a suit on a $450.00 check he had written against the account which the payee had held an unreasonable length of time, and won his case, thereby relieving himself of that much of his loss. He later put $125.00 of his own funds into the Circuit Clerk's account. This leaves a balance of $68[illegible] that Mr. House is short in his office account, which he has not replaced after the expiration of four years from the time of loss.

"The County Court has taken the position that since the Clerk is in a hurry for his money, they are in a hurry for the Clerk to straighten up his account. We have no way of knowing without an audit to whom the various funds the Clerk holds belongs to, nor whether he owes the County any money as a result of the loss that he hasn't accounted for.

"I plan to file a demurrer to his petition, then take time to plead. My idea is to set up an equitable answer in the nature of a counter-claim, asking the court for an accounting by the Clerk, and that his office be audited to determine the exact amount of the Clerk's shortage.

"In the event an audit is made and the exact amount of shortage of the Clerk in his accounts is determined, what is the opinion of your department as to the proper remedy to compel the Clerk to replace the loss? I am assuming that there should be

> no question but what the Clerk is personally liable for the bank loss, and he has never denied his liability. The Clerk's funds consist of filing fees deposited with him on institution of civil suits by litigants, fines collected, if any, fees earned, etc.
>
> "Our Circuit Court convenes on the 27th day of May and Mr. House's suit against the county is returnable on that day."

If we understand your question correctly, you desire to know what is the proper remedy to compel the Clerk of the Circuit Court to make good a shortage in his office if an audit of his books shows that a shortage exists. You state in your letter that the loss about which you inquire occurred in a bank failure on May 5, 1931. We therefore call your attention to Section 863, R.S. Mo. 1929, which reads as follows:

> "Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state."

In view of the above, it is the opinion of this department that an action to recover a shortage of money owed by a circuit clerk, which shortage accrued more than three years prior to the date when the Statute of Limitations began to run, would be barred by the Statute of Limitations.

You state that Mr. Jesse House was Circuit Clerk of your county for the term beginning January 1, 1931, and expiring December 31, 1934. The roster of county officers compiled by the Secretary of State shows that Mr. Jesse House was elected in November of 1934 to succeed himself as Circuit Clerk and that he is also ex officio Recorder of Deeds. We direct your attention to Section 19 of Article II of the Constitution of Missouri, which provides as follows:

> "That no person who is now or may hereafter become a collector or receiver of public money, or assistant or deputy of such collector or receiver, shall be eligible to any office of trust or profit in the State of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable."

It is therefore our opinion that a circuit clerk who has failed to account for and pay over all public money for which he is accountable is ineligible to hold any office of trust or profit in the State of Missouri, and if such clerk is elected to and attempts to hold an office of trust or profit in this state, he would be subject to be ousted from office by the proper procedure.

Very truly yours,

J. E. TAYLOR,
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK,
Attorney-General.

JET/afj

COUNTY TREASURER:

1. Sections 12130,12133,12134, 12137 and 12138 R. S. Mo. 1929 are not repealed until December 31, 1936.

2. County Treasurer's salary cannot be increased to a greater amount than as made under the estimate in the County Budget Act, but may be fixed at a lesser amount.

5-22

May 17, 1935

FILED
22

Honorable Elvin S. Douglas
Prosecuting Attorney
Bolivar, Missouri

Dear Sir:

This Department is in receipt of your letter of April 29, wherein you request an opinion regarding the repealing of certain sections and enacting new ones in lieu thereof, as pertaining to county treasurer. Your letter is as follows:

"I wish you would advise me in regard to the following propositions:

The Laws of 1933, pages 338 and 339, repeal certain sections of the Revised Statutes of 1929 in regard to the election of County Treasurer, the giving of bond by the Treasurer, and his compensation,etc.

This law of 1933 then provides for consolidating the office of County Treasurer with the office of Collector in 1936.

As the provisions of this new law for consolidating the Treasurer's and Collector's offices merely regulate those offices after November, 1936, should the provisions of this new Act be construed as repealing the old law in regard to Treasurers until the offices are consolidated in 1936?

If the 1933 law, repealing certain sections of the old law concerning County Treasurers, is now in effect,

what authority has the County Court to fix Treasurer's bond, his salary, etc.?

If the County Court has made no order fixing salary of the County Treasurer, but has approved a County Budget which, among other things, includes a certain salary for the County Treasurer, would that preclude the County Court from afterwards fixing a different salary for the Treasurer?

I shall greatly appreciate your advice in regard to these matters."

I.

SECTIONS 12130, 12133, 12134, 12137 AND 12138 REVISED STATUTES MISSOURI 1929, ARE NOT REPEALED UNTIL DECEMBER 31, 1936.

In 1933, at page 338 Laws of Missouri 1933, the Legislature passed an act repealing Sections 12130, 12133, 12134, 12137 and 12138 Revised Statutes Missouri 1929; these statutes related to the election of a County treasurer, the giving of a bond and the compensation. The Legislature then proceeded to enact section 12130 which relates to counties containing more than 40,000 population, the election of a treasurer to take place "On the Tuesday after the first Monday in November, 1936, and every four years thereafter."

Section 12132a consolidates or places under the Collector the office of Treasurer, the time for consolidation being "On and after the expiration of the term of office of the county treasurer on the 31st day of December, 1936."

The remaining sections, 12132b, to 12138a, relate to the office of treasurer in counties of more than 40,000,

the County of Polk being less than 40,000 the office of county treasurer would terminate on December 31, 1936.

The question involved is, the Legislature having at the session of 1933 abolished certain sections pertaining to the election and the giving of bond and the salary of the county treasurer, and enacted new sections relating to the office of treasurer, what is the position of the county treasurer at the present time in so far as the apparently repealed statutes may affect it?

There are a number of elements involved in determining this question. We shall discuss first the element of the intention of the Legislature in passing the Act of 1933. The heading in the title of the act is as follows:

> " POLITICAL SUBDIVISIONS: Relating to Consolidation of Offices of Treasurer and Collector in Certain Counties.
>
> AN ACT to repeal sections 12130, 12133, 12134, 12137, and 12138, Article 8, entitled 'County treasurers, funds and warrants.' Chapter 85, Revised Statutes of Missouri, 1929,and to enact eight new sections in lieu thereof pertaining to the same subject to be known as sections 12130,12132a, 12132b, 12133, 12134, 12137, 12138, and 12138a."

Section 1 is as follows:

> "That sections 12130, 12133, 12134, 12137, and 12138, article 8, entitled, 'County treasurers, funds and warrants,' chapter 85, Revised Statutes of Missouri, 1929, be and the same are hereby repealed and eight new sections are hereby enacted in lieu thereof to be known as sections 12130, 12132a, 12132b, 12133, 12134,12137, 12138, and 12138a, and to read as follows:"

The other sections, as heretofore mentioned, in so far as the element of time is considered, are not to

become effective until January 1, 1937. If the Legislature had inserted the words, in substance,"On and after January 1, 1937," in Section 1, then the whole act, and all the sections, would have been prospective in its aspect and then this question would not have arisen. Proceeding with the question of the intention of the Legislature as it may effect the act in all of its component sections, the Supreme Court in the case of Betz v. Columbia Telephone Co. 24 S. W. (2nd) 1. c. 228, said:

> "Apparently conflicting provisions must be reconciled, if possible, with the general legislative purpose. Dysart v.City of St.Louis (Mo.Sup.) 11 S.W.(2d)1045, 62 A.L.R.762. Sections of a statute must be construed with other sections touching the same subject-matter. State ex rel. Thompson v. Dirckx (Mo.Sup.) 11 S. W. (2d) 38. Courts may consider expediency of law in ascertaining intent. State ex rel. v. Regan, 317 Mo. 1216, 298 S. W. 747, 55 A. L. R. 773. Intent of the Legislature must be ascertained and given effect as expressed in the statute. Rogers Foundry Co. v. Squires, 221 Mo. App. 17, 298 S. W. 470. Courts can not interpolate in a statute where omission is not plainly indicated. State ex rel. Cobb v.Thompson (Mo. Sup.) 5 S. W. (2d) 57. To get at the true meaning of the language in a statute the court must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made. Pembroke v. Huston, 180 Mo. 627, 636, 79 S. W. 470. It is a useful and safe rule of construction to resolve any ambiguity or abscurity in a statute in favor of such reading as will best meet the demands of natural justice, so far as that can be done without violence to settled legal principles. Plum v. Kansas City, 101 Mo. 525, 533, 14 S. W. 657, 10 L. R. A. 371; 25 R.C. L. sec. 258."

In the case of Pembroke v. Huston 180 Mo. 627,

quoted above, the court said that the true meaning of an act must be gleaned from the whole purpose of the law relating to the same before the passage of the act and the change in the law intended to be made.

In the decision in the case of Spurlock v. Wallace et al. 204 Mo. 1. c. 678, the court said:

> "In construing statutes, it has been held that the purpose is an implied limitation on the sense of general terms, and a touchstone for the expansion of narrower terms, and that the cardinal purpose or intent of a whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. Words and clauses in different parts of a statute must be read in a sense which harmonizes with the subject-matter and general purpose of the statute. (2 Lewis' Sutherland Statutory Construction (2 Ed.)," sections 369 and 370.)."

In the case of St. Louis v. Kellman 235 Mo. 1. c. 695, the court, in defining the word "repeal", said:

> "Attending to that term, what does the word 'repeal' mean when used by lawmaker or judge? 'Repeal' is defined as the abrogation or annulling of a previously existing law by the enactment of a subsequent statute, which either declares that the former law shall be revoked and abrogated or which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two can stand in force - the latter is the 'implied' repeal,heretofore mentioned; the former, the 'express' repeal. (Black,L.Dict. Tit.'Repeal!) Bouvier defines it to be: 'The abrogation or destruction of a law by a legislative act.' (Bouv. L. Dict.Tit.'Repeal.') Note the word destruction. Webster defines

> it: To recall; to rescind or abrogate by authority; to revoke. He gives among its synonyms annul, cancel, reverse, abolish. He defines the noun 'repeal' as meaning: Revocation, rescission, abrogation. Abrogate, in turn, means to annul by an authoritative act, to abolish by the authority of the maker, to repeal. Other instructive shades of meaning come out in accredited definitions of the several synonyms, but the foregoing are enough for our purpose. The repeal of an ordinance, then, is accomplished when it is destroyed, abolished, abrogated, cancelled, annulled recalled or rescinded by a later one."

We cannot assert that the Legislature did not intent to repeal the statutes as mentioned in Section 1 quoted supra, as no such conclusion could be drawn from the reading of the entire act. We are concerned with the question of the time the repeal is to become effective. As stated in the above decision, the whole act and the purpose and object in view must be taken into consideration in determining the element of time. In the case of School District v. McFarland 154 Mo. App. l. c. 416, this principle is found enunciated as follows:

> "The reasoning in the case of State ex rel. v. Fry, 186 Mo. 198, 85 S. W. 328, is applicable here. In that case there was a village school district consisting of territory partly in Newton county and partly in McDonald county, and it was attempted, under section 9747, Revised Statutes 1899,to create a country school district out of the territory on the Newton county side of the line. It was contended that the general words,'any school district,' as used in section 9747 embraced a village school district as well as a country school district. The Supreme Court held that this contention could not be maintained, saying;

> 'It is a canon of interpretation that "all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular; that is, they must be understood as used in reference to the subject-matter in the mind of the Legislature, and strictly limited to it." (Endlich, Int. of Stat.,sec.86.) It is indispensable to a correct understanding of a statute to inquire what is the subject of it. (2 Lewis' Sut. on Stat. Con.(2 Ed.), sec.347).' . . . . . 'The subject of section 9747 of article 1 and of the sections preceding it is distinctly stated in section 9739, the first section of that article, to be "all subdistricts, as organized and bounded," i. e., country school districts, and under the canon of construction aforesaid, the words "any school district" in section 9747 must be limited to country school districts, whose organization was alone provided for in article 1, and not to village school districts whose organization was provided for in article 2, unless it appears by other legislation that such was not the legislative intent.' "

The rule effecting the effective date is discussed in the case of State v. Bockelman 240 S. W. 1. c. 211, wherein the court said:

> "As said, the act of 1919 (Laws of 1919, p. 672),now section 734, R. S.1919,repealed section 1005 of the act of 1913,and enacted a new section in lieu thereof.The material portions of this section we have set out in our statement. This law was passed in 1919, but by its terms <u>was not to become effective</u> until <u>the 1st day of January, 1921.</u> In the construction of this law, it is of vital importance to determine as of what date the law speaks, for, if it be taken to

speak as of the date of its passage, the words therein used might have one meaning and application; whereas, if it is to be taken as speaking of the date when it becomes effective, the words used therein might have a totally different application and meaning. Where there is no constitutional restrictions, the Legislature may fix a future date upon which a law shall go into effect. 36 Cyc. pp.1192 and 1200; Ex parte Ah Pah, 34 Nev. 292, 119 Pac. loc. cit.774. In the latter authority it is said:

'The Legislature, in the absence of constitutional restrictions, is free to fix in each act the time it is to take effect, and an examination of our Constitution reveals no such prohibition. Matter of Kenna, 91 Hun. 178, 36 N. Y. Supp. 280; Thomas v. Scott, 23 La. Ann. 689; Price v. Hopkin, 13 Mich. 318; Honeycutt v. St. Louis, 40 Mo. App. 674; Penn Co. v. State, 142 Ind. 428, 41 N. E. 937; 36 Cyc. 1192, 1193; Am. & Eng. Ency. of Law, vol. 36, pp.563-565.'

The Missouri Constitution (1875, section 36 of article 4) places no inhibition upon the Legislature as to fixing a future date for a law to become effective. It prohibits them from becoming effective upon their passage and approval, except in excepted cases. The Legislature has often asserted its right to pass a law to become effective in the future, and our cases seemingly have approved them. State v. Brassfield, 81 Mo. 151, 51 Am. Rep. 234; State v. Orrick, 106 Mo.111, 17 S. W. 176, 329; State ex rel. v. Edwards, 136 Mo. 360, 38 S. W. 73."

In the case of State ex rel. Elsas v. Workmen's Compensation 318 Mo. 1012, the Supreme Court sustained these general rules, saying, "The General Assembly may provide when certain sections of the law shall become effective."

The statute may have a potential existence although it will not go into effect until a future time. The Legislature may provide that different parts of a statute may go into effect at different times. The statute should be construed to carry out the legislative intent, and reasonable effect should be given to every word, phrase and sentence when possible. The right of the court to resort to extrinsic evidence to determine the time when a statute should take effect, is discussed in the case of Gardner v. Collector 6 Wall. U. S. 499-511, as follows:

> "Whenever a question arises in a court of law * * * * of the time when a statute took effect * * * * the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

CONCLUSION

Bearing in mind the rules and principles, and the intention of the Legislature of the time the Act was to become effective, we are of the opinion that it was the intention of the Legislature to abolish the office of the County Treasurer and place its duties under the office of County Collector, in counties of 40,000 or less in population, on and after December 31, 1936, and that the whole act must be read together.

The time when Sections 12130 Revised Statutes Missouri 1929, and 12132 Revised Statutes Missouri 1929, should become effective also carries with it the intention

that the sections mentioned in Section 1 as being repealed should not become effective until the same time, to-wit, December 31, 1936. If we are correct in our conclusion the result is that the Treasurer shall continue to act, in so far as his duties are concerned, and his compensation and giving of bond, as set forth in Sections 12133, 12134 and others, shall continue to be in full force and effect until the expiration of the present term, at which time said sections will, as stated in Section 1 of the new act be automatically repealed. We do not believe that the Legislature intended to pass the new act repealing the sections herein mentioned, thereby resulting in a condition in which the county treasurer, until December 31, 1936, is without provision for the giving of bond, additional bond, and fixing of compensation, and that the construction herein placed on the act is one which will meet the demands of natural justice and such construction can be done without violation of legal principles.

II.

COUNTY TREASURER'S SALARY CANNOT BE INCREASED TO A GREATER AMOUNT THAN AS MADE UNDER THE ESTIMATE IN THE COUNTY BUDGET ACT, BUT MAY BE FIXED AT A LOWER AMOUNT.

Regarding your question relating to the county court having made no order fixing the salary of the county treasurer, the same having been approved and included in the estimate under the County Budget Act.

We assume that this estimate was made under Class 4 Laws of Missouri 1933, page 341, which is as follows:

"Class 4: The county court shall next set aside the amount required to pay the salaries of all county officers

where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

Section 8 Laws of Missouri 1933, page 342, is as follows:

"It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested, also he shall submit an itemized statement of the supplies he will require for his office, separative those which are payable under class 4 and class 6. Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary revenue. No officer shall receive any salary or allowance for supplies until

> all the information required by this section shall have been furnished. The clerk of the county court shall prepare and file an estimate for his office;also for the expense of the judges of the county court. If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4,after having provided for the prior classes,the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."

In view of the above section,we are of the opinion that if the county court has included in the Budget estimate the amount to be paid to the county treasurer that the county court would be precluded from changing the amount of salary greater than that included in the estimate, but there is no provision against changing the amount of the salary to a less amount than that included in the estimate, as the county court has the power to fix the salary of the county treasurer by Section 12138 Revised Statutes Missouri 1929 "at such compensation as may be deemed just and reasonable."

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

COUNTY COLLECTORS: Franchise taxes and railroad taxes not included in amount of taxes assessed and levied for purpose of determining commission of collector. Merchant's ad valorem tax is included.

9-17

August 21, 1935.

FILED 23

Mr. Lewis A. Duval
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

"There appears to be a question as to just what taxes are included in the total amounts of taxes under Section 9935 as amended by laws of 1933. The Section recites as follows:

"The Collector --- Shall receive as full compensation for his services in collecting revenue, except back taxes, the following commissions and no more:

"I - In each County in this State, wherein the whole State, County, Bridge, Road, School and all other local taxes including Merchant and Dramshop licenses -----

"This does not specifically set out Railroad, Corporation Franchise or advalorem tax. The point is with out these last mentioned taxes Macon County is classed in section XI but with them will come in class XII with reference to the maximum salary of Collector."

Section 9935, Laws of Missouri, 1933, page 454, reads in part as follows:

> "The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:
>
> "I. In each county in this state wherein the whole state, county, bridge, road, school and all other local taxes, including merchants' and dramshop licenses, assessed and levied for any one year amount to _____ dollars or less, a commission of _____ per cent on the amount collected."

The purpose of the above section is to determine the amount of compensation a county collector is to receive for his services in collecting the current revenue. The commission which the collector receives for collecting said revenue is based on the amount of State, county, bridge, road, school and all other local taxes assessed and levied for any one year.

Under the provisions of Section 4643, R. S. Mo. 1929, the corporation franchise tax is payable to the State treasurer and the county collector has nothing to do with the collection of the tax. Since the collector does not collect said tax and consequently receives no commission therefor, it is apparent that the corporation franchise tax should not be included in the amount of the taxes assessed and levied for the purpose of determining the collector's commission.

The commission of the collector for collecting railroad taxes is governed by Section 10044, R. S. Mo. 1929, which reads as follows:

> "The county collector shall be allowed for collecting the railroad taxes, payable out of the same, one per centum on all sums paid without seizure of personal property; and

> on all collections made by seizure of personal property, he shall be allowed five per centum on the amount, which shall be taxed or charged as costs and paid by the railroad company; and on all collections made by suit against such company or companies two per centum on the amount, to be paid as costs by the defendant."

Since the collector's commission for collecting railroad taxes is fixed by the above section and not by Section 9935, supra, it is evident that the Legislature did not intend that the amount of taxes assessed and levied against a railroad should be included in the amount of taxes assessed and levied for the purpose of determining the collector's commission under Section 9935.

We assume from your letter that the ad valorem tax about which you inquire is the ad valorem tax which is assessed against merchants under the provisions of Section 10077, R. S. Mo. 1929. Under the provisions of Section 10081, Laws of Mo. 1931, page 360, the county collector is required to collect said merchant's tax and there is no special statute fixing his compensation for such services. Furthermore, said section reads in part as follows:

> "**** and the sum of the valuation of the statements as equalized by the county board of equalization shall be included in and made a part of the total valuation of property taxable for all purposes: ****"

We are therefore of the opinion that the ad valorem tax assessed against merchants should be included in the amount of taxes assessed and levied for the purpose of determining the commission of the collector under Section 9935, supra.

CONCLUSION.

It is the opinion of this department that corporation franchise tax and the railroad tax assessed under the provisions of Article XIII, Chapter 59, R. S. Mo. 1929, should

not be included in the amount of taxes assessed and levied for the purpose of determining the collector's commission under the provisions of Section 9935, Laws of Mo. 1933, page 454.

It is our further opinion that the merchants' ad valorem tax assessed under the provisions of Article XVII, Chapter 59, R. S. Mo. 1929, should be included in the amount of taxes assessed and levied for the purpose of determining the commission of the collector.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JET/afj

CONSTABLE: Subject to Ouster on changing residence from Township.

9-17

September 9, 1935.

FILED
23

Honorable Lewis A.Duval
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Sir:

We acknowledge your request for an opinion dated August 31, 1935, which reads as follows:

> "At the November Election Armel Burke was elected as constable of Valley Township in Macon County Missouri and qualified as such. In March he farmed some land in Valley Township but there being no house available for his use on the land he moved his family about half a mile south of the township line into Callao Township with the intention he says of moving back into Valley Township this fall. The question has arisen as to whether he is still a constable.
>
> "I find no decision on this matter in Missouri Reports but have attached a brief giving you such information as I have in the matter. Will you kindly give me your opinion on the matter as soon as convenient?"

Your Constable was elected to a term of office and under the qualifications as provided in Section 11748 R. S. Mo. 1929, which reads as follows:

> "At the general election to be held in 1920, and at each general election every two years thereafter, the qualified voters of each township in every county in this state shall elect a constable, <u>who shall be a resident of the township for which he is elected,</u>

> and who shall hold his office for two years and untill his successor be elected, and qualified; provided, that in townships that now contain or may hereafter contain a city of over one hundred thousand and less than five hundred thousand inhabitants and which has been or may hereafter be divided into justice of the peace districts, the constabulary districts of said township shall be made to conform to and be coextensive with such justice districts, and the qualified voters in each constabulary district shall elect a constable at the general election in the year ninetwen hundred and twenty-two and every four years thereafter, and all constables now in office in said constabulary districts shall hold their respective offices, upon being appointed and commissioned by the county court of the said county in which said districts are located, until the general election in the year nineteen hundred and twenty-two, and until their successors are duly elected and qualified; and in case of vacancy in said office, the county court shall appoint a constable who shall hold office until the next general election for constables; and every constable elected or appointed in said constabulary districts, in addition to his other qualifications as herein provided, shall be a resident of the district for which he is appointed or elected. The judges and clerks of election shall certify the result thereof to the clerk of the county court, and in case of a tie or contested election, it shall be determined by that tribunal."

Article XIV, Section 7, Missouri Constitution reads as follows:

> "The General Assembly shall, in addition to other penalties, provide for the removal from office of county, city, town and township officers, on conviction of

> willful, corrupt or fraudulent violation or neglect of official duty. Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

Section 11202 R. S. Mo. 1929, provides when an officer shall forfeit his office and reads as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

57 Corpus Juris, page 733, Section 9 has this to say about the presumption of eligibility to the office of Constable.

> "The eligibility of a person is not established by the fact that he has been elected by the people, or has been issued a certificate of election, or has taken the oath of office and given an official bond as sheriff, or has received a commission as such officer."

57 Corpus Juris, page 753, Section 62, has this to say about common law eligibility to the office of Constable.

> "At common law, and by virtue of the express provisions of some constitutions and Statutes, residence in the district in which he is to serve is necessary to the eligibility of a person for the office of constable."

CONCLUSION.

We find nothing in the Constitution or Statutes of the State of Missouri, that would disqualify a duly elected and qualified constable from his office, because after election and qualification he moved his family from the township in which he was elected and qualified. If this constable be disqualified from holding his office it is by virtue of the common law which makes continued residence in the township necessary to eligibility to said office. It is admitted that this constable moved out into another township with his family and with the intention of making his home in the foreign township until fall. It is explained that he intends to move back to the township of his office in the fall. The physical act of staying out of Valley Township until fall, accompanied with the mental determination to make his home without the township until fall apparently amounts to a change of residence without the township, and might subject the constable to an ouster proceeding under the provisions of Section 1618, R. S. Mo. 1929.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

WOS:H

SCHOOLS:)
COUNTY SUPERINTENDENT:) County Superintendent of Schools must serve as truant officer or school attendance officer without compensation.

10-2

October 1, 1935.

FILED
23

Mr. Earl E. Duffey
Superintendent of Schools
Daviess County
Gallatin, Missouri

Dear Mr. Duffey:

This is to acknowledge your letter as follows:

> "Please send me your ruling on fees for county superintendents for their services as truant officer."

In 1933 the Legislature by repealing Section 9435, R. S. Mo., 1929, and enacting in lieu thereof Section 9435, Laws of Missouri, 1933, page 379, placed upon the county superintendent of schools the additional duty of acting as school attendance officer without compensation. Said section in part provides:

> "The county superintendent of schools in each county shall act as school attendance officer for the county without additional compensation for such services. * * *"

Said section further provides:

> "that the board of education in school districts organized under the provisions of Article 4, article 16 and article 17, of chapter 57, R. S. 1929, may appoint and remove at pleasure one or more school attendance officers and shall pay them from the public school funds; and provided

> <u>further</u>, that if any board of education in any school district organized under the provisions of the aforesaid articles does not appoint a school attendance officer, the county superintendent of schools shall act in such district."

And further,

> "shall serve in the cases which they prosecute without further fee or compensation than that paid by the board as aforesaid,"

And further,

> "Whenever a county superintendent of public welfare has been appointed in any county, such county superintendent of public welfare may be appointed by the county superintendent of schools as the county school attendance officer, with such additional compensation as may be fixed by the county court."

A reading of the above excerpts from said Section 9435 plainly indicates the intention of the Legislature to be that the county superintendent of schools shall receive no compensation when performing the duties imposed upon him as truant officer. However, if a board of education, organized under the provisions of Article 4, Article 16 and Article 17, of Chapter 57, R. S. 1929, appoints a school attendance officer or officers, then said person or persons would receive compensation for their services, to be fixed by the board. But when the county superintendent of schools acts as truant officer no provision is made for payment of compensation for such service.

It is our opinion that Section 9435, Laws of Missouri, 1933, page 379, places an added duty upon the county superintendent of schools, namely, that of school attendance officer, without allowing compensation for the services he renders as such.

As the Legislature has decreed that the county superintendent of schools must serve as a school attendance officer without compensation, this Department cannot by a ruling legislate fees for county superintendent of schools if we desired to do so, because that function rests solely with the Legislature and as it has declared the public policy of the State relative to county superintendent of schools acting as school attendance officers, we are powerless to change it. It follows, then, that we cannot make a ruling as to fees for county superintendants of schools for their services as truant officers in answer to your specific question.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General

JLH:EG

SCHOOLS: $400.00 appropriation made by State to counties to be placed into county revenue fund as special fund and same applied on payment of county superintendent's salary.

10-8

October 2, 1935.

FILED
23

Mr. Roy S. Dunsmore
County Superintendent of Schools
Oregon County
Alton, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"Section 61 of the 1935 laws shows the $400.00 to be applied on the salary of the county superintendent is to be deposited as a special fund.

"As a manner of handling this fund the following method has been suggested: For the county superintendent to hold the three last salary warrants (which will amount to $400.00) and not protest them. When this fund comes in from the state the treasurer will take up the warrants by drawing on this fund.

"Please advise us whether or not this would be a satisfactory way to handle the fund, and if not will you please state the way it should be handled."

Laws of Missouri, 1933, Section 9465, page 385, provides as follows:

"For the purpose of ascertaining the population of any county in this state in order to determine the salaries

> of County Superintendents of public schools, the last previous decennial census of the United States shall be conclusive."

Oregon County, according to the last decennial census of the United States, has a population of 12,220 inhabitants.

Laws of Missouri, 1933, Section 9463, page 384, in part provides as follows:

> "In counties having * * * population the County Superintendent of Schools shall receive * * *; in counties having a population of more than twelve thousand and less than fifteen thousand he shall receive One Thousand Six Hundred Dollars; * * * * * * * * * of which the State of Missouri shall appropriate annually out of the general revenue fund of the state of Missouri four hundred dollars to each and every county. The county superintendent shall receive his salary monthly from the county revenue fund in the form of a warrant drawn upon the county treasurer."

A reading of the above section shows that the Legislature contemplated four things: First, that the salary of the county superintendent of schools should be ascertained by the population method; second, that the salary is specific as to amount; third, that the State of Missouri intends to appropriate four hundred dollars annually to each and every county and, presumably, to assist the county in paying the salary of the county superintendent of schools; fourth, that the county superintendent of schools receives his salary from the county revenue fund monthly on a warrant drawn on the county treasurer.

It is thus seen that if the State did not appropriate the four hundred dollars to each and every county that the county superintendent of schools would receive his salary regardless of what the State does. And it is further seen that the county superintendent of schools obtains his money from the county revenue fund on a warrant drawn upon the county treasurer.

On March 2, 1933, this Department rendered an opinion to Hon. J. R. Gideon, Prosecuting Attorney, Taney County, Missouri, wherein we held that the moneys the State appropriated went into the general revenue of the county and that the county court was not authorized in setting it aside as a special fund for the payment of the county superintendent's salary. This ruling was made in view of the 1929 law and the appropriation acts of 1929 and 1931. However, since said opinion was rendered, the 1933 Legislature amended Section 9463 and also passed an appropriation act similar to the 1935 appropriation act, which, beyond peradventure of a doubt, specifically instructs that the moneys the State appropriates must be applied on the salary paid the county superintendent of schools.

We invite your attention to Section 42, page 87, Laws of Missouri, 1933, and Section 61, Laws of Missouri, 1935, page 114. We quote Section 61 as follows:

> "There is hereby appropriated out of the State Treasury, chargeable to the general revenue fund for the fiscal years 1935 and 1936 the sum of Ninety-One Thousand, Two Hundred Dollars ($91,200.00) for the purpose of carrying into effect Section 9463 Revised Statutes of Missouri, 1929, which provides that the State shall pay annually to each county the sum of $400.00, same to be credited to a special fund and applied on the salary paid the County Superintendent of Schools."

In view of the above appropriation act it is our opinion (1) that our opinion dated March 2, 1933, as far as same conflicted with this one, is hereby overruled; (2) that it is our opinion that the four hundred dollars received by the county by virtue of said Section 61 shall be placed in the county treasury and there earmarked as a special fund, and same applied on the salary of the county superintendent of schools; (3) that the plan suggested in your letter of handling said fund is feasible and would be a proper method to follow. The plan, as suggested by you, meets all the requirements of the statute, namely, that the Legislature gives four hundred dollars to each and every county and that said four hundred dollars is placed in the county revenue fund, and that the county superintendent of schools receives his salary from the county revenue as provided by Section 9463, supra; so that all provisions of the statute are fully complied with.

The Legislature clearly intended by its appropriation act that the four hundred dollars was not to augment the county revenue fund but was to be used solely to be applied on the payment of the county superintendent's salary. We presume the Legislature, when it made this appropriation in 1935, had also in mind the county budget act passed by the 1933 Legislature, and also our opinion of March 2, 1933, and thus removes all doubt as to its intention as to how said four hundred dollars would be used and did so by creating a special fund, same to be applied on the salary paid the county superintendent of schools.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting)Attorney-General

JLH:EG

SALARIES AND FEES: Court Reporter's salary is payable on the certificate of the circuit judge alone being presented to the county treasurer. No approval of the county court is required.

11-14

October 29, 1935.

FILED 23

Honorable Lewis A. Duval,
Prosecuting Attorney,
Macon, Missouri.

Dear Sir:

We are in receipt of your inquiry as follows:

> "There is a question between the County Court and the Court Reporter relative to payment of the Reporter's salary under Section 11720 R. S. 1929. The question appears to be whether the certificate of the circuit Judge shall be handled through the County Court as bills payable or whether the certificate of the Circuit Judge is an order on the County Treasurer to be paid by the Treasurer upon presentation of the Circuit Judge's certificate by such Reporter.
>
> "Will you kindly advise as soon as possible. I am also forwarding a letter prepared by the Court Reporter for any additional information it may contain in the matter."

And in connection therewith is received a letter from the Court Reporter touching on the same subject as your letter.

Replying thereto, Section 11720, R. S. Mo. 1929, provides the method of payment of the salary of the court reporters and in each of the classifications with respect to population uses the following language:

> * * * payable in equal monthly installments out of the county treasury on the certificate of the judge in whose court he is employed."

The fair and, we believe, plain meaning of this provision is that said monthly salary is to be paid out by the county treasurer when the certificate of the judge in whose court the reporter is employed is presented to the county treasurer. The legislature in enacting this provision doubtless had in mind that the public was properly safeguarded from imposition or the payment of an unjust claim for salary by requiring that before such salary be paid, it must be first certified by the judge in whose court the reporter is employed. The judge of that court has personal knowledge of the facts and occupies a dignified, responsible and honorable office by virtue of the direct vote of the people of the district, and he is the logical person to pass on such question.

Section 12162 is a general statute prescribing the rights and duties of the county court.

Section 12163 applies to such demands only as are "presented to the county court".

Likewise, Sections 12169 and 12170 only apply to sums of money found by the county court to be due from the county.

Section 11720, being a special statute, must prevail as against the general statute where they are not in harmony. This special statute, by providing that this money shall be paid out on the certificate of the judge in whose court the reporter is employed, signifies the intent of the lawmaking body that this is the necessary and only act required to be done in order to justify the county treasurer in paying this money.

Sections 12163, 12169 and 12170 appear to deal with only such demands as are presented to the county court or such sums as are found by the county court to be due, and with warrants drawn on account thereof, while Section 11720 appears to contemplate that the reporter's salary need not be submitted to the county court, it having been certified by the circuit court.

CONCLUSION

It is our opinion that the court reporter's monthly salary is payable upon a certificate from the circuit judge or judge in whose court the reporter has performed his services being presented to the county treasurer, and that no affirmative action pertaining thereto is required by the county court.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, JR.,
(Acting) Attorney General.

DW:HR

ELECTIONS:) Form of ballot for bond election, substantial
) compliance with Section 7219, R. S. Mo. 1929.
BONDS:)

12-16

December 10, 1935.

FILED
23

Senator A. H. Drunert
and
Mr. William Barton
Jonesburg, Missouri

Gentlemen:

This is to acknowledge receipt of your letter of December 2d, 1935, in which you request the opinion of this Department on the question therein submitted. Your letter is as follows:

> "Jonesburg originally incorporated as a village held an election Saturday, under provisions Sec. 7218, R. S. Mo. 1929, for the purpose of voting bonds for the erection of a community center building to meet a Federal grant under W. P. A. The proposition carried, and bonds will be issued.
>
> "We are writing to inquire if the form of ballot as set out in Sec. 7219, 'For increase of debt--yes; For increase of debt--no' changed for some reason by the Board of Trustees of Jonesburg as follows: 'For the Bond Issue--Yes; For the Bond Issue--No' is a substantial compliance with Section 7219 R. S. Mo. 1929, so as to be legal.
>
> "Unofficially speaking the issue to issue bonds carried by seven votes over the two thirds majority needed to vote bonds.

> "Exhibit A is the ballot that was used. Exhibit B is the ballot suggested as proper, but since the election was held using Exhibit A as the official ballot the question arises as suggested above."

Section 7219, Revised Statutes of Missouri, 1929, provides as follows:

> "The council, trustees or other proper officers of such city, town or village shall prepare and cause to be printed ballots to be used at such election, which shall be in the following form: 'For increase of debt--Yes:' 'For increase of debt--No;' the former of which shall be taken as a vote assenting to such increase of debt, and the latter as dissenting therefrom."

Attached to your letter, marked Exhibit "A", is a form of official ballot used in the election of November 30, 1935, in which the ballot provides:"For the Bond Issue--Yes; For the Bond Issue--No." It is apparent that the form of the ballot does not follow the form as set forth in the statute in Section 7219, supra, wherein the statute says that the ballot shall be in the following form: "For increase of debt--Yes;" "For increase of debt--No;"

If the statute had provided that no ballot could be counted except it be in the precise form therein set forth or the statute contained words showing that the provisions as to the form of the ballot were mandatory, it would then be clear that if the ballot as set forth in the statute was not used the election would be invalidated. We do not find any provisions in this statute which make the statute mandatory.

The cases hold that where the statutes merely provide that certain ballots shall be used and do not prescribe what results shall follow if they are not used the statute is directory, and the test as to the legality of the ballot is whether or not the voters were afforded an opportunity to express, and that they did fairly express, their will. Sanders v. Lacks, 142 Mo., l. c. 263; Horsefall v. School District, 143 Mo. App. 541.

In the case of State ex rel. City of Memphis v. Hackman, 202 S. W. 7, 273 Mo., l. c. 699, the court, in discussing the question as to the form of a ballot in a bond election, had this to say:

> "It is contended that the form of the ballot used at the election did not conform to the law. Section 9546, Revised Statutes 1909, provides that the ballot to be used at elections of this character shall be in the following form: 'For increase of debt. Yes. For increase of debt. No.' The notice of this election and the ballots used at same were: 'For Incurring Indebtedness, Yes. For Incurring Indebtedness. No. The former of which shall be taken as a vote assenting to increasing said debt and the latter as dissenting therefrom.'
>
> "The question confronting us here is as to the nature of the statute. If directory, then the form of ballot used was in substantial compliance with the law, otherwise not. The general rule on this subject is that where a statute provides specifically that a ballot not in a prescribed form shall not be counted, the statute is mandatory and must be enforced; but where it merely provides that certain

ballots shall be used and does not prescribe what results shall follow if they are not used, the statute is directory, and the test as to the legality of the ballot is whether or not the voters were afforded an opportunity to express and that they did fairly express their will. (Sanders v. Lacks, 142 Mo. l. c. 263; Horsefall v. School Dist., 143 Mo. App. 541.) Here the statute simply prescribes a certain form of ballot, but does not declare what results will follow if it is not used. The statute, therefore, may be reasonably held to be directory. In State ex rel. v. Stouffer, 197 S. W. (Mo.) l. c. 251, the ballots used did not conform to the requirements of the statute, but, as in the case at bar, simply provided that a certain form of ballot should be used without prescribing that none other should be counted. That statute was held to be directory."

From the above and foregoing authorities we are of the opinion that the provisions of Section 7219, R. S. Mo. 1929, are not mandatory but directory, and that the ballot used in the instant municipal election, being in substantial conformity therewith, the bonds authorized, insofar as dependent upon the form of the ballot, are legal.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

COUNTY CLERKS)
SALERIES AND FEES) Entitled to fees for certificates for States; must account for notarial fees.

January 4, 1935.

FILED
25

Hon. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Englehart:

Sometime ago you requested an opinion of this office on various matters. Some of these problems were answered in an opinion of this office to Wm. Womack, dated December 26, 1934, a copy of which was on such date forwarded to you. We herewith render you an opinion on the following inquiry:

> "Various provisions of section 11781 provide for fees for certifying an acknowledging various documents. Should the clerk be allowed the regular acknowledgment fee of $.50 for every paper acknowledged for the county and which is certified to any department of the state government, and this fee shown as a part of fees earned and his salary is based on it. Additional fees are shown in the Abstract for the making of the order or for the copying of it in the court record. This is a $.50 fee for placing the seal on the document.
>
> Should the county clerk receive and have on hand receipts for fees surrendered to the treasury by the clerk, when there are acknowledgments made for private individuals?"

In reply to your first question we direct attention to Section 11781 R. S. Mo. 1929, which provides in part:

> "For every certificate and seal not hereinbefore provided for--50¢" " "

Various statutory provisions require the County Clerk to acknowledge for the County and certify various papers, documents and proceedings to various state and county officers and departments. The only compensation received by the Clerk is from fees provided by law. Most of his duties are duties performed for and on behalf of the county and the state. It is not reasonable or logical that he should be expected to perform these services without fees or compensation when this section particularly specifies that he shall receive fifty cents for each certificate and seal. Without question he is entitled to compensation for services rendered to state and county for which he is required to make account. Callaway County vs. Henderson, 139 Mo. 510, l. c. 520:

> "* * *The duty is imposed upon the clerk to include in his return 'all fees for all services of whatever character done in hos official capacity' and upon these the court acts. The fees contemplated by the law includes the compensation allowed by law for all services rendered. Callaway Co. v. Henderson, 119 Mo. 38.
>
> When the clerk makes the returns required by the statute, then the court is given power to pass upon them, that is, to pass upon the items included in the reports. The law imposes a duty upon the clerk as well as the court. He is required to make a return of all amounts received as clerk as well for services rendered the State and county, as for services purely notarial."

Of course, if a particular statute provides that the certificate therein named should be made by the County Clerk without compensation or fee, such certificate could not be charged for.

CONCLUSION.

It is therefore the opinion of this office that absent specific statutory provisions the County Clerk is entitled to fifty cents for each certificate and seal made, whether it is made for the State or County or for an individual.

In respect to your second inquiry, we believe that the quoted portion of the case of Callaway County vs. Henderson supra, answers this inquiry. In that decision the Court stated:

> "He is required to make a return of all amounts received as clerk as well for services rendered the State and county, as for services purely notarial."

As the foregoing fees are fees which must be accounted for they should be surrendered to the Treasurer by the Clerk and receipt therefore taken in the same manner as any other fees.

CONCLUSION.

It is therefore the opinion of this office that the County Clerk should receive and treat fees for acknowledgments made for individuals in the same manner as he handles the other fees of his office.

Respectfully submitted,

HARRY G. WALTNER, JR.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM

SHERIFF FEES - County not liable for defense costs in subpoenaing witness or serving writ of habeas corpus ad testificandum when defendant is convicted.
COSTS -

5-22.

May 15, 1935.

FILED 25

Honorable Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

We have your request of April 19, 1935 for an opinion, which request is as follows:

"Please give me your opinion to the following problems relating to payment of costs in criminal cases.

"Under Section 3825, R.S. of Mo. 1929, page 3332 Ann. St., it is provided that 'whenever any person is convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county'. Under this section is the county liable for services of the sheriff in subpoenaing witnesses for the defendant, when the defendant is convicted and unable to pay the costs and is committed to the county jail?

"Suppose that the defendant was being tried for second degree murder. He filed a petition for a Writ of Habeas Corpus Ad Testificandum to have a witness brought to court from the state penitentiary. The Writ is granted and the witness is produced in court by the sheriff of the county where the case is tried and the defendant is convicted. Under the above quoted section should the county

> pay the sheriff's fees for producing the witness under the Writ of Habeas Corpus? Thanking you, I remain,"

Your opinion presents two questions: (1) Where defendant is convicted, and is unable to pay the costs, is the county liable for fees earned by the sheriff in subpoenaing defense witnesses? (2) Where defendant is convicted, is the county liable for fees earned by the sheriff in serving a writ of habeas corpus ad testificandum on a defense witness?

I.

Liability of county for costs incurred by defendant, where defendant is subsequently convicted.

When passing upon this matter, it is well to bear in mind that costs were not recoverable at common law, and today are purely creatures of statute. State ex rel. v. Wilder, 197 Mo. 27, l.c. 37; City of Greenfield v. Farmer, 195 Mo. App. 209, l.c. 211.

The statutes relating to the taxation of costs showing a clear intention on the part of the Legislature to relieve the county or state of such costs, in Section 3825, R. S. Mo. 1929 provide:

> "Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Section 3826, R. S. Mo. 1929 relating to costs in capital cases, or where the defendant is sentenced to imprisonment in the Penitentiary, specifically prohibits the

payment of costs incurred by the defendant. Likewise, the same rule is found in Section 3827, dealing with cases where the defendant is sentenced to imprisonment in the county jail.

Giving heed to the doctrine that the "prime effort of all judicial interpretation is to ascertain what the Legislature really intended in using the particular language", this office is of the opinion that no costs are chargeable to the county for fees earned by the sheriff in subpoenaing defense witnesses where the defendant was convicted and unable to pay the costs.

II.

Taxation of costs for serving writ of habeas corpus ad testificandum on defense witness.

It appears from your letter that the defendant filed petition for writ of habeas corpus ad testificandum in a second degree murder case, and that the defendant was subsequently convicted. If the defendant had been acquitted, such fees of the sheriff in serving such writ would have been chargeable to the State or county under the provisions of Section 3828, R. S. Mo. 1929. But the defendant having been convicted, the sheriff must look to the defendant and no one else for the recovery of costs incurred in serving the writ. There is no provision in this State for the taxation of costs in habeas corpus matters at the conclusion of habeas corpus proceedings. It cannot be successfully urged that the costs herein must be paid by someone. Such would follow only if there were a statute authorizing the taxation of such costs.

Commenting upon the lack of statutory authority for taxing costs in a habeas corpus matter, the Supreme Court (1913) in Ex parte Nelson, 253 Mo. 627, l.c. 629, said:

#4 - Honorable Melvin Englehart

> "There being a casus omissus in this State in regard to the taxation of costs in habeas corpus proceedings, this court cannot, except by the usurpation of power, tax the costs herein against the petitioner or make any order in regard thereto. * * * "

It is, therefore, the opinion of this office that the costs of serving the writ of habeas corpus ad testificandum, under the facts outlined in your letter, cannot be paid by either the State or county.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

CITY OF ST. LOUIS:

City of St.Louis cannot reduce number of employees of elective office by appropriating less than amount as fixed for number of employees by ordinance.

July 3, 1935.

7-24

FILED
25

Hon. John P. English,
Recorder of Deeds,
St. Louis, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following:

> "Whether or not the Recorder of Deeds of the City of St. Louis is a state office within the meaning of the statutes and has the right to appoint as many deputies as he sees fit - and, whether or not the Recorder of Deeds of the City of St. Louis has the right to appoint as many deputies as he sees fit - and, whether or not the City of St.Louis has the right to reduce the number of deputies or employees in the office of Recorder of Deeds by appropriation or otherwise."

In the original organization of the State of Missouri under Sec. 11889, R.S. Mo. 1929 the State of Missouri is divided into one hundred fourteen counties and the City of St. Louis (Sec. 11995). We shall first discuss the question of whether or not you, as Recorder of Deeds, are to be treated in the light of a state officer or a city officer, although we believe, in our ultimate conclusion, the question of whether or not you are a state officer will have little or no bearing on the question.

The question of whether or not the Collector of Revenue of the City of St. Louis, along with the various other officers of the City of St. Louis, was a state (county) officer under the St. Louis Charter of 1876, and the constitutional provisions as they relate solely to St. Louis, are fully discussed in the case of State ex inf. v. Koeln, 270 Mo., l.c. 183, as follows:

"In opposition to this view, however, both the relator and respondent in their briefs contend that the Collector of Revenue for the city of St. Louis is a State (county) officer and his election is to be governed by the statutes of the State and that since the statutes of the State made no provision for an election to be held in April, 1913, a legal election was not then held which would entitle the respondent to now hold the office.

"Article 4, section 1, St. Louis Charter of 1876, then in force, was as follows:

> 'The following named city officers shall be elected by the qualified voters of the city, and shall hold their office for a term of four years, and until their successors shall be duly elected and qualified, viz: a mayor, comptroller, auditor, treasurer, register, collector, recorder of deeds, inspector of weights and measures, sheriff, coroner, marshal, public administrator, president of board of assessors, and the president of the board of public improvements.'

"Article 2, section 1, of the same charter provides:

> 'A general election of all elective officers required by this charter, or by any ordinance of this city, shall be held on the first Tuesday in April, 1877, and every four years thereafter, except as otherwise provided in this charter and the scheme.'

"Section 11432, Revised Statutes 1909 (Laws 1905, p. 272),provides:

> 'The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this State, who shall hold their office for four years and until their successors are duly elected and qualified: Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector.'

"Section 8057, Revised Statutes 1909 (Act of 1879) provides:

> 'Whenever the word "county" is used in any law, general in its character to the whole State, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city.'

"It will appear from the foregoing quoted sections of the charter and statutes that there is an apparent conflict of law with reference to the election of a collector of the city of St. Louis.

"The following provisions of the Constitution of Missouri, 1875, may be briefly mentioned as applicable, viz: Article 9, section 20, gives to the City of St.Louis the right, in the manner therein designated, to adopt 'a scheme' and 'a charter in harmony with and subject to the Constitution and laws of Missouri,' and provides that the charter and scheme when adopted shall 'take the place of and supersede the charter of St. Louis and

all amendments thereof and all special laws relating to St. Louis County.

"Section 23 of the same article provides that 'such charter and amendments shall always be in harmony with and subject to the Constitution and laws of Missouri...The city as enlarged shall.....collect the State revenue and perform all other functions in relation to the State in the same manner as if it were a county as in this Constitution defined.'

"Section 25, same article provides:

> 'Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this state.'

"The process of logic by which is determined whether the Collector of the City of St. Louis is a city officer or a State officer is apt to become confused by reason of the singular and peculiar relationship which the city of St. Louis bears to the State. Loosely speaking any officer elected by the suffrage of the city of St. Louis might be termed a city officer, at least in the sense that he is elected by the vote of the city. The character of the electorate, however, should not necessarily determine the character of the office. The territory confined within the boundaries of the city of St. Louis forms a political subdivision of the State. This territory has no county organization in the ordinary use of that term, but by the Constitution the said city is to 'collect the state revenue and perform all other functions in relation to the State in the same manner as if it were a county as in this Constitution defined.' If this political subdivision of the State were styled a county no confusion

would arise in arriving at the conclusion that the person whose duty it was to collect the State taxes was an officer of the State and that his election would be a subject of legislative control.

* * * *

But was it intended by this constitutional provision that the charter provision thus superseding the said special laws should for all future time be the controlling law upon the subject-matter covered by said special laws? In other words, was it the intention of the Constitution to forever withdraw from general legislative control the right to prescribe the manner of electing a collector of the revenue for the political subdivision of the City of St. Louis? Or was it the intention merely to provide a convenient rule of conduct in such matters until such time as the General Assembly of the State should, in a legal way, otherwise provide? That the latter was intended, is, we think, clearly evident by the language of section 25, supra, appearing in the same article of the Constitution, viz: 'Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this State.' (Ewing v. Hoblitzelle, 85 Mo. 64, l.c. 76, et seq.) The following authorities also support the general principles here underlying: State ex rel. v. Railroad, 117 Mo. l.c. 11-12; St.Louis v. Klausmeier, 213 Mo. 119, l.c. 129-130; Peterson v. Railroad, 265 Mo. 462, l.c. 504.

"That the General Assembly has the power to legislate with reference to the subject of electing collectors of revenue in the different counties of the State there can be no doubt. Having that

> power over the respective counties, it necessarily follows from the above constitutional mandate that it also has this same power over the political subdivision of the State known as the City of St. Louis."

The City of St. Louis, being a city within itself, having none of the ordinary attributes of a county, and having amended its charter and voted new charters under its constitutional powers, it is difficult to apply the various decisions affecting its city organization and harmonizing with the ordinary county organization.

In view of the decision above quoted, which relates to the Collector of Revenue of the City of St. Louis, we hold that it is applicable also to the Recorder of Deeds of St. Louis and that said office of Recorder of Deeds is a State (county) office. Disregarding the fact that the Recorder of Deeds of the City of St. Louis may be treated as a State (county) officer, there is no statute under the State of Missouri expressly creating the office of Recorder of Deeds of the City of St. Louis; hence, the office of Recorder of Deeds must receive its origin, not from the Constitution and statutes of Missouri, but from the charter framed in harmony with the constitution.

The status of the Assessor of the City of St. Louis and the effect of the charter of the City of St. Louis adopted by the people on June 30, 1914 is fully discussed in the case of State ex rel. McDaniel v. Schramm, 272 Mo. l.c. 546, as follows:

> "I. Since the adoption of the Constitution in 1875, the city of St. Louis, by virtue of the provision of that instrument, has become a city distinct from the four classes of cities into which all the other cities of the State are divided by the Constitution. It has become, also, the possessor of a distinct charter, the creation and adoption of which was provided for by article 9, sections 20, 22, 23 and 25, of the Constitution of 1875. That instrument further provided, upon the adoption of such charter and the accompanying scheme of separation from the county of St.Louis that the provisions of the new charter should supersede and take the place of all special laws previously applicable in the former territory

of St. Louis County then added to that city by the act of separation, and the previous charters and amendments thereto of the city of St.Louis. It further provided that the charter of St. Louis to be adopted in virtue of its authority, should only be amended in the manner pointed out in that instrument. (Cases cited)

"Recognizing, however, that the territory of the municipality thus authorized--although separated from the county of St. Louis--would continue under the control of the future Legislatures of the State of Missouri in all respects not otherwise provided by the Constitution, an express affirmance of such legislative authority was inserted in the provisions of the Constitution. (Ibid., sec. 25) The City of St. Louis is the only one in the State which by name is authorized by the Constitution to exercise the specific powers granted to it by that instrument. (Ibid., sec. 20) A general enabling act was, however, inserted to embrace other cities which, although not named, should fall within a constitutional class. (Ibid., sec. 16) Cities thus constitutionally chartered form classes distinct and separate from the four divisions prescribed by the organic law (Ibid., sec. 7), and their respective charters have all the efficacy of special grants by the Legislature. (Cases cited)

"The new municipality thus organized adopted by the vote of the people, a charter which provided a complete plan for the government of the city in all of its departments and for the election of officers necessary to put such plan into practical operation.

"No department of the city government was more essential to its sustenance and vigor than that providing a basis for the collection of its revenues. The officer charged with performance of these duties is the assessor of taxes,

nine-tenths of which belong to the City of St. Louis exclusively and without which it could not exist. Incidentally and as a part of his duties, his assessment includes a comparatively insignificant revenue for the State at large. Previous to the adoption of the charter, his election was provided for by laws specially applicable to the county of St. Louis. (Laws 1871-2, p. 88, sec. 21) Upon the adoption of the new charter, that law was substituted by the following provisions: Scheme and Charter, art. 5, sec. 15; Shheme and Charter, art. 4, sec. 1; Scheme and Charter, art. 1, sec. 8.

"The new officer substituted by the charter for the performance of the duties of the assessor of St. Louis County, was designated as 'The President of the Board of Assessors.' His office was declared by the scheme and charter to be a 'city office' and under the control of the city government, and he was required to perform all his duties 'in accordance with the general laws' and his qualifications and duties were specifically prescribed. (Scheme and Charter, art. 5, secs. 17, 18, et. seq.) The date of the elections of the President of the Board of Assessors and other elective officers designated in the scheme and charter, was fixed by that instrument to begin on the first Tuesday in April, 1877, and every four years thereafter. (Scheme and Charter, art. 2, sec. 1) Under the express language of the Constitution, the charter requirements in these respects superseded and took the place of the previous special laws on the subject, applicable to the county of St. Louis. (Constitution 1875, art. 9, sec. 20) In an accordant spirit, the Legislature of the State has never undertaken in any act, to alter or control the election of the President of the Board of Assessors (the successor by charter to the previous assessor of St. Louis County) but in every intervening act has expressly

stated that such act providing for the election of an assessor in other counties of the State, should not include the city of St. Louis. (R.S. 1879, sec. 6678; R.S. 1889, sec. 7524; R.S. 1899, sec. 9137; R.S. 1909, sec. 11341) And in the last of such enactments (the one under review in this case) has explicitly excepted the city of St. Louis. It is under this enactment that respondent claims, after having served four years by election, according to the charter, in the spring of 1913, that he is now entitled, after the expiration of his term, to hold over as appointee of the Governor, because his own and all prior elections for forty years were invalid in that they were held in the fall instead of the spring as was provided by the charter in fixing the date and the beginning of the terms of all officers for the government of the city of St. Louis.

* * *

"Now in the matter in hand the Legislature, as appears from the act under review, in the simplest terms stated that the territory of the city of St. Louis should not be governed by it. Hence, as to so much of the State of Missouri as is contained in the boundaries of that city, there was a total failure on the part of the Legislature to make any law whatever. The present case cannot, therefore, fall within any rule of construction applicable to the separation of a complete act from an invalid portion of the same act; for here the Legislature has refused to make a law extending over the city of St. Louis. Consequently no court can now make a law which the Legislature adjourned without enacting, or, in other words, make a law as to that territory over which the lawmaking body failed and refused to exercise its power of legislation.

"It must not be overlooked in the instant case, that the question to be

solved is not whether the Legislature had the power to act, but whether it did, in fact, legislate as to the territory of St. Louis when the statute under review was passed. The terms of that statute declare to a certainty that such portions of the State's domain was not embraced within the scope of the act. The question as to whether or not it should be included, was directly presented to the Legislature yet the fact is indisputable that the lawmaking body, after consideration of that question, expressly refused to make a law governing it and so stated in the act itself. In view of its express refusal to legislate as to this locality, what the Legislature might have done is a wholly futile inquiry devoid of any logical or legal consequence. The fact that it did not make a law for the City of St. Louis, but positively declined to include that territory, is apparent and undeniable from an inspection of the language and terms of the act under review. Having stamped that decision in the very act itself, it is impossible, except by perversion of its terms and ascribing to its words a meaning which is contrary to their intrinsic sense and import, to hold that the Legislature included or intended to include the city of St. Louis as the subject of the act. It follows that the entire theory of respondent, that the statute under review, upon a holding of the invalidity of the proviso would, without further legislative action, become a different law including the excluded territory, is built upon a tissue of sophisms and fallacies and contradiction of terms relied upon to prove that legislative nonaction meant affirmative action; and exclusion meant inclusion.

* * *

"It is wholly unnecessary to pass upon the contention of respondent that the proviso of the act under review is unconstitutional; for having shown that if so, nothing is left of the act itself as an entirety, since we could not make it apply to the City of St. Louis without

> judicial legislation, it follows upon that conclusion that respondent would have no greater authority to hold the office in question than if the act was constitutional and valid in all respects. In neither case would the election of an assessor for the City of St. Louis be governed by the terms of the act, for if valid as an entirety, St. Louis is excepted from its provisions, and if invalid as to the proviso only, then the legislation in the body of the said act did not extend to the 'subject or territory' of the City of St. Louis and cannot be so enlarged by any process of reasoning or construction in the light of the law as expounded above."

We construe the above decision as applicable to the office of Recorder of Deeds, and in the absence of any statutes of Missouri which create the office of Recorder of Deeds of the City of St. Louis, we must look to the charter and ordinances of the City. The Recorder of Deeds must derive his title from the ordinances and charter of the city unless, treating St.Louis as a county, we may interpret Chapter 74 entitled "Recorders of Deeds", Revised Statutes of Missouri 1929, as applicable thereto, Section 11526 of which (amended by Laws of Mo. 1933, p. 360) provides:

> "There shall be an office of recorder in each county in the state containing 20,000 inhabitants or more, to be styled, 'The office of the Recorder of Deeds.'"

Section 11542, Art. 1, Chapter 74, R.S. Mo. 1929, which refers to the appointment of deputies by the Recorder, provides:

> "In all counties wherein the offices of clerk of the circuit court and recorder of deeds have been or may be separated, the recorder of deeds may appoint in writing one or more deputies, to be approved by the county court of their respective counties, which appointment, with the like oath of office as their principals, to be taken by them and indorsed thereon, shall be filed in the office of the county clerk. Such deputy

> recorders shall possess the qualifications of clerks of courts of record, and may, in the name of their principals, perform the duties of recorder of deeds, but all recorders of deeds and their sureties shall be responsible for the official conduct of their deputies. But no recorder now holding office shall appoint such deputy or deputies until he shall have entered into a new bond to the state in such sum, manner and form as is now required by law."

You will note in the above section that the "Recorder may, in writing, appoint one or more deputies to be approved by the county court of their respective counties." The City of St. Louis has no county court; hence, we cannot interpret this statute to give you the authority to appoint one or more deputies in your office as Recorder of Deeds.

We have incorporated the above sections of the statutes in order to deduct this element from the possibility of the general state statutes governing your office and the appointments incidental thereto.

We return to the conclusion reached in the case of McDaniel v. Schramm, supra, under which we concluded that the office of Recorder of Deeds must in its operation derive its authority from the charter and ordinances of the City of St. Louis. This being our conclusion, what is the authority of the City of St. Louis to determine the number of employees consisting of deputies, assistants, stenographers, etc. by appropriating a sum for seven less than the ordinance, Section 3958, provides. Said section provides:

> "The recorder of deeds shall be and is hereby authorized to appoint the following employees, who shall receive the following monthly salaries, respectively: One chief deputy, three hundred dollars; one cashier, one hundred seventy-five dollars; eight deputies, one hundred seventy-five dollars each; two assistant deputies, one hundred fifty-five dollars each; two indexers, one hundred forty-five dollars each; one

> draftsman; one hundred forty dollars; fourteen comparers, one hundred forty dollars each; one marriage license clerk, one hundred fifty dollars; one assistant marriage license clerk, one hundred twenty dollars; two clerks, one hundred twenty dollars each; ten stenographers, one hundred seven dollars each; two watchmen, ninety dollars each; one record compiler, one hundred dollars; and necessary recording clerks, who shall receive seven and one-half cents per folio of one hundred words. (Ord. 33,076, sec. 1.)"

The above ordinance sets forth the number of employees, deputies, assistants, etc. and fixes the salary of each. The ordinance, if valid, determines that you may appoint the number of each as set forth therein, and it is either a potent ordinance or an impotent one. The Charter of the City of St. Louis is the organic law of the municipal corporation, and it bears the same general relation to the ordinances of the city that the Constitution of Missouri bears to the state statutes (St. Louis v. Dorr, 145 Mo. 466, l.c. 478; Quinette v. St. Louis, 76 Mo. 402), assuming that the ordinance is valid, and we have no reason to question its validity. As was said in the case of Jackson v. The Grand Ave. Railway Co., 118 Mo., l.c. 218,

> "Valid ordinances of municipal corporations are as binding on the incorporators as the general laws of the state on the citizens at large."

In the case of Grand Ave. R'y. Co. v. Citizens' R'y. Co., 148 Mo. l.c. 671, the Court said:

> "****a charter adopted by direct grant of the Constitution itself, has all the efficacy of a legislative enactment, and that if such a power be given to a city by charter framed and enacted by the legislature itself, ordinances passed in obedience to such charters, are laws of the State within such municipality, and are binding upon all persons who come within the scope of their operation, unless they conflict with, and are not in harmony with the Constitution and general laws of the State, * * *"

The City of St. Louis, being under a charter voted by its people and having passed ordinances in conformity with this charter, is on a parity with the General Assembly of the State of Missouri, which passes laws in conformity with the Constitution of the State of Missouri. Therefore, when the Board of Estimate of the City of St. Louis undertakes to reduce the appropriation of the office, i.e., the estimates as to the number of employees you may be entitled to under Sec. 3958 of the General Ordinances, it amounts to legislation by appropriation.

The power of the Legislature of Missouri to inject general legislation of any sort in an appropriation act as being repugnant to the Constitution is discussed in the case of State v. Thompson, 289 S.W., l.c. 340-341, wherein the Court said:

> "What, then, is the effect of section 100 of said Appropriation Act, where it provides that in all cases where the salary of an officer or employee has not been 'definitely fixed by statutory law' the amount paid to such official under the Appropriation Act, cannot exceed the amount of salary paid to the person holding the same position the previous biennium? If the Legislature could go thus far in an appropriation bill, it could go further and fix the salaries of all such officers at a given, definite amount.
>
> "Said section 100 strikes at two classes of officials. That part which undertakes to regulate the payment of such salaries as are definitely fixed by statutory law was perfectly useless, because no more could be paid in any event than the statute had fixed. The last part of said section 100 reads as follows:
>
> > '****And in all cases where the salary of any such official or employee is not definitely fixed by statutory law, no salary paid by virtue of this appropriation act shall be in excess of the salary paid to the officer or employee holding such position the previous biennium.'

"It is mani fest that the real purpose of this provision was an undertaking to regulate, determine, and fix the salaries of all such officers or employees affected by the Appropriation Act whose compensation might not be fixed at all by statutory law, or, if at all, where the statute fixed a maximum only. This provision has no other character than that of general legislation, and to inject general legislation of any sort into an appropriation act is repugnant to the Constitution (article 4, sec. 28, Constitution of Missouri) and the appropriation bill, as provided by the Constitution (article 4, Sec. 28) may have a plurality of subjects, while a bill for general legislation may have but one.

"An appropriation bill is just what the terminology imports, and no more. Its sole purpose is to set aside moneys for specified purposes, and the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations. * * * * Here we have an appropriation act which not only appropriates money for the various subjects embraced therein, but which attempts to fix and regulate all salaries affected by the act which either have not been fixed by any statute, or not definitely fixed, which would include all salaries where the maximum alone was named. That the Legislature has the right by general statute to fix salaries is beyond question, but has it the right to do so by means of an appropriation act? We think not."

CONCLUSION

It is the opinion of this department that Section 3958, supra, of the Revised Code or General Ordinances of the City of St. Louis, being an ordinance which gives to your office the number of employees, assistants, deputies, etc., definitely states the salaries of each and entitles you to that number of

employees; therefore the Board of Estimate does not have power, authority or right to reduce that number by failing or refusing to appropriate for the salaries of said employees.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

OWN:AH

APPROPRIATIONS: Cannot expend for purposes not reasonably definitely designated.

August 10, 1935.

FILED 25

Mr. J. D. Elliff, President
Mr. V. H. Collins, Secretary
Board of Curators
Lincoln University
Jefferson City, Missouri

Gentlemen:

This will acknowledge receipt of your two letters, the latter one of which, covering the subject matter of the first, is as follows:

"The 58th General Assembly of Missouri made an appropriation to the Negro Vocational School at Dalton. This school is under the direct control of the Board of Curators of Lincoln University.

"For your further information it might be stated that adjoining the state property at Dalton is a twelve-acre plot of ground, privately owned, on which are several buildings used at the present time by the Dalton School for school purposes.

"In attempting to administer the affairs of the Negro Vocational School at Dalton and to carry out the provisions of House Bill No. 413 as they pertain to said school, the Board of Curators of Lincoln University finds itself in need of the following information:

"1. Under the provisions of House Bill No. 413 of the 58th General Assembly of Missouri is the Board of Curators of Lincoln University authorized to use any of the money appropriated forthe use of the Negro Vocational School at Dalton to purchase the land mentioned in the foregoing statement and use it for school purposes?

"2. If such land cannot be purchased from the above mentioned appropriation is the Board of Curators of Lincoln University authorized to lease the land in question and use it and the buildings for school purposes?

"3. In case the land and the buildings can be leased by the Board of Curators of Lincoln University is said Board authorized to use money appropriated in House Bill No. 413 of the 58th General Assembly to repair buildings on this land and use said buildings for the Negro Vocational School?

"4. Finally, is the Board of Curators of Lincoln University authorized to take an option on the land mentioned in the foregoing sections of this letter with a view of purchasing it at a later date and paying for this option out of funds appropriated by House Bill No. 413?"

Replying thereto, we find that in 1933 the Legislature, Laws of 1933, page 410, created the State Purchasing Agent. Section 2 of that Act provides as follows:

"He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State."

We find no provision in the Constitution authorizing Lincoln University or the Board of Curators thereof to purchase real estate. It would, therefore, follow that the 1933 Act of the Legislature, to the extent that the Board of Curators of Lincoln University theretofore had authority to purchase real estate, has been repealed, and that such purchase of real estate when made shall be through the State Purchasing Agent on behalf of said institution.

Section 3 of House Bill No. 413 passed by the 58th General Assembly, as altered by the Governor before signing the same, appropriated out of the State Treasury, chargeable to the State revenue fund for the years 1935

and 1936, the sum of $11,000.00 for the use of the Board of Managers of Lincoln University, for the administration of the demonstration farm and vocational school at Dalton, for the negro race, $5,000.00 of which is for salaries; $3,750.00 of which is for buildings, building equipment, operative equipment, educational and recreational equipment, laboratory, scientific and testing equipment, other and miscellaneous equipment; $1,450.00 of which is for labor, material and supplies for repairing and replacing buildings, building equipment, operative equipment, and structures other than buildings; and $800.00 of which is for general expense, including communication, printing, binding, student labor, transportation of things, travel, other general expense, educational, scientific and recreational supplies, grounds, and roadways material and supplies, light, heat, power and water supplies, stationery and office supplies.

Your inquiry raises the question as to what may be legally purchased or bought with money appropriated by the Legislature.

Section 19 of Article 10 of the Constitution of Missouri, is as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object."

4 C. J., page 1460, states the following:

> "An appropriation of funds is an authority from the legislature, given at the proper time and in legal form, to the proper officers to apply sums of money out of that

> which may be in the treasury in a given year to specified objects or demands against the state; the act of the legislature in setting apart or assigning to a particular use a certain sum of money to be used in the payment of debts or dues from the state to its creditors; a setting apart from the public revenue of a certain sum of money for a specified object in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other."

Said cited reference further declares with reference to appropriation bills, the following:

> "Annual statutes by which the legislative branch of the government regulates the manner in which the public money voted at each session is to be applied to the various objects of expenditure."

In the case of Ristine v. State, 20 Ind. 328, 339, speaking of appropriations, is the following statement:

> "An appropriation of the money to a specified object would be an authority to the proper officer to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant if he has appropriated money in the treasury."

We think that a controlling idea running through the discussion of the meaning of an appropriation is that the Legislature is required to define with reasonable accuracy the object for which the appropriation is made, and if they fail to so reasonably accurately define, then the appropriation does not measure up to the constitutional requirements, and if it does so define and does measure up to those requirements, then the money must be spent for the purpose as in said appropriation act specified.

With these observations in mind, to your first inquiry our reply is that the Board of Curators of Lincoln University is not authorized to use any of the money appropriated for the use of the Negro Vocational School at Dalton to purchase land mentioned in your inquiry and for use for school purposes, but the State Purchasing Agent takes over the duties said board formerly exercised with respect to the purchase or lease of lands.

Replying to your second inquiry, we do not find any expression of the legislative intent in the words that are used in the appropriation act in terms authorizing the expenditure of the appropriated money for the purpose of leasing land, except and unless it be in Subdivision D of said act, which appears to be an appropriation of $800.00 for the purposes therein mentioned, among which is "grounds". We think a fair interpretation of that subdivision is that part of said $800.00 appropriation may be expended for the purchase of grounds which will be used in the operation of said school. However, as said Subdivision D contemplates that at least a part of said $800.00 appropriation shall be expended for other purposes therein enumerated, it would appear that not all of the $800.00 was intended to be used for the purchase of real estate. We think that under this subdivision lands may be leased for the use and operation of said school.

Replying to your third inquiry, an appropriation act should be construed strictly when there is a question as to whether a right exists or does not, and we do not think you would be justified in using any of said appropriation for the purpose of repairing buildings on this leased land which is owned by others.

Replying to your fourth inquiry, we do not think said appropriation can be used for the purpose of buying options on land. To do so would be beyond the purview and intent of the Legislature.

Yours very truly

APPROVED:

DRAKE WATSON
Assistant Attorney General.

ROY McKITTRICK
Attorney General.

WOS:H

SCHOOLS: Construction of Laws of Missouri 1933, page 415 with reference to funds from cafeterias.

11-14

November 13, 1935.

FILED
25

Honorable Roy Ellis
President State Teachers College
Springfield, Missouri

Dear Sir:

This Department is in receipt of your letter of October 30, requesting an opinion as to the following state of facts:

> "At the request of our Board of Regents I am writing you relative to our cafeteria fund. Our cafeteria is operated on a non-profit basis for the benefit of the students. While a relatively small percent of the students board there, yet it serves as a restraint upon the price of board in the vicinity of the college. It yields no net return whatever for meeting college expenses. It is in the nature of a revolving fund. Today's receipts purchase tomorrow's supplies and so on ad infinatum. It results in a rather deceptive inflation of our receipts; the money being placed into the treasury each month and withdrawn each month by requisition multiplies the item over and over and gives the college the appearance of receiving a lot of money which it does not receive at all. It leaves a false impression with the legislature and with others.
>
> The Board desires to know whether it might not be exempted from deposit in the state treasury as coming under 'housing activities' or some other phase of the proviso exempting certain funds from deposit in the treasury

according to the Act of 1933. Would it not be within the spirit of the law to say that 'housing facilities' includes board facilities also? The two generally go together."

Laws of Missouri 1933, page 415, provides:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted therefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or

some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

CONCLUSION.

In view of the statute above set out, it is not possible to exempt the funds received by State educational institutions from cafeterias operated by said institutions unless it be that said funds be construed as having been received from "student activities." It would appear that these funds, from the facts as stated in your letter, do constitute "funds received from student activities", however, this is purely a question of fact and thus this Department cannot officially pass upon the matter.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JWH: MM

MOTOR VEHICLES: Procedure to be followed in removing a motor or engine from a motor vehicle and replacing same by a new motor or reconditioned engine.

December 12, 1935

FILED
25

Hon. Charles A. Enos,
Chief of Police,
St. Joseph, Missouri.

Dear Sir:

This Department is in receipt of your letter of December 10th wherein you state as follows:

> "For the information of the department we would like to have the opinion of the Attorney General's Office on the following question as we have had several cases called to our attention recently.
>
> "An automobile dealer sells a new car, the motor 'goes bad' and dealer obtains new motor from factory in exchange for old one. The new motor carries no identifying numbers. If, in the presence of commissioned officers, may dealer lawfully stamp with the original motor number in order for it to correspond with the various secret motor numbers stamped on different parts of the car. If this cannot be done, what procedure should be followed."

Laws of Missouri, 1935, Section 7781-A, page 299, sets out the procedure to be followed in removing a motor or engine from a motor vehicle and replacing same by a new motor or reconditioned engine, and provides in part as follows:

> "Nothing in this article shall be construed to prohibit the owner of a certificate of title to a motor vehicle issued by

> the Secretary of State of Missouri from removing the motor or engine from such motor vehicle and replacing same by a reconditioned motor or engine of the same make or manufacture, and giving such replaced motor or engine the same number as the removed motor or engine bore on having same installed.
>
> "Such owner shall joint with the person removing said motor or engine and replacing the motor or engine in said vehicle in an affidavit, which affidavit shall show the number of the engine or motor removed from said motor vehicle covered by said certificate of title, the date of such removal and the reason for such removal, and shall give a description of the motor or engine replaced in said motor vehicle, which replaced engine or motor shall bear the same number as the motor or engine removed, but shall be preceded by the symbol 'RC'. Said affidavit, together with the original certificate of title shall then be sent to the Secretary of State at Jefferson City, Missouri, with a fee of $1.00, for registration of such change in motors or engines. On receipt of same it shall be the duty of the Secretary of State to file the affidavit, and such certificate, in his office, and issue a new certificate of title covering said motor vehicle in the name of the owner thereof, as shown by the certificate filed, and to deliver said new certificate to such owner."

Section 7781-A, supra, requires, among other things, that the replaced engine or motor bear the same number as the motor or engine removed, but makes no provision that the number be stamped on the new motor in the presence of commissioned officers. Absent such statutory provision, we are of the opinion that a joint affidavit to such effect by the owner and the person removing and replacing same, together with compliance of the other terms of the above section, is

the procedure to be followed in removing a motor or engine from a motor vehicle and replacing same by a new or re-conditioned motor.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

GAMBLING - Weekly drawings.

12-18

December 17, 1935

FILED
25

Honorable Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

We have your request for an opinion under date of December 12, 1935, which request is as follows:

> "Mr. R. operates a Drug Store. He keeps a book on the counter of his store, for the purpose of writing the names of persons who enter his store. It is not necessary that a person make a purchase to have his name written in this book and after the name is written each person is given a number. Every Saturday of each week, a drawing is made in either St. Louis or Chicago, Ill., and this determines which of the persons, whose names are written in this book, is to receive a prize of a sum of money. The number is posted on the front of the store at noon of each Saturday and remains there until three o'clock P.M. in the afternoon and if the person who has the number calls, at the store, he receives the prize. If the person whose number was selected, does not call, the prize is added to the prize of the next week. One registration is sufficient. The only necessary action is to register and come to the store to get the prize."

By Section 4314, R. S. Mo. 1929, lotteries and gift enterprises are made criminal offenses. The

three elements essential to constitute any scheme or drawing a lottery are:

Prize, chance and consideration.

It would appear from your letter that these three elements are present, and may be outlined as follows:

1st. Prize - A sum of money.

2nd. Chance - A drawing, and the holder of the lucky number is declared the winner.

3rd. Consideration - In requiring people to come to the store to register, and to come to the store to receive the prize. The fact that people are required to do something, walk or ride to the store, and come in and register, is sufficient consideration.

The above elements of consideration, chance and prize are fully commented on in State v. Emerson, 1 S. W. (2d) 109.

It is, therefore, the opinion of this office that the drawing scheme of the drug store outlined in your letter constitutes a lottery within the provisions of the above section.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

COUNTY COURT: INTOXICATING LIQUOR: All persons engaged in retail business of intoxicating liquor required to take out a county license. County may enforce collection of license fee by an action at law.

May 7, 1935.

5-7

FILED
26

Mr. John A. Eversole
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "I would appreciate your sending me your opinion of Section 24, of the Intoxicating Liquor law passed in the Special Session of 1933 & 1934, relative to the powers of the County Court to impose and enforce collection of the license provided in said Section.
>
> "I am confronted with the situation of a dealer refusing to purchase the license because the law does not require him to buy it and does not provide a method of collection to be carried out."

Section 24 of the Liquor Control Act of the State of Missouri reads as follows:

> "The county court in each county is hereby authorized to make a charge for license issued to retail dealers in all intoxicating liquor, the charge in each instance to be determined by the county court, by order of record, but said charge shall in no event exceed the amount provided for in Section 22 of this act, for state purposes."

While the above section is inartistic in form, nevertheless, it is plain that the county court is authorized

to make a charge for licenses issued to retail dealers in intoxicating liquor. The charge is to be fixed by the county court by order of record but may not exceed the amount provided for in Section 22 of the Liquor Control Act.

It is a fundamental principle of law, too well established to require any citation of authority that a statute is to be construed so as to ascertain the legislative intent expressed therein and, if possible, so as to avoid a reasonable or absurd conclusion. To hold that the county court has the right to charge for a license issued but does not have the right to require all persons engaged in the retail liquor business to purchase a county license would be reaching an absurd conclusion that we do not believe the Legislature intended.

It is also a well recognized principle of law that that which is implied in a statute is as much a part of it as that which is expressed. In the case of In re Sanford 336 Mo. loc. cit. 692, the Court said:

> "(c). There is a familiar rule of statutory construction which fits this case like a glove fits the hand, namely, That when a power is given by statute, everything necessary to make it effectual or requisite to attain the end, is necessarily implied. (1 Kent's Com. 464; Stief v. Hart, 1 N. Y. 20 (Jewett, C. J.); Mitchell v. Maxwell, 2 Fla. 594; In re Neagle, 135 U. S. 1; Commonwealth v. Conyngham, 66 Pa. St. 99, Witherspoon v. Dunlap, 1 McCord, 546; City of St. Louis v. Bell Telephone Co., 96 Mo. 623; Union Depot Ry. Co. v. Southern Ry. Co., 105 Mo. 562; Springfield v. Weaver, 137 Mo. 650.)
>
> "It is also a well settled rule of construction, that where a statute contains grants of power, it is to be construed so as to include the authority to do all things necessary to accomplish the object of the grant. (Lewis' Sutherland on Stat. Const., Sec. 508, and cases cited. See also Ex Parte Martin, L. R. 4 Q. B. 212; People v. Hicks, 15 Barb. 160; Matter of Oath before Justices, 12 Coke 130; In re Dunn, 9 Mo. App. 255.)
> The latter case is very much like the

one at bar."

It is therefore our opinion that a person engaged in the retail liquor business in a county must take out a county license when the county court has by order of record fixed the amount to be charged for said license.

Section 24, supra, does not provide any method for collecting the license fee charged by the county court. It has been held, however, by the courts on numerous occasions, that where a statute fails to provide a method for the collecting of a license tax that an ordinary suit at law will lie for the collection thereof.

In the case of City of St. Louis v. United Railways Company of St. Louis, 174 S. W. loc. cit. 93, the Supreme Court speaking through Walker, J. said:

> "(12) The defendant, in addition to the foregoing, contends that the levying of the tax under the ordinance does not create a debt; that the ordinance provides an exclusive remedy therein for its enforcement, which remedy is wholly penal, and cannot therefore be enforced in an action for a debt. From the early case of Carondelet v. Picot, 38 Mo. 135, to State ex rel. v. Trust Co., 209 Mo. loc. cit. 490, 108 S. W. 97, it has been held that a tax is not a debt or in the nature of a debt; that it is not founded on contract and operates in invitum; and that, if a remedy is specified for the collection of a tax , it will be held to be exclusive, where no other is provided. This holding, however, should be construed in the light of the modifying rule that, where a statute or ordinance wholly fails to provide a remedy for the enforcement of the payment of taxes, the right arises to institute a civil suit at law therefor. This doctrine has found appropriate lodgment in many cases in this jurisdiction in which the matter of the collection of taxes has been discussed. In the Picot Case, supra, the court said in substance; If a tax be imposed and no method provided for its

recovery, a resort to legal proceedings becomes a matter of necessity, where the Legislature has failed entirely to indicate a mode or manner of collection.

"In State v. Severance, 55 Mo. 378, this court said, where a statute authorized the taxation of railroads and designated no particular manner in which the towns or cities where the taxes are to be levied might proceed to collect same, a resort might be had to an ordinary action at law to enforce payment. The rule being announced generally that, where a statute gives a right and no remedy, resort may be had to the usual remedy applicable to the case.

"In Phelps v. Brumback, 107 Mo. App. loc. cit. 25, 80 S. W. 680, the court says:

"'If the statute authorizes the imposition of a tax but prescribes a remedy for its collection, the usual 'action' for a debt may be had.'

"In State ex rel. v. Dix, 159 Mo. App. 573, 141 S. W. 445, the Court said:

"'Where the statute or ordinance * * * fails to provide a remedy, an implication arises that the legislative body intended that a civil suit at law would lie for the collection of the tax; but, where an adequate remedy is provided, the implication must be the other way.'"

And further at loc. cit. 94, the Court concluded:

"Regardless, therefore, of whether taxes are debts in the sense of ordinary money obligations growing out of contracts, they are in the nature of debts arising out of and necessarily incident to the duty the citizen owes as his portion required to be contributed to the support of that intangible thing called the body politic; and the government, whether it be state or municipal, has the same right to enforce that duty as if it were a debt, and in the same way. State ex rel. v. Trust Co., 209 Mo. 490, 108 S. W. 97;

Greeley v. Bank, 98 Mo. 458, 11 S. W. 980; Perry v. Washburn, 30 Cal. loc. cit. 331; People v. Seymour, 16 Cal. 340, 76 Am. Dec. 521; Sav. Bank v. U. S. 19 Wall. 227, 22 L. Ed. 80."

CONCLUSION.

In view of the above, it is the opinion of this department that a county court may, by order of record, require all retail dealers in intoxicating liquor to take out a county license. They may charge for such license an amount to be determined by them which shall not exceed the amount provided for in Section 22 of the Liquor Control Act for State licenses. It is our further opinion that the county may enforce collection of the license fee against any retail liquor dealer by an ordinary action at law as for debt.

Very truly yours,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/afj

LIQUOR CONTROL ACT: County may exact a license from a wholesale beer dealer in the county where the premises are located.

June 22, 1935.

FILED
26

Hon. John A. Eversole,
Prosecuting Attorney,
Washington County,
Potosi, Missouri.

Dear Sir:

This department is in receipt of your letter of June 17 in which you make the following inquiry:

> "Under the new liquor law does the county have a right to tax a wholesale beer dealer? If so, can they be taxed in more than one county if they are doing business in several counties?
>
> "What about these wholesale grocer companies who cover several counties and claim they cannot be forced to pay a county tax because they received orders for their beer before delivering it?"

We assume that when you use the term "wholesale beer dealer", you refer to a dealer of 5% malt beer. Counties and cities are given authority by the Legislature to exact license fees from dealers of intoxicating liquors in every form. Section 25 of the Liquor Control Act provides:

> "In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized by this act shall pay into the county treasury of the county wherein the premises described and covered by such permit or license

> are located, or in case such premises are located in the City of St. Louis, to the collector of revenue of said city, a fee in such sum (not in excess of the amount by this act required to be paid into the state treasury for such state permit or license) as the county court, or the corresponding authority in the City of St. Louis, as the case may be, shall by order of record determine, and shall pay into the treasury of the municipal corporation, wherein said premises are located, a license fee in such sum, (not exceeding one and one-half times the amount by this act required to be paid into the state treasury for such state permit or license), as the law-making body of such municipality, including the City of St. Louis may by ordinance determine. The Board of Aldermen, City Council or other proper authorities of incorporated cities, may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of such ordinances, where not inconsistent with the provisions of this act."

CONCLUSION

In view of the above section, we are of the opinion that every wholesale beer dealer who holds a permit or license from the Supervisor of Liquor Control must obtain from the county a permit if the premises described and covered by the permit issued by the Supervisor of Liquor Control are within the confines of the county.

This conclusion also answers your question: "If so,

can they be taxed in more than one county if they are doing business in several counties?"

Wholesale grocer companies who cover several counties can be forced to take out a county license only in the county in which the wholesale grocer company is located. The question of wholesale grocer companies selling their products in several counties by taking orders is very similar to the question contained in Part 1 of this opinion.

Referring again to the contents of Section 25, we are again of the opinion that before the county can exact a license fee it is necessary that the permittee receive a permit from the Supervisor of Liquor Control, and the only county that can exact a fee, even though the grocer company be doing business through orders in a number of counties, is the one in which the premises are located.

This conclusion is further strengthened by the words contained in the parentheses "not exceeding one and one-half times the amount by this act required to be paid into the state treasury for such state permit or license".

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

OWN:AH

SCHOOLS:) Person must possess certain qualifications
) at the time of his election, and if acquires
COUNTY SUPERINTENDENT) them after his election but before he
OF SCHOOLS :) qualifies, such does not avail him of anything.

February 5, 1935.

FILED
27

Hon. T. Ansel Faucett
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Mr. Faucett:

This is to acknowledge your letter of January 29, 1935, wherein you inquire:

> "Does a candidate for State Superintendent of Schools have to be qualified at the time of his election, or may he qualify after his election? Assume that a candidate does not have a certificate to teach at the time of his election but acquires one subsequently and before he assumes the duties of his office."

Section 9454, R. S. Mo. 1929,, in part provides as follows:

> "There is hereby created the office of county superintendent of public schools in each and every county in the state; * * * * * said county school superintendent shall be at least twenty-four years old, a citizen of the county, shall have taught or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment; or shall have spent the two years next preceding his election or appointment as a regular student in a state teachers' college or university, and shall at the time of his election hold a diploma from one of the state teachers colleges or state university, or shall hold a state certificate,

> "authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent; * * * * *. All county school superintendents elected on the first Tuesday in April, 1927, and thereafter, shall hold said office for a term of four years from and after the first Monday in July following their election, or until their successor is elected and qualified,* * * * * * * * * *."

We invite your attention to the underscored part of the above statute as it determines the question presented.

Section 9454, supra, states, "and shall at the time of his election hold", and if a person did not hold a diploma or have the other certificates provided for at the date of his election, then, could it be said by judicial interpretation that the words "shall at the time of his election" be construed to mean "shall at the time of his taking office?" In other words, the statute prescribes qualifications and says that the candidate shall at the time of his election possess them, and as the person is elected in April and does not take office until July, would that person be permitted to qualify or obtain the certificate after the date of his election? We think not.

The words "shall at the time of his election" have been before the Supreme Court of Missouri for interpretation in the case of State ex rel. Weed v. Meek, 129 Mo. 431. We quote from said case (page 437):

> "IV. This brings us to the merits of the controversy, and the question, was the defendant eligible to the office of county school commissioner to which he was elected, for theproper solution of which we must look to the statute governing such cases. The qualifications for that office are prescribed by section 8028, Revised

"Statute, 1889, which reads as follows: 'There is hereby created the office of county commissioner of public schools, who shall be at least twenty-one years of age, a resident of the county, when elected, for at least one year prior to such election, and shall hold a certificate entitling him to teach in the public schools of such county. * * *'

While this statute is rather awkwardly worded, and somewhat difficult of construction, according to strict grammatical rules, there can be no doubt that the legislature intended thereby to prescribe the essential qualifications which a citizen must possess, either to be elected legally to the office of commissioner of public schools or in order to hold that office after having been elected thereto. It prescribes three qualifications. He must be twenty-one years of age. He must have been a resident of the county not less than one year. He must hold a certificate entitling him to teach the public schools of the county. When must he possess these qualifications? The statute returns but one and the same answer to each and all of them--'when elected.'"

And further,

"The defendant admits that at the date of the election he did not hold a certificate entitling him to teach in the public schools of DeKalb county. He did not, therefore, possess the requisite qualifications to be elected and to hold the office by virtue thereof (State ex rel. v. Newman, 91 Mo. 445), and shows no legal right thereto against the inquiry of the state in this proceeding."

The dissenting opinion by Judge Walker in the case of State ex inf. Chinn, Prosecuting Attorney, ex rel. Botts v. Hollowell, 233 S. W. 405-703, contains apt language concerning the present question. We quote (page 704):

> "We take no account of certificates granted, if any, subsequent to appellant's election as county superintendent, as the statute is mandatory and requires the qualification to exist at the time of her election. Section 11343, R. S. 1919; State ex rel. Weed v. Meek, 129 Mo. loc. cit. 438, 31 S. W. 913."

We also quote from the case of State ex inf. Burgess v. Hodge, 320 Mo. 877, wherein the Supreme Court of Missouri, en Banc, page 882, said:

> "* * *, it follows that on April 5, 1927, the date respondent was elected, the full period of the third renewal granted him had not expired, and at the time he was elected he had a certificate entitling him to teach in the public schools of Barry County."

From the above it is our opinion that a person must at the time of his election hold a diploma from one of the state teachers' colleges or State University, or shall hold a state certificate authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent, and if such person at the time of his election does not have these necessary qualifications, then such person is not qualified to be superintendent of schools.

It follows from what has been said that the acquiring of a certificate after the election and before the taking of office would not qualify the person seeking office.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

STATE BOARD OF H[illegible]ALTH) Qualifications to practice Chiropody.
CHIROPODY)

January 2, 1935.

FILED
28

State Board of Health
Jefferson City, Missouri

Attention of Mr. J. J. Ferns.

Gentlemen:

We acknowledge your request for an opinion of this office made orally upon the following matter:

> "May the State Board of Health admit to examination for license, a person who was engaged in the practice of chiropody prior to the enactment of the Chiropody Act, if he is a person of twenty-one years of age and of good moral character?"

In connection with this request we have examined the memorandum brief prepared by J. Henry Caruthers. We deeply regret that we cannot agree with the conclusions reached by Mr. Caruthers in his brief.

Under the provisions of Section 9074 R. S. Mo. 1929, no one is allowed to practice chiropody in this state without being duly licensed so to do

> "* * * after examination conducted by such board or a committee thereof.* * * *"

This law became effective August 6, 1919, and from and after that date it was unlawful in this State to practice chiropody without a license duly issued by the State Board of Health. The Legislature being cognizant of the fact that many who were then practicing chiropody in this State should be permitted within certain limitations to continue such practices and to receive a license from the State so to do, provided by what is now Section 9076 R. S. Mo. 1929 that

> "Every practitioner of chiropody, twenty-one years of age or over, and of good moral character, who shall make application for registration before the first day of October,

> 1919, and who can prove to the satisfaction of the board that he has been engaged in the practice of chiropody in this state for a period of one or more years next prior to the passage of this law, shall, upon payment of a fee of twenty-five dollars, be registered without examination and shall receive in testimony thereof a certificate signed by the chairman and secretary of said board. Applications for registration shall be made upon blanks furnished by the board and shall be signed and sworn to by the applicant. All fees received by the board shall once a month be paid by its secretary into the treasury of the state."

Be means of this provision those who had practiced chriopody in this State could by complying with the formalities there provided, become licensed without examination. By this provision the Legislature provided one and only one manner in which chiropodists could become licensed who had no additional qualifications but could only present knowledge and experience gained from actual practice as justifying the issuance of a license to them. This manner was the granting of a license without examination, and application therefore was required to be made before October 1, 1919. The Legislature in its wisdom established definite time for the filing of these applications. It is not at all difficult to understand the wisdom of this requirement. In the following section, Section 9077, it is provided:

> "Any person not entitled to registration as aforesaid, who shall furnish the board with satisfactory proof that he or she is twenty-one years of age or over, and of goodmoral character, and that he or she has received at least four years' high school training, or the equivalent thereof, as determined by the board, and has received a diploma or certificate of graduation from a recognized school of chiropody, having a minimum requirement of two scholastic years, embracing at least nine months of instruction each year, a minimum total of twenty-six hundred hours, shall upon payment of fee of fifteen dollars, be examined and if found qualified, shall be registered, and shall receive in testimony thereof a certificate signed by the chairman and secretary of the board."

By means of the foregoing Section one who is not entitled to register under the provisions of Section 9076 must take the examination to prove his qualifications and before he may be permitted to take the examination he must furnish satisfactory proof of being twenty-one years of age, of being of good moral character, of having the equivalent of four years high school education and the possessor of a diploma issued by a recognized school of Chiropody requiring certain instruction. These statutory requirements are fixed and definite and must be complied with by each and every applicant to take the examination. It is apparent that the instant subject is not one "entitled to registration as aforesaid" as he did not make his application for registration under the provisions of Section 9076 prior to October 1, 1919.

While it is true that the Board may conduct examinations under "such rules and regulations as said Board may determine" still no one will deny that the Board doesnot possess the power to adopt rules and regulations contrary to specific statutory provisions. We cite no authorities for this as it is too elementary to require citations of authority. Likewise, it is only when a statute is ambiguous and uncertain that rules of construction may be applied. In the instant case the provisions of the law are clear, leaving no room for construction.

CONCLUSION.

It is therefore the opinion of this office that the Board of Health cannot lawfully admit to examination an applicant who does not possess the requirements set forth in Section 9077 R. S. Mo. 1929, to-wit, twenty-one years of age, good moral character, the equivalent of four years high school training, a diploma of graduation from a recognized school of Chiropody requiring two scholastic years of nine months each, and a minimum total of 2600 hours.

Respectfully submitted,

HARRY G. WALTNER, JR.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

TAXATION: Property of local council of Girl Scouts of America exempt.

12-21

December 20, 1935.

FILED
28

Mrs. Clifford Fischer,
Commissioner Girl Scouts,
1315 West High Street,
Jefferson City, Missouri.

Dear Mrs. Fischer:

This department is in receipt of your letter of December 20 requesting an opinion as to the following:

> "The Girl Scout Council is requesting an opinion as to whether or not the property on which the Girl Scout Cabin is situated could receive an exemption from taxation. The land is part of the N.E. of the N.W. of Section 29, Township 44, Range 11, contains 1-87/100 acres, and is assessed at $250.00. The books of Cole County show assessments of $4.06 for 1933, $3.91 for 1934, and $3.13 for 1935.
>
> "The Girl Scout organization is supported by public subscription and would appreciate your consideration."

Section 6 of Article X of the Constitution of Missouri provides:

> "The property, real and personal, of the state, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated

> cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemption shall be only by general law."

Section 9743, R.S. Mo. 1929, passed by the General Assembly pursuant to the mandate of the Constitution provides:

> "The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; third, lands and other property belonging to this state; fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; fifth, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns,

> to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

In the case of St. Louis Young Men's Christian Ass'n. v. Gehner, 47 S.W. (2d) 776, Judge Gantt said (l.c. 777):

> "In State ex rel. v. Gehner, supra, after reviewing the authorities, we said: 'It will therefore be seen that the test for tax exemption is not the number of good purposes to which a building may be put, nor the amount of good derived by the general public in the operation of such purposes, but whether the building is used exclusively for religious, educational, or charitable purposes. If it is used for one or more commercial purposes, it is not exclusively used for the exempted purposes, but is subject to taxation."

In the case of Camden County Council, Boy Scouts of America v. Bucks County, 13 Pa. D. & C. 215, the Court had before it the question of whether or not the property belonging to Camden County Council, Boy Scouts of America was exempt from taxation in Pennsylvania. The Court in holding the property exempt from taxation, said:

> "It is not seriously disputed that the petitioner is an institution of purely public charity within the meaning of Section 1, Article IX of the Constitution of Pennsylvania, * * * * "

CONCLUSION

In view of the foregoing, it is the opinion of this department that lots belonging to the Local Council of the Girl Scouts of America, located in incorporated cities or towns or

within one mile of the limits of such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, being used exclusively for charitable purposes are exempt from taxation in the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

TAXATION AND REVENUE: House Bill 124, page 166 Laws of Missouri Extra Session, 1933-34, applicable to general personal real estate of cities of fourth class, but not to special benefits.

1-14

January 9, 1935.

FILED
29

Hon. Elbert L. Ford
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. Ford:

In reply to your request for an opinion of this office we are rendering the following opinion. Your request reads in part as follows:

> "The Treasurer and Ex-Officio Collector of this County has asked me to get an opinion from you in regard to House Bill No. 124,
> * * * * *
>
> The question is will the penalties and interest on drainage, levee and other benefit taxes apply under this bill; also, city taxes, both real and personal and special benefit assessment taxes, such as water works and sewerage taxes."

House Bill 124 of the 57 General Assembly in Extra Session, is found at page 166 Laws of Missouri 1933-34, Extra Session, and reads as follows:

> "That all penalties and interest on personal and Real Estate Taxes, delinquent for the year 1932 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

We shall deal with your questions separately as follows:

I.

HOUSE BILL 124 DOES NOT APPLY TO DRAINAGE AND LEVEE DISTRICT ASSESSMENTS.

On November 12, 1934, this office issued an opinion to the Honorable Charles Young, Treasurer of Livingston County, Missouri, wherein the following conclusion was stated:

> "* * *It is the opinion of this office that House Bill 124 of the Extra Session of the 57th General Assembly as enacted, does not yet apply to or include what is commonly but erroneously termed as 'drainage taxes.'"

We are herewith enclosing to you a copy of this opinion so that you may know the foundation for this conclusion.

II.

HOUSE BILL 124 APPLIES TO CITIES OF THE FOURTH CLASS OPERATING UNDER ARTICLE VIII OF CHAPTER 38 R. S. MISSOURI, 1929; RESPECTING GENERAL, PERSONAL AND REAL ESTATE TAXES.

House Bill 124 as hereinbefore quoted is a general law being couched in broad and general terms. It applies to "all" penalties and interest on "personal and real estate taxes." There is nothing in the act to indicate any intention to limit its operation. The title of the act reads as follows:

> "AN ACT for relieving delinquent taxpayers whose taxes, personal or real estate, were delinquent for the year 1932, and prior years, and providing for penalties thereon after December 31, 1933."

The title indicates the relief sought to be affected. There is nothing from the terms of the act from which we are to gather that any class of delinquent taxpayers are to be deprived of the benefit of the provisions of the law. The remarks of Judge Hays in the case of State ex rel. vs. Koeln, 61 S. W.750, l. c. 751, are apropos:

> "Before going into the constitutional questions involved, it may be well to consider the purpose of No. 80 and how and upon what it would operate if valid. Its declared purpose is to be accepted as true, and should be effectuated if that can be done without offending against the organic law. This purpose is immediate relief from delinquent taxes of all persons on whose property taxes remained delinquent on January 1, 1933, as shown on the official tax books or tax bills. Such relief was declared to consist in the remission of 'penalties, interest and costs' and to be conditioned upon the payment of the original (the assessed and levied) amount of said taxes as charged."

House Bill 124 is a remedial law designed to afford relief to delinquent taxpayers, as such it should receive liberal interpretation and should be applied where it will affect the avowed intent and purpose of the law. The terms "personal" and "real estate" taxes have no peculiar application to state and county taxes and are applicable to city taxes as well.

An examination of the Senate and House Journal of the 57th General Assembly in Extra Session does not indicate that this law was to have a peculiar or limited operation. It appears from the words and expressions of the Legislattre that this law was intended to be for the relief of all delinquent taxpayers and that the terms "personal" and "real estate" taxes should not be limited in their operation to state and county taxes.

We are not required in this case however to rely solely upon an interpretation of House Bill 124. The enforcement of delinquent taxes in cities of the fourth class is provided for in Section 6995 R. S. Mo. 1929. This section reads in part as follows:

> "Upon the first day of January of each year all unpaid city taxes shall become delinquent, and the taxes upon real property are hereby made a lien thereon. The enforcement of all taxes authorized by this article shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes,* * * *"

Under this section delinquent city taxes are to be enforced in the same manner and under the same rules and regulations as may be provided by law for the collection of state and county taxes. This section has heretofore been held to adopt the law respecting state and county taxes, imposing a penalty of 12% per annum on 1% per month upon all taxes paid after date of delinquencies.

In the case of City of Westport ex rel. v. McGee, 128 Mo. 152, the plaintiff obtained interest on a tax bill issued by a city of the fourth class bearing interest at 12% per annum as provided under the general law for delinquent state and county taxes. The defendant apparently took the position that there was no authority for the collection of this penalty on the city tax bill. Upon this contention the Court stated, l. c. 158:

> "Appellant's point as to the rate of interest charged is not well taken. Section 7605, Revised Statutes of Missouri, 1889, provides that, as to state and county taxes, any taxpayer who fails to pay his taxes on a fixed date is chargeable by the collector with a 'penalty' (sometimes also called 'interest') of one per cent. per month. The statute calls this an 'additional tax,' or 'penalty'. Section 1804, Revised Statutes of Missouri, 1889, provides that the payment of all taxes in such cities shall be enforced by the collection in the same manner and under the same rules and regulations, as may be provided by law, for collecting and enforcing the payment of state and county taxes. The imposition of a penalty is a regulation for the collection of the tax and ordinarily the most effective."

As in the foregoing case it is held that the general laws applying to penalties on delinquent state and county taxes are applicable to delinquent city taxes in cities of the fourth class, it necessarily follows that House Bill 124 being a part of the general laws respecting delinquent taxes must be considered as governing the collection of delinquent city, personal and real estate taxes.

CONCLUSION.

It is therefore the opinion of this office that House Bill 124 of the 57thGeneral Assembly in Extra Session, applies to and governs the calculation of penalties and interest on delinquent personal and real estate taxes assessed and levied by cities of the fourth class.

III.

HOUSE BILL 124 DOES NOT APPLY TO SPECIAL BENEFIT ASSESSMENTS LEVIED BY CITIES OF THE FOURTH CLASS.

We believe that the rule laid down in the opinion referred to under point one of this opinion is to govern the conclusion under this heading. The question as to whether or not House Bill 124 is applicable to any given tax is to be determined by an issue of fact, to-wit, whether the tax considered is in truth a general tax or whether it is a special benefit assessment. If it is an assessment in the nature of a drainage or levee district assessment, to-wit, if it is assessed against the specific property benefited by the improvement in direct proportion to the amount of benefits received, it is to be considered as a benefit assessment and not as a tax. On the other hand, if it is a uniform contribution required of all property in proportion to its valuation it is to be considered as within the term "personal and real estate" taxes and hence any tax so classified would be affected by House Bill 124.

CONCLUSION.

It is therefore the opinion of this office that special benefit assessments levied by a city of the fourth class are not to be governed by the provisions of House Bill 124 enacted by the 57th General Assembly in Extra Session.

Respectfully submitted

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HGW:MM

Enc.

SHERIFF: Sheriff not required to pay for lights, fuel, soap, etc., furnished prisoners out of the fees allowed him for boarding said prisoners. County Court is liable for purchases of necessary supplies to keep the jail in good and sufficient condition.

1-22

January 17, 1935

FILED
29

Honorable Elbert L. Ford
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

This will acknowledge receipt of your letter of January 8, 1935, requesting an opinion, which reads as follows:

"I received today the following letter from the County Court.

'We, the County Court, wish you would get us an opinion as to who should pay the fuel, light bills, etc. for keeping prisoners in the County Jail.

The County pays the Sheriff a stipulated amount per day for boarding prisoners. Should this not include lights, fuel, soap, laundry and all incidental expenses?

Please give us this opinion.'

I would appreciate it if you would advise me if the contract for boarding prisoners with the Sheriff includes all the incidental expenses at the jail. I assume this proposition has come up in some other County and you probably have an opinion already written on this.

Please advise me at your earliest convenience."

I.

Section 11794 Revised Statutes Missouri 1929, provides:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the County court of each county and by the municipal assembly of any city not in a county in this state; Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

8 Corpus Juris, page 1130, defines 'board' as used in the above section, as follows:

"That which is served at the board or table, food, especially meals regularly furnished for pay, sometimes including lodging, but often, as in table board, day board, excluding lodging."

We are of the opinion that the fee allowed a sheriff for boarding prisoners is his compensation for feeding said prisoners and he is not required to pay for lights, fuel, soap and other incidentals for his prisoners out of the fees allowed him under the provisions of Section 11794, supra.

II.

Section 8524 Revised Statutes Missouri, 1929, provides:

> "There shall be kept and maintained, in good and sufficient condition and repair, a common jail in each county within t is state, to be located at the permanent seat of justice for such county."

Section 8526 Revised Statutes Missouri 1929, reads as follows:

> "The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

The Supreme Court has on numerous occasions held that the sheriff, under the provisions of the above sections, can purchase all supplies necessary to keep the jail in good and sufficient condition, which includes sanitary conditions, and needs no order of the county court to render the county liable for such purchases.

In the case of Harkreader v. Vernon County 216 Mo. 699, the facts were as follows; the Sheriff of Vernon County brought suit against the county in three counts, the first for $246.15 for gas and water service in the county jail; the second count for $18.00 for stamps used in his official business , and the third count for $72.00 for janitor service in his office, all of which sums he had paid out because of the refusal of the county court to supply such water, gas, janitor service and stamps and for which he demanded and was refused reimbursement. He obtained judgment on each count and Vernon County appealed. The Supreme Court examined the judgment of the trial court and Judge Lamm, speaking for the court, at l. c. page 708,said:

> "It is written in the statutes that jails should be 'kept and maintained in a good and sufficient condition,' etc. (R. S. 1899,sec.8104),that is, 'good and sufficient' in a modern sanitary sense, having an eye to the sure results established by scientific investigation of the disease-breeding effects of filth and bad air. That statute is broad enough to cover the extraordinary condition disclosed by this record.
>
> We are driven to the conclusion there was more piqué than principle at bottom in the action of the county court.
>
> Let the judgment be affirmed."

In the case of Disinfecting & Mfg. Co. v. Bates County 273 Mo. l. c. page 305, the court said:

> "It is not doubted that the statutes (Secs.1571 and 1573,R.S.1909) and the construction thereof by this court in a case to an extent analogous (Harkreader v. Vernon County, 216 Mo.696) furnish authority to a sheriff of a county to purchase such articles and supplies as are requisite and necessary to keep and maintain the county jail 'in good and sufficient condition and repair.' "

In Sanitary Co. v. Laclede County 307 Mo. l. c. page 17 and 18, the court, in passing on the authority of the sheriff to purchase necessary supplies to keep the jail in a sanitary condition and render the county liable for such purchases, said:

"The evidence offered by plaintiff tended to sustain its demand and need not be specially noticed. The defendant offered evidence tending to prove that the sheriff, upon whose order the goods were sold and delivered, had no authority to order the same and that they were not needed or necessary. This might be a good defense in so far as the goods sold and delivered for use at the court house and poor farm are concerned. Section 9507 requires that the agent purchasing supplies for the county be lawfully authorized, and this requirement is not done away with, even though the claim may not be defeated, because the prescribed legal steps have not been followed. No question of that sort can be successfully raised as to any part of the goods ordered for and used at the county jail. Under Section 12549 the jail is required to be kept in good and sufficient condition, and under Section 12551 the sheriff of the county has the custody, keeping and charge of the jail. He, therefore, has full authority to purchase all supplies necessary to keep such jail in good and sufficient condition, which includes sanitary condition, and needed no authorization by the county court to render the county liable for purchases for such jail for such purpose. (Harkreader v. Vernon County, 216 Mo. 696.) The sheriff testified that the goods were needed and used at the court house, as well as at the jail. There was no testimony whatever tending to show that the goods ordered were not needed at the jail. Therefore, the circuit court should have directed a verdict for plaintiff, to the extent that such goods were used at the jail, and for that reason the judgment in defendant's favor cannot be sustained."

We are therefore of the opinion that a sheriff has the authority, under the provisions of Sections 8524 and 8526, supra, to purchase all necessary supplies necessary to keep the jail in good and sufficient condition, including lights, fuel and soap, and that the county is liable for such purchases.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

OWN:LC

COUNTY SUPERINTENDENT) County Superintendant of Schools must be
OF SCHOOLS:) twenty-four years old at the time of his
election.

March 11, 1935.

FILED
29

Hon. Tom Foraker,
Principal
Nashville Public School
Nashville, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of February 26, 1935, requesting an opinion of this office, reading as follows:

"I am aware that the present law regarding the qualifications of the county superintendent states the minimum age as twenty four.

I have ninety hours of college work, am teaching my fifth term, hold a First Grade County Certificate, but I am only twenty two years of age.

Is there any possible way that I could be exempted from the age requirement? If I were elected, could the election be contested?"

Section 9454 Revised Statutes of Missouri 1929, reads in part as follows:

"There is hereby created the office of county superintendent of public schools in each and every county in the state; the qualified voters of the county shall elect said county superintendent at the annual district school meeting held on the first Tuesday in April, 1923, and every four years thereafter; said county school superintendent shall be at least twenty-four years old, a citizen of the county, shall have taught or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment; or

> shall have spent the two years next preceding his election or appointment as a regular student in a state teachers' college or university, and shall at the time of his election hold a diploma from one of the state teachers colleges or state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent:* * * *"

The above statute is plain and unambiguous and requires that a County Superintendent of Schools shall be at least twenty-four years of age.

It is our opinion that unless you are at least twenty-four years of age you would not be qualified to hold the office of County Superintendent of Public Schools. Hence, if you were elected you could not qualify and if you attempted to hold the office you would be subject to ouster proceedings.

Yours very truly,

James L. HornBostel,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JLH:JET/MM.

CHIROPRACTIC: Only one way provided now in the statute for obtaining license to practice chirporactic, and that is by examination. The provision relative to licensing those engaged in practice before act passed has expired.

March 12, 1935.

FILED
29

Honorable Lawrence J. Fontana
Member, House of Representatives
58th General Assembly
Jefferson City, Missouri

Dear Mr. Fontana:

This is to acknowledge your letter as follows:

"I have been asked by my brother, Dr. Jerome Fontana, who as you know is Secretary of the Chiropractic Board for an opinion on the following explained case.

A Miss Louise Sandweg of St. Louis, Missouri, insists that she has the right to practice chiropractic in the State of Missouri because she was too ill to appear before the board to obtain her license in 1927.

Miss Sandweg's attorney cites Section 13549, Chapter 105 of the Revised Statutes of Missouri, which he says covers Miss Sandweg's case in so much as she completed her school work in 1925, was given a diploma by the Missouri Chiropractic College of St. Louis, Mo., and was supposably to have practiced chiropractic until 1927 at which time illness prevented her from obtaining a license to practice.

"As Secretary of the Chiropractic Board my brother feels that he owes the chiropractic profession the right to obtain a legal ruling in a case of this kind, therefore, he is enclosing two affidavits which were given to him by Miss Sandweg in hopes that they will help to clarify the situation."

Chapter 105, Revised Statutes of Missouri, 1929, relates to "Chiropractic" and provides for a State Board of Chiropractic Examiners. The Chiropractic Act was enacted by the 54th General Assembly in 1927. It was approved by the Governor on March 14, 1927, and went into effect 90 days thereafter. Section 13549 of said chapter provides in part as follows:

"No person shall engage in the practice of chiropractic without having first secured from the board of chiropractic examiners a license as provided in this chapter. * * *."

Therefore, since the effective date of the Act (1927) no person could engage in chiropractic without first securing a license. In order to secure a license it is necessary for the applicant to possess certain qualifications. We quote from Section 13549, supra:

"Any person desiring to procure a license authorizing him or her to practice chiropractic in this state shall make application therefor to the board on a form prescribed thereby, giving his or her name, sex, age, which shall not be less than 21 years, name of school or college of which he or she is a graduate, and shall furnish the board satisfactory evidence of preliminary education as required in this chapter, and of good moral character, etc."

After furnishing said application to the Board the above section further provides that an examination shall be conducted, namely:

> "The board shall subject all applicants to an examination in the following subjects: anatomy, physiology, symptomatology, hygiene and sanitation, chiropractic orthopedy, pathology, principles of chiropractic, chiropractic analysis, and practical application of their knowledge and skill in chiropractic adjusting and nerve tracing."

If an applicant "shall correctly answer 75 per cent. of all questions propounded in such examination, and who shall not fall below 60 per cent. in any one subject, a license to practice chiropractic" shall be issued by the Board.

Above we have shown that every person to practice chiropractic must have a license and in order to obtain the license must possess certain qualifications and pass an examination satisfactory to the Board. However, when the law went into effect in 1927, provision was made to license those already engaged in the practice of chiropractic. We further quote from Section 13549, supra:

> "Provided, that persons who have been engaged in the practice of chiropractic for a period of two years continuously prior to the passage of this chapter may be granted a license by the board upon the payment of the required fee, and upon satisfying the board that he or she is a person of good moral character, and upon meeting such other requirements as the board may prescribe;"

The Board, however, was limited in granting a license to a person engaged in the practice of chiropractic continuously for two years before the 1927 law was passed, by this proviso

found in said section, to-wit:

> "Provided further, that any such person, who has practiced chiropractic for such period of two years shall apply for such license within thirty days after organization of the first board of chiropractic examiners:"

Section 13548, R. S. Mo. 1929, provides in part as follows:

> "The members of the board shall meet and organize in Jefferson City, Missouri, within thirty days following their appointment, * * *."

Thus, when the 1927 Act went into effect the Board was organized thirty days after the effective date thereof. And the persons who were engaged in the practice of chiropractic for a period of two years before the Act went into effect, had only thirty days after such organization in order to apply to the Board for a license without having to take the examination.

CONCLUSION.

You state that a person was engaged in the practice of chiropractic and evidently met all the requirements provided in Section 13549, supra, and could have been admitted without the examination had she applied within thirty days after the organization of the Board. However, she failed to do same because of illness. We find no exception in the statute and invite your attention to its mandatory provision, "shall apply for such license within thirty days after the organization of the first board of chiropractic examiners."

We conclude and it is our opinion that the person mentioned in your letter would not be entitled to a license to practice chiropractic unless she filed an application and took

the examination as required for other applicants.

We are returning herewith copies of affidavits appended to your letter.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG
Encs.

CIRCUIT CLERKS - Retain only fees taxed as circuit clerk costs; to retain fees earned after January 1, 1935; liability of county for circuit clerk fees; county treasurer shall report to circuit clerk only such fees as are for services of circuit clerk.

May 7th, 1935

5-10

FILED
29

Honorable Elbert L. Ford
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

We have your request for an opinion which is as follows:

"There has been some controversy in regards to what fees the Circuit Clerks are entitled to since the enactment of this new law.

"I would appreciate it if you would render me an opinion at your earliest convenience as to construction of Section 11786 about 'the aggregate amount of fees that any Clerk of the Circuit Court, etc;' as to the following:

"1 - Does the Circuit Clerk retain only the Circuit Clerk fees he collects or does it include all fees, including jury and stenographer fees in civil cases?

"2 - Can the Clerk retain the fees in civil cases which he collects in old cases where the fees accrued in same prior to January 1, 1935 or do these fees go into the County Treasury?

"3 - Is the County liable for Clerk fees in criminal cases that are terminated after January 1, 1935?

"4- All fees accrued in criminal cases are paid to and through the County Treasurer's

office. Since the enactment of this new law, who shall the Treasurer report the fees in such cases?

A - To the County Clerk as under old law

or

B - To the Circuit Court Clerk and if to the Circuit Clerk's office what fees does the Treasurer report to the Circuit Clerk?

"Our Circuit Clerk interprets this law and your opinion of the above date as permitting him to retain the jury and stenographer fees and all fees which he collects even though they accrued prior to January 1, 1935. My opinion is adverse to his on these matters and I have so stated. This is rather important to the Counties and Circuit Clerks in this State as to what fees the Circuit Clerk may retain. I would appreciate you rendering this opinion at your earliest convenience."

We shall attempt to answer your inquiry in the order outlined by you.

I.

<u>The circuit clerk retains only such fees as are compensation to the circuit clerk.</u>

As to the nature and character of fees which the circuit clerk is entitled to retain, we call your attention to that portion of Section 11786, Laws Mo. 1933, p. 369 which reads in part as follows:

"The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3

> of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. * * "

Thus, from the above statute, it clearly appears that the circuit clerk is entitled to retain fees for his services. If fees are taxed as costs for other purposes, then such fees are not compensation for the circuit clerk. Witness fees are taxed as costs in cases, but they are taxed as compensation for the witnesses, and the circuit clerk would not under any circumstances be permitted to retain as fees for his services witness fees taxed as now provided by law.

It is true that under the provisions of Section 8774 R. S. Mo. 1929 that there is taxed against the losing party and collected as costs the sum of twelve dollars ($12.00) as jury fees which, as the statute provides:

> " * when collected, shall be paid into the county treasury to the credit of the county revenue fund; * * "

Also, under the provisions of Section 11724, there is a fee of three dollars ($3.00) taxed in each circuit court case as a stenographer fee for the court reporter, but this fee under the statute is to be collected as other costs and paid by the clerk into the county treasury for the purpose of reimbursing the county for compensation allowed the court reporter.

It is, therefore, the opinion of this office that the circuit clerk can retain only such fees as are taxed as costs for services of the circuit clerk, and is without authority to retain any fees taxed as costs for the jury or court reporter.

II.

The clerk may retain only such fees in civil cases which are earned by the clerk subsequent to January 1, 1935.

#4 - Honorable Elbert L. Ford

Prior to the first Monday in January, 1935, the circuit clerk was paid a salary under the provisions of Section 11786 and Section 11813, R. S. Mo. 1929. The clerks taking office on the first Monday in January, 1935 received compensation for their services under the provisions of Section 11786, Laws Mo. 1933, p. 369.

Prior to the first Monday in January, 1935, all fees earned by the circuit clerk belonged to the county. When such fees were earned the title to same at once vested in the county, regardless of when they were actually collected. However, the 1933 Legislature amended Section 11814, Laws Mo. 1933, p. 372, and required the circuit clerks to pay all fees in excess of those permitted to be retained by them, into the county treasury. Fees that are taxed as costs, for the services of the circuit clerk, after the first Monday in January, 1935 belong to the circuit clerk when earned. Thus, fees of the circuit clerk earned in the year 1935 belong to the circuit clerk regardless of whether they were collected in 1935 or in 1936.

This precise question was raised in Harrington v. City of St. Louis(1891), 107 Mo. 327, wherein the court commented upon this phase of the matter, l.c. 330:

> "The law itself divides the official term into years for all the purposes of applying the limitation as to the amount of fees which the sheriff may retain. Each year of the official term stands by itself. It follows that the sheriff must render a separate account of receipts and expenses for each year. When the fees for the particular year reach the amount of $10,000, with expenses added, the balance must be paid over to the city. The excess of one year cannot be carried into another year for the purpose of bringing the fees of that year up to $10,000, with deputy hire added. It is not the object of this law to make the clear compensation of the sheriff $10,000, per annum. His compensation for each year must come from the fees and emoluments of the office for that year, *

> "With this result it is proper to be more explicit as to what feesmust be brought into each year's account. For illustration we will take the first year of the first term in this case. The receipts for that year will be composed of the fees and emoluments earned and collected during that year, and, also, of the fees and emoluments earned during the year, but collected during a subsequent year. In other words, the fees of a particular year are those earned during that year, no matter when collected. It often occurs that fees and commissions are earned in one year and collected in a succeeding year. All such fees and commissions must be carried into the account of the year in which they were earned."

I am enclosing a copy of an opinion under date of February 8, 1935 written by James L. HornBostel of this office, which, among other things, holds that the circuit clerks are entitled to retain only the fees earned each year regardless of when the fees are collected. That is still the opinion of this office.

III.

Counties not liable to the circuit clerk for payment of fees chargeable to the county.

Under the provisions of Section 3827, R. S. Mo. 1929, when a defendant in a criminal case is sentenced to pay a fine or to the county jail, the county becomes liable for the costs incurred on the part of the State. Under Section 3828, R.S. Mo. 1929, if a defendant is acquitted in a criminal case wherein the sole punishment is not by imprisonment in the penitentiary, then the county becomes liable for all the costs in the case, except where the prosecutor is required by law to pay the costs.

#6 - Honorable Elbert L. Ford

Under the provisions of Section 3830, the liability of the county to pay costs is as follows:

> "When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs the county shall pay all the costs, except such as were incurred on the part of the defendant."

The 1933 Legislature, Section 11814, Laws Mo. 1933, p. 372, relieved the county of its liability for payment of such fees due the circuit clerk under cost bills otherwise paid by the county. A copy of an opinion written under date of February 8, 1935 by Mr. James L. HornBostel of this office, fully covering this matter, is enclosed herewith.

IV.

<u>The county treasurer shall report to the circuit clerk only such fees as are paid to the county treasurer for the services of the circuit clerk.</u>

As pointed out above, under Point I of this opinion, the circuit clerk is entitled to retain only fees earned by the circuit clerk, and is not entitled to retain jury or stenographer fees taxed as costs in cases. The county treasurer should report to the circuit clerk all fees of the circuit clerk which are paid to the county treasurer.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

FER:FL

ROY McKITTRICK
Attorney General

COUNTY COURTS: County Courts shall return to county school funds, incomes and rents from properties foreclosed; insurance premiums and incidental expenses to owning said properties to be paid from county school fund.

May 14, 1935.

FILED 29

Honorable Elbert L. Ford
Prosecuting Attorney
Kennett, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"Mr. T. G. Douglass, Superintendent of Public Schools of this County wrote Mr. King, State Superintendent of Schools, relative to the County Court's duty in reference to the income in form of rents, etc. from certain farms and city property the County has acquired by means of foreclosures on County School Fund loans.

"The question Mr. Douglass desires to know is whether or not such rents and incomes from such foreclosures should be used in paying insurance premiums, upkeep and other expenses incidental to the County owning said property or should these rents and incomes be paid or should they be apportioned annually to school districts.

"Mr. King and Mr. Douglass have asked that I request of you an opinion governing this condition. This is rather an important question because during the depression the County Courts over the State have acquired considerable property by reason of foreclosures on school fund loans."

"Please let me have this opinion at your earliest convenience."

We direct you to applicable statutes. Section 9245, R. S. Mo. 1929, provides that the County court shall have jurisdiction of the county school fund arising from any source whatever, which reads as follows:

> "Whenever any county in this state may have, separate and apart from the township funds, any public school fund arising from any source whatever, the same shall be under the jurisdiction of the county court of said county, who shall be governed in its care and investment by the same rules and regulations as govern its actions in the township funds -- the proceeds of said funds to be collected annually and distributed as provided in section 9257."

Section 9243, R. S. Mo. 1929, provides that it is the duty of the several county courts of this State to collect, preserve and securely invest the county school funds, the incomes of which shall be faithfully appropriated for establishing and maintaining free public schools. This section reads as follows:

> "It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight, nor less than four per cent. per annum, on unencumbered real estate security, worth at all times at least double the sum loaned and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly

> preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

Section 9256, R. S. Mo. 1929, provides that the county court shall have authority to repossess property by purchase in its name or by someone in its behalf; that after having acquired said property, as provided, may appoint an agent to take charge of, rent out or lease or otherwise manage the same under the direction of said court. This section reads:

> "Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such

> sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

In the case of Morrow v. Pike County, 189 Mo. 610, one Mr. Morrow entered into an agreement with the county court to defend the county regarding two different school funds. The contract provided that he was to be paid a certain amount were he successful in defending the county regarding said school funds and he was. The county court issued a warrant in favor of Mr. Morrow for $1250.00 to be paid out of any money in the treasury appropriated for any ordinary expenses or rejected Watson fund, and this warrant was cashed by him. Then he later applied for $1250.00 to be paid out of a permanent fund as per contract. Nothing was done beyond filing of his claim. Then he died. The widow as executrix then sued the county.

In directing from what fund Mr. Morrow should be paid, the court said:

> "**** It will be seen that the written contract does not provide what fund Mr. Morrow's compensation should be paid from, but such fund is wholly left to be regulated by the application of correct principles of law. The county court, however, did order that it should be paid out of the 'permanent school fund,' thereby meaning either the 'county public school fund,' referred to in Revised Statutes 1899, sec. 9824, or meaning the account which was carried on the county books as the 'permanent fund' of Watson Seminary. It matters little which fund was referred to, for they are precisely the same in contemplation of law, i. e., the permanent fund of Watson Seminary held by the county, which resulted from fines, penalties and forfeitures, since the repealing of 1859, aforesaid, became ipso facto, and eo instanti by that repeal a part of the 'county public school fund.' The county court properly placed the burden of protecting this fund upon the fund itself and this arises from the following propositions; the public school fund does not belong to the county in a technical sense. It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the law-

making power in relation to the fund, (Ray County to use v. Bentley, 49 Mo. l.c. 242); it may not divert the general county revenue to its protection, and, on the other hand, it can not apply the school fund to the payment of ordinary county debts. (Knox County v. Hunolt, 110 Mo. l. c. 75.) But it is fundamental that, conceding the right to make the contract in question, the burden of protecting the trust fund should fall upon the fund itself on well-recognized equitable principles. ****"

CONCLUSION.

In light of the foregoing, we are of the opinion that rents and incomes from properties acquired by county court should be returned to the county school fund for apportionment as provided in Section 9257, R. S. Mo. 1929. The act of acquiring such property had its inception by a loan from the county school fund and the county court is charged, under the provisions of the statutes above quoted, with sacredly preserving the incomes from such funds. In this case the rents and incomes from foreclosures belong to the county school fund.

We further conclude that if the payment of insurance premiums, upkeep and incidental expenses be incurred in connection with protecting the principal that had its beginning in the county school fund, such expenses as were necessarily incurred from owning said property by the county court must come from the fund itself.

Yours very truly,

APPROVED:

RUSSELL C. STONE
Assistant Attorney-General.

ROY McKITTRICK
Attorney-General.

RCS/afj

CHIROPRACTIC: Board may only revoke licenses for reasons set forth in Statute.

9-6

September 5, 1935

FILED
29

Dr. Jerome F. Fontana, Secretary
State Board of Chiropractic Examiners
2605 Chippewa Street
St.Louis,Missouri

Dear Dr. Fontana:

This is to acknowledge your letter dated September 3, 1935 as follows:

"We would appreciate an opinion in regard to the enclosed advertisement.

This advertisement is believed by the Chiropractic Board to be unethical, as it is very detrimental to the Chiropractic Profession.

We have repeatedly called Dr.Counts' attention to these facts, but he has not needed our advice to cease this type of advertisement.

Enclosed you will find application, which must be filled in and signed by every applicant applying for License to practice Chiropractic in this State. You will please note question 18 and 19 of this application.

We would,therefore, appreciate knowing what powers this Board may exercise in

compelling Dr. Counts to discontinue such advertising."

Chapter 105 R. S. 1929 pertains to "Chiropractic - State Board of Chiropractic Examiners." And Section 13549 of said chapter provides, in part, as follows:

"No person shall engage in the practice of chiropractic without having first secured from the board of chiropractic examiners a license as provided in this chapter. Any person desiring to procure a license authorizing him or her to practice chiropractic in this state shall make application therefor to the board on a form prescribed thereby, giving his or her name, sex, age, which shall not be less than 21 years, name of school or college of which he or she is a graduate, and shall furnish the board satisfactory evidence of preliminary education as required in this chapter, and of good moral character, and that he or she is a graduate of a chiropractic school or college teaching chiropractic in accordance with the requirements of this chapter* * * * * * *

Any applicant who applies for examination to procure a license to practice chiropractic, and who has matriculated in a chiropractic school or college after the passage of this chapter, furnish satisfactory evidence of their preliminary educational qualifications, * * * * * which shall be construed as the maximum requirements for qualifications* * * * * * * * * * * * *. "

And further,

"The board shall subject all applicants

to an examination in the following subjects:* * * * * * * * * *."

Section 13552 of said chapter pertains to the renewal of license and recording thereof.

Section 13553 provides, in part, as follows:

"It shall be the duty of the board of chiropractic examiners to carefully investigate all charges of immoral or illegal actions of anyone to whom a license to practice chiropractic in this state has been issued. "

And further,

"The accused shall have an opportunity to be heard to answer such charges in person, or by attorney, and if upon such hearing it shall be proven beyond a reasonable doubt to the board, that the accused is guilty of such immoral or illegal action, or is addicted,or has been addicted, during a period of the past six months to the use of narcotics, durgs, or intoxicating liquors, or in any way guilty of deception or fraud in the practice of chiropractic, or of shielding anyone in immoral practices, criminal or illegal actions, or is guilty of any criminal or illegal actions, the board shall revoke his license."

We invite your attention to the fact that nothing is found in the chapter pertaining to chiropractic that gives the board the right to revoke a person's certificate for advertising. Neither do we believe that an applicant, when applying for a license, agrees to refrain from advertising and after securing the license acts contrary to the admissions in the application, gives the board any right to revoke the license or to

claim that the license was procured by fraud. We are of said opinion because the statutes do not give the board the power to determine what constitutes proper and improper advertising. However, in connection with advertising, we believe that the board would have a right to cause a complaint to be issued to anyone advertising, if said advertising was a deception or fraud in the practice of chiropractic. That is to say, that the statute (13553, supra) specifically provides that the board shall have a right to revoke any certificate issued if the licensee was "in any way guilty of deception or fraud in the practice of chiropractic." We refuse to comment on whether or not the copy of advertisement appended to your letter is a fraud or deception in the practice of chiropractic, because that would be a matter to be decided by the board. If your board finds as a fact that such advertising is a fraud or deception in the practice of chiropractic, then we are of the opinion that you would have a right to issue a complaint to the licensee thus advertising and conduct an inquiry to the end that if such person was guilty of deception or fraud in the practice of chiropractic that his or her license would be revoked.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JLH:LC

CHIROPRACTIC: (1) Reciprocity requirements;
(2) Actual term necessary for applicant to attend recognized college or school for chiropractic.

October 22, 1935. 10-73

FILED 29

Dr. Jerome F. Fontana, Secretary
State Board of Chiropractic Examiners
2605 Chippewa Street
St. Louis, Missouri

Dear Sir:

This is to acknowledge your letter dated October 17, 1935, as follows:

"We would very much appreciate your opinion in the following case:

"We have on file an application from one, Dr. Vincent A. Vacca, who is licensed in the State of Iowa and wishes reciprocity with the State of Missouri, with which state Missouri has a reciprocal agreement.

"The application of Dr. Vacca shows:

"1. That he has graduated from the Palmer School of Chiropractic in January, 1933, after completing his course of 3 years of 6 months each. Our law requires 3 years of 9 months each.

"2. That he has attended 2,421 class hours of 60 minutes each. Our law requires 2,045 hours of 60 minutes each.

"3. That he has not practiced in the State of Iowa after receiving his

license, as required by our law, but has practiced in the State of Indiana for 2 years and 8 months without a license.

"The question being, can a license be granted Dr. Vacca by reciprocity under the above circumstances?

"Another question, can this Board accept an application for examination or reciprocity if the applicant has the required number of hours, but has not attended a Chiropractic College for a period of 3 years of 9 months each, as required by our law."

Section 13549, R. S. Mo., 1929, provides in part as follows:

"No person shall engage in the practice of chiropractic without having first secured from the board of chiropractic examiners a license as provided in this chapter. * *"

Said section further provides:

"Any applicant who applies for examination to procure a license to practice chiropractic, and who has matriculated in a chiropractic school or college after the passage of this chapter, * * Their chiropractic course shall cover a period of not less than three years of nine months each, and requiring actual attendance of not less than 2045 hours and which shall be construed as the maximum requirements for qualifications to practice chiropractic under this chapter. * * *"

The intent of the Legislature is very apparent in that it fixed the number of years and months and hours that an applicant must attend a chiropractic school or college after the passage of the Act, and also placed a limitation on the Board by providing that such years, months and hours were the maximum requirement for qualifications; so that the Board cannot increase the qualifications as to the chiropractic course of instruction in a school or college. It likewise follows that the applicant must attend three years of nine months each and actual attendance of not less than 2,045 hours in a school or college in order to be qualified as to the chiropractic course of instruction.

We invite your attention to the fact that the requirements as to the chiropractic course of instruction only prevail as to those seeking to be licensed after the passage of the chiropractic act. Said act was passed by the Legislature in 1927. The Legislature knew that at the time of the passage of said act that there were persons engaged in the practice of chiropractic and also students matriculated in colleges or schools seeking to qualify for practice of chiropractic. Consequently, the Legislature made provision, affecting those engaged at the time of the passage of the act in the practice of chiropractic, as follows:

> "Provided, that persons who have been engaged in the practice of chiropractic for a period of two years continuously prior to the passage of this chapter may be granted a license by the board upon the payment of the required fee, and upon satisfying the board that he or she is a person of good moral character, and upon meeting such other requirements as the board may prescribe: Provided further, that any such person, who has practiced chiropractic for such period of two years shall apply for such license within thirty days after organization of the first board of chiropractic examiners: * *".

It is to be noted that this provision is not now of any force and effect and could be deleted from said section. The Legislature also provided a different requirement of chiropractic course for those students who were matriculated in colleges or schools preparatory to the engaging in the practice of chiropractic, providing as follows:

> "Provided further, that students who are matriculated in a properly recognized chiropractic school or college on October 1, 1926, and who have had two years high school or its equivalent at that time, shall be admitted to examination upon qualifying with three years of six months each actual attendance in such school or college: * *"

This provision is likewise obsolete and of no force and effect and was inserted presumably in said section to permit those students who were attending recognized chiropractic colleges or schools, which at that time only had courses of study of three years of six months each, to be eligible to examination.

However, at the present time it is our opinion that an applicant must attend a school or a college that has a chiropractic course of not less than three years of nine months each, and requiring an actual attendance of not less than 2,045 hours.

Section 13549, R. S. Mo. 1929, also has a provision as to "reciprocity", providing as follows:

> "Provided further, that the board may issue a license without examination to persons who have been regularly licensed to practice chiropractic in any other state, territory, or the District of Columbia, wherein the regulations

> for securing such license are equivalent to those required in the state of Missouri, provided such applicant shall furnish satisfactory evidence that he or she has continuously practiced chiropractic in such state, territory, or the District of Columbia, at least one year after the securing of such license, * *"

The facts stated in your letter concerning Dr. Vacca show that he was licensed to practice in the State of Iowa but that he never practiced in said State "at least one year after the securing of such license." Therefore, Dr. Vacca would not be the subject of reciprocity and would be the same as a new applicant, which would require three years of nine months each and 2,045 hours attendance in a recognized school or college of chiropractic.

It is our further opinion that reciprocity should be with states, territories or the District of Columbia when the requirements of such are equivalent to the Missouri statutes, which means that such states, territories or District of Columbia must have a prescribed chiropractic course of instruction equal to or greater than the provisions of Section 13549, supra.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

Sheriff

Sheriff has authority to buy necessary supplies for jail but not for court house unless ordered to do so by county court.

FILED 31

January 4th
1 9 3 5

Mr. Thomas Gaines,
Sheriff of Howard County,
Fayette, Missouri.

Dear Sir:-

We have your letter of November 26, 1934, in which is contained a request for an opinion as follows:

> "I would like to ask your opinion on a point of law regarding my office. Who, in your opinion, has the authority to do the buying of supplies such as insecticide, germicide, soaps, etc. for the county jail and court house? I would appreciate hearing from you at your convenience."

Section 8526, Revised Statutes of Missouri, 1929, provides in part as follows:-

> "Sec. 8526. Who shall be jailer.--The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, * * *."

Under the above section the sheriff is empowered to purchase necessary supplies for use in the jail. For instance, in the case of Kansas City Sanitary Co. v. Laclede County, 269 S. W. 395, the Supreme Court of Missouri, at page 398, stated as follows:

> "Under section 12549 the jail is required to be kept in good and sufficient condition and under section 12551 the sheriff has the custody, keeping and charge of the jail. He, therefore, has full authority to purchase all supplies necessary to keep such jail in good and sufficient condition, which includes sanitary condition, and needed no authorization by the county court to render the county liable for purchases for such jail for such purpose. Harkreader v. Vernon County, 216 Mo. 696; 116 S. W. 523."

The sections referred to are the same sections as sections 8524 and 8526, Revised Statutes of Missouri, 1929.

For purchases for use in the court house, however, a different situation arises, the county court having control thereof.

Section 2078, Revised Statutes of Missouri, 1929, provides as follows:

> "Sec. 2078. Shall Control County Property.--The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Section 1870, Revised Statutes of Missouri, 1929, provides as follows:

> "Sec. 1870. Duties of Sheriffs.--The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

The Supreme Court of Missouri in the case of Kansas City Disinfecting & Mfg. Co. v. Bates County, 273 Mo. 300, passed squarely on this question. In that case Judge Faris stated, at pages 305-6, as follows:

> "It is not doubted that the statutes (Secs. 1571 and 1573, R. S. 1909) and the construction thereof by this court in a case to an extent analogous (Harkreader v. Vernon County, 216 Mo. 696) furnish authority to a sheriff of a county to purchase such articles and supplies as are requisite and necessary to keep and maintain the county jail 'in good and sufficient condition and repair.' But such authority, absent an order of the county court, which might pro hac vice make him its agent, would not extend to purchases made for the poor house or the poor farm, the custody and control of which are vested by statute in the county court, and not in the sheriff. (Sec. 1343, R. S. 1909). Likewise, the county court is by statute vested with the control of the

> court house (Sec. 4081, R. S. 1909) and while it is made the duty of the sheriff 'to furnish fuel, stationery and other things more necessary for the use of the court' (Sec. 3887, R. S. 1909), this duty is delimited by the appended provision directing performance thereof 'whenever ordered by the court.' (Sec. 3887, supra.) This latter conditional duty is disassociated from control of the premises and is a general one which the sheriff owes to the circuit court, to the probate court, and even to the county court itself, though the latter court is the general statutory contracting, auditing and fiscal agency of the county. Clearly, such an order should either be express, or plainly implied from the necessities of the situation."

Sections 4081 and 3887, Revised Statutes of Missouri, 1909, referred to in the above quotation, are substantially Sections 2078 and 1870, Revised Statutes of Missouri, 1929, respectively.

In view of the above it is our opinion that the sheriff can purchase for the jail but not for the court house. If the jail is in the court house the sheriff may purchase supplies for use only in that part of the court house devoted to use as a jail.

Very truly yours,

CHAS. M. HOWELL, Jr.
Assistant Attorney General

CMHJr:LC

APPROVED:

Attorney General.

SHERIFFS - Fees for notifying petit jury; Fees for notifying judges of election; Officer has no jurisdiction outside of Missouri; Fees for delivering ballots.

February 4, 1935

FILED
37

Honorable Thomas Gaines, Sheriff
Howard County
Fayette, Missouri

Dear Sir:

In answer to your letter of January 14, 1935 for an opinion on four separate items, we will, for convenience, subdivide this opinion and answer each item separately. Your request is as follows:

> "I would like to have an opinion on the following:
>
> "First: After drawing petit jury, what is fee for notifying them?
>
> "Second: After Judges of election have been drawn, who notifies them and what is the fee?
>
> "Third: Does Constable have right to go outside of State for a prisoner?
>
> "Fourth: What would be a reasonable fee for Sheriff delivering ballots over the county at the different precincts for an election, as statutes say the county court shall allow a reasonable fee.
>
> "An opinion on the above would be greatly appreciated, as I want to know just what the duties of sheriff are, and also the fees."

#2 - Honorable Thomas Gaines

I.

Fee of Sheriff for Notifying Petit Jury.

In answer to this, we call your attention to Section 8758, R. S. Mo. 1929, which imposes the duty upon the sheriff to notify petit jurors by the following language:

> " * the clerk of the court for which the jury is drawn shall immediately thereafter issue a summons to the sheriff of the county, directing him to summon the persons thus drawn as petit jurors * "

For the above service, two sections of the statute are involved, Section 11789, R. S. Mo. 1929 and Section 11791, R. S. Mo. 1929.

Section 11789 provides:

> "Fees of sheriffs shall be allowed for their services as follows:
>
> "For summoning a standing jury...$8.40
>
> * * * * * *
>
> "For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip .....$ .10"

Section 11791 provides:

> "Sheriffs, county marshals or other officers shall be allowed fees for

their services in criminal cases
and for all proceedings for contempt
or attachment as follows:

* * * * * * *

"For summoning a petit jury and calling
same at the trial. . . . . .$1.00"

From the above and foregoing statutes, it is apparent that the Legislature intended reasonable compensation to the sheriff for summoning a petit jury of twenty-four persons, representatives from each township in the county, and therefore intended that he should receive the flat fee of $8.40 for such service, and did not intend that the $1.00 fee provided for in Section 11791 should be for such service, but intended that the $1.00 fee should be for summoning and calling the petit jury in court on each day of court in which the petit jury are required to be present.

It is, therefore, the opinion of this office that the sheriff is entitled to a fee of $8.40 for summoning the panel of twenty-four petit jurors, plus 10¢ per mile for each mile necessarily traveled in summoning said jury, as provided for in Section 11789, R. S. Mo. 1929.

II.

What are the Sheriff's Fees for Notifying Judges of Election

We find from an examination of the statutory laws of this state that a county court is a court of record, Section 1826, R. S. Mo. 1929; that under Section 1844, R. S. Mo. 1929 it has power "to issue all writs which may be necessary in the exercise" of its respective jurisdiction.

#4 - Honorable Thomas Gaines

Section 10209, R. S. Mo. 1929 provides that with reference to the election, the county court shall select and appoint the number of judges required to hold the election, taking one-half of the judges so appointed from each of the lists submitted by the two leading political parties.

Section 10210, R. S. Mo. 1929 provides that before the judges enter upon the duties of election judge, they shall take an oath which is set out in detail in this section. The law provides when the polls shall be opened and closed, and under Section 10194, R. S. Mo. 1929:

> "The judges of each election hereafter to be held, general or municipal, shall open the polls at six o'clock in the morning and continue them open until seven (7) o'clock in the evening, unless the sun shall set after seven (7) o'clock, when the polls shall be kept open until sunset, * "

Under the 1933 Laws, p. 239, it is provided:

> "The judges of election shall designate two of their number, not of the same party, whose duty it shall be to have charge of the ballots and to furnish them to the voters in the manner hereinafter provided."

A new section, Section 10211, Laws 1933, p. 239, also provides that the judges shall appoint clerks of election who,

> " * before entering on the duties of their appointment, shall take an oath or affirmation, to be administered by one of the persons appointed or elected judges of the election, * "

#5 - Honorable Thomas Gaines

It is apparent from the above and foregoing synopsis of election law that the Legislature, by the use of the terms "select and appoint" found in Section 10209, R. S. Mo. 1929, meant that the county court should notify such persons of the action of the county court in selecting them to be an election judge, although a specific statute on this matter has been omitted by the Legislature. It has been made the duty of the sheriff to attend each court held in his county, Section 1870, R. S. Mo. 1929.

Section 1845, R. S. Mo. 1929, in part, provides:

> "Where there is no sheriff or other ministerial officer qualified to act, * the court, or clerk thereof in vacation, may appoint one or more persons to execute its process and perform any other duty of such officer, who shall be entitled to such fees for their services in each cause as are allowed by law to sheriffs in like cases."

It is apparent from this section that any writ of either selection or election of any election judge by the county court is a matter of court record and a proper notice of such action should be served upon the election judge so selected. It was not the intent of the lawmakers that the county court, some county judge or the clerk of a county court should attempt to serve its decisions by mail or some other method. The intention was to have the sheriff in attendance on the county court to serve or carry out any notices or any other matters it had to serve, and for such services the Legislature, in Section 11789, R. S. Mo. 1929 provided a fee of fifty cents for serving every notice or rule of court, to be paid to the sheriff, and also mileage at the rate of ten cents per mile for each mile actually traveled in serving such writ or notice.

#6 - Honorable Thomas Gaines

III.

As to the Right of Constable to go Outside of State For a Prisoner.

No officer of the State of Missouri has any jurisdiction or authority outside of the State except such as may be specifically delegated by State and Federal law.

In this connection, we call your attention to Sections 3587 and 3588, R. S. Mo. 1929, which are as follows:

Section 3587:

"Whenever the governor of this state shall demand a fugitive from justice from the executive of another state or territory, and shall have received notice that such fugitive will be surrendered, he shall issue his warrant, under the seal of the state, to some messenger, commanding him to receive such fugitive and convey him to the sheriff of the county in which the offense was committed, or is by law cognizable."

Section 3588:

"The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state."

#7 - Honorable Thomas Gaines

You will note that the sheriff does not perform any of the duties of messenger in any official capacity he may hold in the State of Missouri, but performs such services in the official capacity of an appointed agent or messenger of the Governor of the State of Missouri. You will note that under the provisions of Section 3588 that before any expenses can be allowed to a messenger they must meet "the satisfaction of the Governor". In State ex rel. v. Allen, 180 Mo. 27, l.c. 31, the court, speaking of the meaning of such in Section 3588, R. S. Mo. 1929 (then Section 2744, R. S. 1899) said:

> " * the duty of determining the question of the compensation and expenses of such messenger, is vested solely in the Governor, and he is the head of a co-ordinate branch of the government, and all his acts as such are in that capacity, and hence he can not be interfered with in the discharge of his duties by the courts. The relator has performed a service for which he is entitled to be paid. * But this court has no power in the premises. The Governor alone has the power to determine how much shall be paid, and to order it paid. Until he does so the Auditor can not lawfully issue a warrant therefor."

A constable or any other person could be selected by the Governor and appointed as a messenger, and when so selected becomes the agent of the State of Missouri for the performance of such duties as are delegated to messengers. The constable in that situation would not perform any duties by virtue of being constable, but by virtue of having been appointed messenger of the Governor of the State.

Furthermore, under the provisions of Section 11405, R. S. Mo. 1929 relating to the duties of the State Auditor, the expense accounts of a messenger of the Governor in returning a fugitive to the State of Missouri cannot be paid

until the head of the department (the Governor) shall fix the expense account at a just and reasonable figure.

It is, therefore, the opinion of this office that no officer has a right to go beyond the boundaries of the State for the purpose of returning a prisoner to this State for trial except where such officer, sheriff, constable, or other person, is appointed a messenger by the Governor. No compensation is fixed for such duty, except that which the Governor may see fit to allow.

IV.

Fees of Sheriff for Delivering Ballots

Under the provisions of Section 10305, R. S. Mo. 1929, ballots prior to the election shall be delivered to the judges of the election of each election district in the county by the sheriff, who shall be allowed a reasonable compensation for his services, to be provided for by the county court. The question of what constitutes a reasonable compensation is a matter of fact for the county court and the sheriff to settle between themselves. In the event the sheriff presents a bill in a specific amount for such "reasonable services", the county court does not allow it, an ample remedy is provided by Section 2093, R. S. Mo. 1929 giving the right to the sheriff to appeal to the circuit court from the decision of the county court denying his account for services.

Respectfully submitted,

RRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

FER:FE

BOARD OF PHARMACY: Drugs, medicines, chemicals and poisons must be sold by a licensed pharmacist or assistant pharmacist -- with certain exceptions.

March 26, 1935.

FILED
31

Hon. Newt. Gardner
Secretary
Board of Pharmacy
State of Missouri
1700 West 39th Street
Kansas City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date enclosing a copy of an opinion given by the Missouri Board of Pharmacy. Your letter and enclosure reads as follows:

"Enclosed find copy of the opinion of the Pure Food and Drug Department and the Missouri State Board of Pharmacy in regard to restricting various drug store merchandise for sale in various places in the state of Missouri.

"Would appreciate your giving us your opinion as to whether these products should be sold under this classification relating to the pharmacy laws in the state of Missouri.

"Thanking you in advancefor your reply."

- Enclosure -

"February 26, 1935.

Mr. Jerome Eisner
401 Broadway
New York City, New York.

Dear Mr. Eisner:

'The Pure Food and Drug Department and the State Board of Pharmacy of Missouri which

enforces the pharmacy laws reports that these laws restrict the sale of common household drug products to licensed pharmacists and licensed pharmacies and the following may not be sold in Missouri by variety stores and other general merchants.

Aromatic Spirits of Ammonia; Asperin; Bicarbonate of Soda; Boric Acid ointment; Castor Oil; Epsom Salt; Essence of Peppermint; Glycerine; Gum Camphor; Peroxide of Hydrogen; Rubbin Alcohol; Sweet Spirits of Nitre; Tincture of Iodine.

The following may be sold by variety stores and other general merchants. No permit or license is required.

THE FOLLOWING COMMON HOUSEHOLD DRUG PRODUCTS:

(a) Adhesive Tape; Liquid Inhalants; Mercurochrome; Milk of Magnesia; Nose Drops; Petroleum Jelly; Styptic Pencils; Witch Hazel.

(b) Non-narcotic, proprietary preparations and remedies in original and unbroken packages.

(c) 'Paris Green, lead arsenate, or other poisonous substances or mixtures of poisonous substances, in unbroken packages, for use in the arts or for insecticides purposes, provided they bear a label with the name or names of such poisonous substances, and the word "POISON" and the names of at least two readily obtainable antidotes with directions for their administration.'

NOTE

The following may be sold by variety stores and other general merchants: Lysol, mentholatum, ungentine.

Yours very truly,

MISSOURI BOARD OF PHARMACY

BY_____ Secretary.

NG:MR

Article 1, Chapter 94, of the Revised Statutes of Missouri, 1929, pertains to laws in regard to druggists and pharmacists and the State Board of Pharmacy. Section 13140 of said article makes it unlawful for any person not licensed as a pharmacist to conduct or manage a pharmacy or other place of business for the retailing of any drugs, medicines, chemicals or poisons; or for any person not licensed as a pharmacist or assistant pharmacist to compound, dispense or sell at retail any drug, chemical, phison or pharmaceutical preparation. Said section reads as follows:

> "It shall be unlawful for any person not licensed as a pharmacist within the meaning of this chapter to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drugs, medicines, chemicals or poisons, or for the compounding of physicians' prescriptions, or to keep exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, or for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this chapter to compound, dispense or sell at retail any drug, chemical, poison or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physicians' prescriptions, except as an aid to or under the supervision of a person licensed as a pharmacist under this chapter. And it shall be unlawful for any owner or manager of a pharmacy or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense or sell, at retail, any drug, medicine or poison, except as an aid to or under the supervision of a person licensed as a pharmacist or assistant pharmacist: Provided, however, that nothing in this section shall be construed to interfere with any legally registered practitioner of medicine or dentistry in the compounding or dispensing of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his em-

ploy at least one person who is licensed as a pharmacist, nor with the sale of poisonous substances which are sold exclusively for use in the arts, or for use as insecticides, when such substances are sold in unbroken packages bearing a lable having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes: Provided further, that in any village of not more than five hundred inhabitants, where there is no person licensed as a pharmacist within less than two miles of such village, the board of pharmacy may grant to any person who is licensed as assistant pharmacist a permit to conduct a drug store or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than five hundred: Provided, however, that nothing in this section shall be so construed as to apply to the sale of patent and proprietary medicines, and in any locality where there is no licensed pharmacist or assistant pharmacist, the ordinary household remedies and such drugs or medicines as may be specified by the board of pharmacy shall be permitted to be sold by those engaged in the sale of general merchandise: Provided further, that nothing in this section shall be so construed as to prevent any person, firm or corporation from owning a pharmacy, drug or chemical store or apothecary shop, providing such pharmacy, drug or chemical store or apothecary shop shall be in charge of a licensed pharmacist."

Section 13148 of said article provides in part as follows:

"The board of pharmacy shall have a common seal, and shall have power to adopt such rules and by-laws not inconsistent with law as may be necessary for the

> regulation of its proceedings and for the discharge of the duties imposed under this chapter, ****."

It will be noted that there are a number of exceptions contained in Section 13140, supra. Those that concern us here are:

(1) The sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word "Poison" and the names of at least two readily obtainable antidotes.

(2) The sale of patent and proprietary medicines.

(3) In addition to the above exceptions, it is provided that in any locality where there is no licensed pharmacist or assistant pharmacist, the ordinary household remedies and such drugs and medicines as may be specified by the board of pharmacy shall be permitted to be sold by those engaged in the sale of general merchandise.

In our opinion, this provision makes it clear that ordinary household remedies, drugs and medicines cannot be sold in localities where there is a licensed pharmacist or assistant pharmacist except by a licensed pharmacist or assistant.

In the case of State v. Donaldson, et al., 42 N. W. (Minn.) 781, the objection was raised that the exception of patent and proprietary medicines only applied to shopkeepers whose place of business is more than one mile from a drugstore or apothecary shop. The court, in denying this contention at loc. cit. page 783, said:

> "****According to the construction claimed for it, the provision of the act as to the sale of patent or proprietary medicines would be of just this character. It would be giving pharmacists a monopoly of the business, without in any manner protect-

> ing public health. It would therefore be void, and, if so, the whole act would fail. A construction that would lead to such a result is to be avoided, if possible. Under these circumstances, we think we are justified, in order to sustain the act, in adopting the other construction, and holding that the clause under such consideration was intended to exclude generally from the operation of the act the business of dealing in and selling patent medicines. This would make it in harmony with other provisions of the act, and right in the line of all, or nearly all, similar legislation in other states. This disposes of the first case, as both the articles sold were 'patent' or 'proprietary.'"

In the case of Riggs v. City of Hot Springs, 26 S. W. (2d) (Ark.) loc. cit. page 72, the Court said:

> "From all of the testimony it is fairly inferable that the article compounded and vended by the appellant was prepared from a secret formula as a medicine for the treatment of certain diseases, put up in packages or bottles, and labeled with a name, for immediate use. This was sufficient to constitute it a patent medicine in the sense in which that term is generally used and in which it was used in the city ordinance in question. While originally the word 'patent' was attached to an article because it was the subject of a patent, it has lost that significance by usage, and has become merely a part of the name of the article, and, where any article intended to be used for medicinal purposes is prepared from a secret formula and is placed in containers, either packages or bottles, for sale, to be used without further preparation, and is labeled so that it may be for immediate use, it is a matter of common knowledge that such remedies are called 'patent' or'proprietary' medicines. ****"

The only Missouri case we have found defining "patent"

and "proprietary" medicines is McHenry v. Royal Neighbors of America, 211 Mo. App. 230, loc. cit. pages 235 and 236, wherein the court said:

> "**** Admitting that she did, were these patent or proprietary medicines? The doctor who sold them testified they were merely regulatory potions which he had prepared for use in his practice. Webster defines 'patent' as a writing securing to an inventor for a term of years the exclusive right to his invention, while proprietary is defined as 'belonging or pertaining to a proprietor; considered as property owned; as a proprietary medicine.' Also 'proprietary articles, manufactured articles which some persons have an exclusive right to make and sell.'
>
> "The physician who sold these pills or tablets to the insured testified that he did so without having prescribed them, and that he had prepared them for use in his practice, and made no claims that they were in any sense patent or proprietary. In the face of this evidence, we hold that the medicine so purchased was neither patent nor proprietary. Moreover there was no testimony of a substantial character tending to show that this medicine was for the personal use of the insured."

In the case of State v. Jewett Market Co., 228 N. W. (Iowa) 288, it was held that asperin is a drug or medicine and not a proprietary or patent medicine. At page 289 of this opinion, the Court said:

> "It is contended that aspirin is not a drug within the meaning of paragraph 1 of section 2578 of the Code. The expert evidence in the case showed that it is a drug. It is classified as a coal tar product. It is a remedial agent used in the treatment of disease. It is described in the record as 'a potent, active drug.' The evidence is amply sufficient to establish the fact that asperin is a drug with decided physiological properties, and is used to cure, mitigate, or prevent disease.
>
> "III. It is contended that aspirin

comes within the exception of paragraph 4 of section 2579 of the Code, in that it is a proprietary medicine, and hence may be sold by the appellant as such. An expert witness testified in this case that: 'A proprietary medicine is a medicine which has a secret formula.'

"In Ferguson v. Arthur, 117 U. S. 482, 6 S. Ct. 861, 863, 29 L. Ed. 979, the court said: '"Proprietary" is defined thus in the Imperial Dictionary: "Belonging to ownership; as, proprietary rights." In Webster: "Belonging or pertaining to a proprietor" -- "proprietor" being defined, "One who has the legal right or exclusive title to anything, whether in possession or not; an owner." In Worcester: "Relating to a certain owner or proprietor."'

"In State v. Zotalis, 172 Minn. 132, 214 N. W. 786, the Supreme Court of Minnesota said: 'Aspirin is a coal tar product commonly kept in drug stores and is used and sold for medicinal purposes. It is a drug or medicine within the statute. It is not a proprietary or patent medicine."

In State v. F. W. Woolworth Company, 237 N. W. (Minn.) 817, the Court held that milk of magnesia was not a proprietary medicine. At page 818 the Court said:

"The evidence showed that milk of magnesia is a medicine and used generally internally to correct over-acidity of the stomach and bowels, and as a laxative. It is used also as a mouth wash, and sometimes as a lotion for the face. It is used only for medicinal or hygienic purposes. It is made and distributed by many manufacturers of drugs and medicines. It is frequently prescribed by physicians, either on written prescription or by oral direction. It is also frequently called for and sold to people without a doctor's prescription or direction. It is not poisonous, and, when properly prepared, is

a harmless household remedy. There is no secret about its manufacture or ingredients.

"Defendant contends that the preparation was a proprietary medicine, or should be so considered. One of the manufacturers testified that, in his opinion, their process of manufacturing was distinctive from the process generally used; that they used a special machine and process, which was a trade secret; that they used a few more grains of magnesium hydrate than the minimum required by the United States Pharmacopoeia formula; and that their product was purer than the ordinary milk of magnesia. We find nothing in this evidence to show that the preparation was a proprietary medicine. It had no distinctive name. It was labeled as a United States Pharmacopoeia preparation and came well within the formula contained in that treatise. Any manufacturer could make exactly the same preparation under the United States Pharmacopoeia formula. No distinction is pointed out between this and other milk of magnesia generally sold, except the very general statements of this witness. We may hazard the observation that the other manufacturers would make, in general terms, the same or similar claims for their products.

" *

"We conclude that the milk of magnesia here in question was not a proprietary medicine."

And further at page 819, the Court said:

"We find no good reason for departing from the Donaldson Case, and hold that a harmless household remedy, not a patent or proprietary medicine, sold and used solely or principally as a medicine, comes within the pharmacy law restricting the sale of drugs, medicines, and poisons."

In conclusion the Court stated at pages 819 and 820:

> "It is also our interpretation of the Donaldson and Zotalis cases that they hold that where a preparation is a medicine prepared, sold, and used solely or principally as medicine, and is not a patent or proprietary medicine, then its sale comes within the law and is restricted to sales by or under the supervision of a licensed pharmacist; that the fact that it is a harmless or household medicine does not except it from the law; and that, as so applied, these cases hold the law valid."

CONCLUSION.

In view of the above it is the opinion of this department that it is unlawful for any person not licensed as a pharmacist to conduct or manage any place of business for the retailing, compounding or dispensing any drugs, medicines, chemicals or poisons or to keep exposed for sale at any retail any drugs, medicines, chemicals or poisons, except poisonous substances which are sold exclusively for use in the arts or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the names of at least two readily obtainable antidotes, and except patent and proprietary medicines. And further, in a locality where there is no licensed pharmacist or assistant pharmacist, the oridinary household remedies and such drugs or medicines as may be specified by the board of pharmacy may be sold by those engaged in the sale of merchandise.

It is plain from a review of the foregoing authorities that ordinary household remedies, medicines, and drugs in a locality where there is a licensed pharmacist or assistant pharmacist comes within the purview of the act but that patent and proprietary medicines do not. We do not have the necessary technical knowledge to distinguish b etween ordinary drugs and medicines and patent and proprietary medicines and feel

that, with this opinion in mind, you are far more capable of designating what are patent and proprietary medicines than we are.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/JLH:afj

TAXATION: Institution of Suit contemplated by Section 9962b is satisfied by filing of petition.

5-15

May 13, 1935.

FILED 31

Hon. A. H. Garner
715 Frisco Building
Joplin, Missouri

Dear Sir:

We acknowledge receipt of your letter requesting an opinion of this office upon the following state of facts:

"* * * * At the time of the passage of 94-called the Jones-Munger Act - and at the time this law went into effect, we had a number of suits pending; that is, filed in the clerk's office. Summons were not issued on all of them because we did not have time. However, since that time, summons have been issued and proceeding as necessary to complete them ready for judgment, and have been proceeding on all these suits which were filed prior to the enactment of Senate Bill 94, as provided by the old law, but have not filed any new suits.* * * * *On account of the number of suits pending we could not get summons out immediately, but have proceeded from time to time as fast as summons and publications could be drawn. The point has been raised as to whether or not after suit was pending and summons not issued at the time of filing, whether summons could be issued at a later date. Bear in mind these suits were filed and summons issued as soon as we could get them out,* * *could these suits be pursued to final judgment, bearing in mind that they were filed in the clerk's office prior to the passage of Senate Bill 94, being filed in March, 1933 and prior; and not having sufficient time to issue all the summons at one time, does the fact that they have been sent out since that time as quickly as prepared invalidate these suits."

I.

SUITS PENDING ON EFFECTIVE DATE OF SENATE BILL 94 MAY BE PROCEEDED TO JUDGMENT UNDER OLD LAW.

Under the provisions of Section 9962b, discretion is placed with the county collector as to the manner in which he shall collect the delinquent taxes, upon which suit had been instituted prior to the effective date of Senate Bill 94. He is permitted to proceed to final judgment and foreclosure of the tax lien under the old law or he may dismiss those suits and collect the taxes by virtue of Senate Bill 94. A portion of this section reads as follows, (page 445, Laws of Missouri 1933):

> "* * * *as to suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

From the foregoing authority it is clear that authority is vested in the county collector to proceed to judgment in all cases which were pending at the effective date of Senate Bill 94. That is, providing the suits were "instituted" before that date.

II.

FILING OF PETITION CONSTITUTES INSTITUTION OF ACTION.

It is the general rule in this State that the bringing of an action, such as will toll the running of a statute of limitation, is effected by the filing of the petition with the clerk of the Court, providing it is a Court of Record. The obligation of the plaintiff then ceases and it becomes the duty of the clerk to see that process is issued. If the statute of limitations runs before the clerk has had an opportunity to issue the process, the Court has held that this cannot be charged to the plaintiff and the plaintiff thus deprived of his right of action. In the early case of Lumber Company vs. Wright, 114 Mo. 333, this doctrine was first established. In the case of McGrath vs. Railroad Company, 128 Mo. 1, 9, the Court has stated on this subject:

> "In the absence of directions to the contrary, the filing of a petition amounts to an order to the clerk to issue process in the cause.
>
> Hence such filing was rightly held to be, in effect, a 'suing out' of the writ, as contemplated by the old section, 2013. But, as the plaintiff could not always direct the movements of the clerk in issuing process, it was also justly considered that the former could not be held answerable for any delay on the clerk's part in setting the legal machinery into full action, after the plaintiff had taken the proper initiative.
>
> To avoid the barrier of limitation, the earliest move in the proceeding was considered and held to be its legal commencement, in accordance with a general principle of the common law demanding a liberal and favorable construction of a law, as against a forfeiture of rights."

Other cases indicate that if the plaintiff instructs the clerk not to issue the summons the statute would run. State ex rel. vs. Wilson, 216 Mo. 215, 292. In that case they held a delay of four months, more or less, in the issuance of the summons was not fatal to the plaintiff's action. In the instant case, however, it has been many months, possibly more than a year, in some cases, intervening between the filing of the petition and the issuance of the summons. The appropriate rule is laid down in the case of Franz vs. Radeackar, 264 S. W. 97, 98:

> "The petition must, however, be filed with the bona fide intention that process be issued at once upon the defendant. The filing of the petition, without interference from the parties with the usual legal procedure thereon, serves as an implied demand that process be issued forthwith upon the defendant. But if the petition is filed with the clerk with instructions not to issue process at once upon the defendant, or to hold it until further notified, the implied demand becomes nullified, and the action will not be deemed to have been commenced at the filing of the petition, and the action will not be treated as brought until the order is given to the clerk to issue the citation."

The determination of the problem presented is really a question of fact rather than a matter of law. We can only apply the law to such facts as you have presented. If these suits were filed with a bona fide intention of the immediate issuance of process to the defendant, and diligent effort has been made since that time to obtain the issuance of such summons, or at least, if it can be said that the delay in the issuance of the summons cannot be chargeable to the plaintiff, it is our view that these suits were instituted within the meaning of Section 9962b, Laws of Missouri, 1933, page 445.

CONCLUSION

It is therefore the opinion of this office that the County Collector may, in his discretion, proceed to prosecute the suits to final judgment which were instituted prior to the effective date of Senate Bill 94, and that such suits were instituted within the meaning of Section 9962b, Laws of Missouri 1933, page 445, if petitions were filed prior to July 24, 1933, and since that date plaintiff has not been at fault in the matter of the issuance of the summons.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM

SALES TAX - HOUSE BILL 198 - Sales made by merchants to persons on relief by orders obtained by the persons on relief, are not subject to the tax. Check or cash given to persons on relief, when purchases are made with the check or cash, such sales are subject to the tax.

August 28, 1935

FILED
31

Mr. Geo. E. Gayou
Executive Vice-President
Missouri Retailers Association
511 Locust Street
St. Louis, Missouri

Dear Sir:

This department is in receipt of your letter of August 26 wherein you make the following request:

"First, I understand Attorney General, Roy McKittrick has issued an opinion to Wallace Crossley that merchandise bought with orders issued to the client by the Missouri Relief and Reconstruction Commission are not subject to the sales tax.

As I telephoned you this morning, this is in conflict with the regulations in the State Auditor's rules.

A person applying for relief gets an order for groceries, or other merchandise, takes it to the store, receives the merchandise and the seller holding the order individually takes it to the Dispersing Officer of St. Louis and St. Louis County of Missouri Relief and Reconstruction Commission, who cashes these relief orders. They contend in the office of the Missouri Relief and Reconstruction Commission that these transactions are not subject to the sales tax.

Will you give us an opinion to advise our members what to do about these orders?"

The files of this department do not reveal that this precise question has ever been passed upon by this department in a written opinion. This question involves the applicability of House Bill 198, effective on this date, to the Federal Emergency Relief Act of 1933. In the administration of relief to those in need, Section 721 of the Federal Emergency Relief Act of 1933 declares an emergency in the following language:

> "The Congress hereby declares that the present economic depression has created a serious emergency, due to widespread unemployment and increasing inadequacy of State and local relief funds, resulting in the existing or threatened deprivation of a considerable number of families and individuals of the necessities of life, and making it imperative that the Federal Government cooperate more effectively with the several States and Territories and the District of Columbia in furnishing relief to their needy and distressed people."

Section 723 of the Act sets up a Federal Emergency Relief Administration in the following language:

> "There is hereby created a Federal Emergency Relief Administration, all the powers of which shall be exercised by a Federal Emergency Relief Administrator (referred to in this chapter as the "Administrator") to be appointed by the President, by and with the advice and consent of the Senate. The Administrator shall receive a salary to be fixed by the President at not to exceed $10,000, and necessary traveling and subsistence expenses within the limitations prescribed by law for civilian employees, in the executive branch of the Government. The Federal Emergency Relief Administration and the office of Federal Emergency Relief Administrator shall cease to exist upon the expiration of two years after May 12, 1933, and the unexpended balance

on such date of any funds made available under the provisions of this chapter shall be disposed of as the Congress may by law provide."

Section 724, sub-section (a), relates to the grants to states, terms and conditions thereof in the following language:

"Out of the funds of the Reconstruction Finance Corporation made available by this chapter, the Administrator is authorized to make grants to the several States to aid in meeting the costs of furnishing relief and work relief and in relieving the hardship and suffering caused by unemployment in the form of money, service, materials, and/or commodities to provide the necessities of life to persons in need as a result of the present emergency, and/or to their dependents, whether resident, transient, or homeless."

Section 725 relates to the manner in which the Governor of the state makes application from time to time to the Administrator for relief funds. Section 726 contains the duty of the Federal Administrator upon receipt and request for a grant to the state by the Governor and the Governor's duty as to disbursements and is in the following language:

"The Administrator upon approving a grant to any State shall so certify to the Reconstruction Finance Corporation which shall, except upon revocation of a certificate by the Administrator, make payments without delay to the State in such amounts and at such times as may be prescribed in the certificate. The Governor of each State receiving grants under this chapter shall file monthly with the Administrator, and in the form required by him, a report of the disbursements made under such grants."

Under the Federal Administrator's Executive Order Number 6442, the following rules are made with reference to the creation of State Emergency Relief Administration.

"(1) The Federal Emergency Relief Administrator is authorized to assume control of the administration of relief in any State where, in his judgment, more effective and efficient cooperation between the State and Federal authorities may thereby be secured in carrying out the purposes of said act.

(2) The Administrator is further authorized to create in any State in which he has assumed control of the administration of relief, a State emergency relief administration and such advisory committee or committees as he may deem necessary.

(3) Such State emergency relief administration, under the direction of the Federal Emergency Relief Administrator, shall be responsible for the distribution and expenditure of any and all funds granted to the State by the said administrator.

(4) Such State emergency relief administration shall appoint such personnel, volunteer or paid, as is required and shall fix the salary of all paid workers subject to the approval of the Federal Emergency Relief Administrator, provided that no salary shall be paid in excess of the amount fixed in section 3(b) of said act.

(5) Such State emergency relief administration shall appoint such local emergency relief administrations, organizations, or directors as may be necessary.

(6) All personnel appointed under paragraph (2) of this order shall serve at the pleasure of the Federal Emergency Relief Administrator and all personnel appointed under paragraphs (4) and (5) of this order shall serve at the pleasure of said Administrator and/or such State emergency relief administration."

We have set forth the section relating to the Federal Emergency Relief Act of 1933 for the purpose of determining the mechanics of the Act and the authority of the Federal Government over the funds which are granted to the states.

Honorable Corrington Gill, Assistant Administrator of the Emergency Relief Administration at Washington, wrote the Honorable Forrest Smith, State Auditor, stating in substance that the funds made available through the Federal Emergency Relief Act of 1933, are grants to the state and upon being granted become state money and subject only to the regulations and other conditions under which funds are made available from month to month. Granting that the same may become state funds, we are of the opinion that under the provisions quoted supra of the Act, that the Federal Government retains control and supervision of the funds, even after the funds have come into the hands of the state and that the funds are disbursed at the direction and under the supervision of the Federal Relief Administrator, and the funds in question in reality never lose their identity as Federal Funds.

You state in your letter "A person applying for relief gets an order for groceries, or other merchandise, takes it to the store, receives the merchandise and the seller holding the order individually takes it to the Dispersing Officer of St. Louis and St. Louis County of Missouri Relief and Reconstruction Commission, who cashes these relief orders." It is noted that the person never receives any funds or money, but an order which enables him to purchase groceries or other merchandise. The proprietor of the store takes the order to the Dispersing Officer of St. Louis or St. Louis County who cashes the relief orders. We think that when the state undertakes to impose a tax on such an order so received by the grocerman, it burdens or interferes with the exercise of federal power and makes the Federal Government a source of revenue and taxes the means used for the performance of Federal functions. The question of automobiles and trucks purchased with funds by the Federal Relief Administration being subject to a state license tax, and a tax on gasoline consumed in operating them, is discussed in the case of Wiseman v. Dyess, 72 S. W. (2d) l. c. 518, in part as follows:

> "It is unnecessary to consider or to decide what the state of the law would be if the funds apportioned to this state had become the property of the state, as, in our opinion, that result was not intended and has

not been accomplished. It is our opinion that these funds and the automobiles for which a portion of the funds had been expended were and are federal property, and as such are not subject to taxation by the state. It is true the act of Congress refers to the apportionment of these funds to the states "as grants to the several States," but it does not appear that such a donation thereof was made as to pass the title and control thereof from the federal government. They are, and continue to be, federal funds, subject to the supervision of the federal government in their disbursement. The state has no control over the expenditure of these funds. It does appear that for the convenience of the Federal Administrator, and to expedite the distribution of the federal government's bounty, application for the funds is made by the Governor of the state, who signs the receipt therefor and indorses the check used in remitting the funds, but when he has done so he delivers the indorsed check to the plaintiff State Administrator for distribution. The clerical acts mentioned comprise the full extent of the authority and duty of the Governor."

The facts as contained in your letter, show conclusively that if the merchant or seller is to receive the cash for the order received from the person on relief, it must come from an agency or instrumentality of the federal government. The wide sweeping decision denying a state the right to tax any instrumentality or agency of the United States Government is that of Panhandle Oil Company v. State of Mississippi ex rel Knox, 277 U. S. 1. c. 858, in part as follows:

"A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured

and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its constitutional powers to operate the fleet and hospital. M'Culloch v. Maryland, supra, 436 (4 L.ed. 608); * * * * * To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. Western U. Teleg. Co. v. Texas, 105 U.S. 460, 26 L. ed. 1067; * * * * * And that is to tax the United States--to exact tribute on its transactions and apply the same to the support of the state.

The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled. Osborn v. Bank of United States 9 Wheat. 738, 867, 6 L. ed. 204, 234; * * * * * Petitioner is not liable for the taxes claimed."

CONCLUSION

In view of the foregoing it is the opinion of this department that if the funds in question be regarded as federal funds, the state cannot exact the tax of one per cent on purchases or orders by persons on relief for groceries or other merchandise, when the order is received by the relief agencies for payment, as it would constitute a tax on the federal government. Likewise, if the funds in question be considered as being state funds, this department has recently ruled in an official opinion to Honorable George C. Johnson, State Purchasing Agent, that sales to the state were exempt from the sales tax.

We are informed that in some instances in lieu of the order, the relief agencies give to those applying for relief cash or check. For your information, purchases made by check or cash would be subject to the sales tax inasmuch as the funds used for the purchases have lost their identity as state or federal funds.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, JR.
(Acting) Attorney General

OWN:SW

DEPUTY HEALTH COMMISSIONERS: The County Court has discretion in appointment of Deputy Health Commissioners. State Board of Health has no power to make such appointment.

2-20

February 12, 1935.

FILED
32

Hon. L. O. Gillihan
Prosecuting Attorney
Daviess County
Gallatin, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date requesting an opinion which reads as follows:

> "I have been requested by our County Court to get an opinion from your office, construing Section 9025, page 271, 1933, Session Acts, entitled 'Deputy state commissioners of health - appointment - term - salary.', answering the following questions:
>
> "1. Is it necessary that the County Court appoint a deputy health commissioner?
>
> "2. If the County Court does not appoint such deputy health commissioner, does the State Board of Health have the power and authority to make such appointment and fix the salary to be paid him?
>
> "3. Is or is not the appointment of a deputy health commissioner left to the discretion of such County Court?"

In order to more clearly understand the intention of the Legislature, we set out Section 9025, R. S. Mo. 1929,

which reads as follows:

> "At the first regular February term of the county court in each county of the state after this article becomes effective and at the regular February term of said county court every third year thereafter said court shall appoint a reputable physician as a deputy state commissioner of health for that county for a term of three years. In case of a vacancy in the office of the deputy state commissioner of health of a county, the county court shall at its next regular term of court appoint a reputable physician for the unexpired term. If the county court fails to appoint a deputy state commissioner of health as above provided at the February term of said court or at the next term following a vacancy, the state board of health shall appoint a reputable physician as deputy state commissioner of health for that county who shall serve until the county court of such county makes such appointment. The county court of any county upon appointing a physician as deputy health commissioner shall confer with such physician and agree with him as to his compensation and expenses for the performance of his duties as deputy state health commissioner of that county and such compensation and expenses shall be paid to him out of the county treasury of that county. If it becomes necessary for the state board of health to appoint a deputy state health commissioner, as above provided, said state board of health shall fix a reasonable compensation for such deputy state health commissioner and shall designate what shall be his reasonable expenses, all of which shall be paid out of the county treasury of the county of which he is deputy state health commissioner."

The foregoing section has been repealed and a new section, known as Section 9025, Laws of Missouri, 1933, page 271, has been enacted in lieu thereof. Said section reads as follows:

> "At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said county court every year thereafter, said court may appoint a reputable physician, as a Deputy State commissioner of health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

It will be noted that the old section uses the word "shall" throughout and that the new section uses the word "may" in place thereof.

57 Corpus Juris, Section 5, page 548, defines the word "shall" as follows:

> "In common, or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative, or man-

> datory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears; but the context ought to be very strongly persuasive before it is softened into a mere permission. And if any right to any one depends upon giving the word an imperative construction, when a right or benefit depends upon giving it a mandatory meaning, the presumption is that the word was used in that sense, and it cannot be given a permissive meaning merely; and when a right to a person or property is lost or destroyed by a failure to do an act within a limited time, it is given a mandatory effect; and it ought to be construed as meaning 'must', for the purpose of sustaining or enforcing an existing right, but need not be so construed for creating a new one."

The word "may" is defined in 39 Corpus Juris, Section 4, page 1393, as follows:

> "The verb 'may' may be and usually is employed as implying permissive or discretional, and not mandatory, action or conduct; or it may be employed as implying imperative or mandatory action or conduct. More specifically, 'may' has been construed sometimes to mean 'shall', and sometimes not to mean 'shall;' and sometimes to mean 'must', and sometimes not to mean 'must;' sometimes to mean 'must' or 'shall', and sometimes not to mean 'must' nor 'shall.' Whether the word is to be construed as mandatory or as permissive is to be determined in each case from the apparent intention as gathered from the context,

considering the whole instrument in which it is used; and it is always construed in a permissive sense unless necessary to give effect to the intent in which it is used."

From the foregoing definitions, it will be seen that the word "may" usually implies permissive or discretionary powers while the word "shall" is generally imperative or mandatory. It is apparent that under the old law, the Legislature intended to make it mandatory upon the County Courts to appoint deputy health commissioners and if they failed to do so, it was the duty of the State Board of Health to appoint same. A careful reading in comparison of the old section with the new makes it apparent that the Legislature intended, under the provisions of the new section, that the County Court should have the right to decide whether or not a Deputy State Commissioner of Health should be appointed. Not only does the Legislature use the word "may" throughout the new section, but it specifically provides that the power of deciding whether or not a Deputy State Commissioner of Health will be appointed shall be vested in the County Court. The further language used in said section, "If a county court of any county decides to appoint a deputy health commissioner" is conclusive evidence that the Legislature intended that the County Court should have the right to decide whether or not a deputy health commissioner is to be appointed.

The old section made it the duty of the State Board of Health to appoint a deputy health commissioner if the County Court failed to do so. The new section does not require the State Board of Health to appoint a deputy health commissioner under any circumstances and gives them no authority to do so.

We are therefore of the opinion that the appointment of a deputy health commissioner is to be left to the discretion of the County Court who may or may not appoint

one as they deem best, and it is our further opinion that the State Board of Health does not have the power or authority to appoint a Deputy Health Commissioner when the County Court fails to do so.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/JLH:afj

INSANE PAUPERS - Liability of county for transportation to and from hospitals.
SHERIFFS ------- Fees for transporting insane patients.

February 16, 1935

FILED
32

Honorable Alex R. Gibson
Sheriff of Putnam County
Unionville, Missouri

Dear Sir:

We have your request for an opinion dated January 22, 1935 relative to the fees of the sheriff for conveying insane persons to state hospitals upon an order of the county court.

In this connection, we call your attention to that portion of Section 8636, R. S. Mo. 1929 which provides in part as follows:

> "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto."

In order to send an insane poor patient to a state hospital, the county court shall hold a hearing (Sec. 8646), and if upon such hearing the county court be satisfied that such person is insane and poor, then said court:

> " * shall cause a suitable order to be entered of record, * then such order shall * set forth that the person found to be insane is a fit subject to be sent to a state hospital * to undergo treatment therein; and shall further require * that the clerk of the court forthwith forward a certified copy of said order of court to the su-

perintendent of the hospital, accompanying the same with a request of admission of the person found to be insane to the hospital." (Sec. 8647, R. S. Mo. 1929)

By Section 8649:

"Upon receiving the application and the official copy of the order of court, the superintendent shall immediately advise the clerk whether the patient can be received, and, if so, at what time. The clerk shall thereupon, in due season for the conveyance of such person to the hospital by the appointed time, issue his warrant to the sheriff of his county, or any other suitable person, commanding him forthwith to arrest such insane person and convey him to the state hospital designated in the order."

It is further made the duty of the superintendent to receive the patient only when accompanied by the warrant.

Section 8639 provides:

"Whenever a patient is sent to a state hospital, by order of any court or officer having authority to make such order, the warrant, or copy of such order, properely authenticated, by which such patient is sent, shall be lodged with the superintendent."

From the above and foregoing, it is apparent that the liability for transporting insane paupers to state hospitals upon an order of the county court, is made a proper charge against the county. It was not the intent of the law that friends or relatives of insane paupers, unable to support such persons themselves, should be imposed upon by being compelled at their own expense to con-

vey such insane paupers to state hospitals. There are two ways by which such insane paupers may be conveyed to a state hospital, but both are at county expense. Section 8650 provides that relatives may accompany the patient, and in such case the warrant shall be directed to one of them, and the person to whom it is directed and his assistants shall, if demanded, receive the same compensation allowed for the like services to the sheriff.

By Section 8662, Laws Mo. 1933, p. 409, the fees payable to a sheriff for taking a patient to a state hospital or removing one therefrom are fixed by law at the rate of ten cents per mile, and one dollar per day for the support of each patient. Additional compensation is allowed for persons assisting the sheriff in taking such persons to or from state hospitals.

It is, therefore, the opinion of this office that the county sending an insane pauper to a state hospital is liable for fees allowed by law to the sheriff, if the sheriff transports such insane pauper. If such insane pauper is transported by relatives to the state hospital, then said relatives may demand and receive the same compensation as is by law allowed to the sheriff. It is the opinion of this office that the county court is without authority in any case to demand, as a condition precedent to sending an insane pauper to a state hospital, that relatives assume the burden and cost of transporting such person to a state hospital.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

SCHOOLS: School District having received previous aid in erecting a school building will ~~not~~ be denied subsequent aid, under Section 9357, R.S. 1929, when in need of a new school building.

August 30, 1935. 8.31

FILED 32

Hon. L. O. Gillihan
Prosecuting Attorney
Daviess County
Gallatin, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "In connection with the location of a new High School building duly authorized by voters of the Gallatin School District, it has become necessary to obtain an opinion from your office construing section 9357, R. S. Missouri, 1929.
>
> "I am enclosing herewith copy of letter received by me from Dean H. Leopard, President of the above school board, which is self-explanatory and fully sets out the difficulties of the present board and which explains the necessity of an opinion from your office."

Appended to your letter is a copy of the communication received from the President of the Board of Education, Consolidated District No. 8 of Gallatin, Missouri, which reads as follows:

> "In connection with the location of the new High School building

authorized by the voters of the Gallatin School District (Consolidated District No. 8 of Daviess County) at the election of last week, the Board of Education is especially concerned with the interpretation to be given to Section 9357, R. S. Mo. 1929, which reads as follows:

"'Whenever a district organized under the provisions of this article has secured a site of not less than five acres for the central high school building of said district and has erected thereon a suitable school building, suitable for a central school and containing one large assembly room for the meeting of the citizens of the district and has installed a modern system of heating and ventilating, the state shall pay one-fourth of the cost of said building and equipment: Provided, the amount thus paid by the state shall not exceed $2,000 for any one district.'

"It had been the expectation of the board that the aid authorized by this statute would be available, as the building contemplated fulfills all the requirements of this section, including an assembly or community hall. However, it now develops that some years ago the Gallatin School district received this $2000 on the theory that its present building met these requirements. This information was a surprise to the present board, since, while the present building has a study hall which evidently was approved as meeting the definition of an assembly room, it does not by any means conform to present conceptions of 'a large assembly room for the meeting of the citizens of the district', is wholly inadequate for that purpose, and has never been used as such. It is almost certain that it would not now be approved as meeting the statutory requirement.

"It was our intention to acquire a new tract of five acres on which to construct the new building, but we are now con-

fronted with the question, whether a district which builds a new building with the assembly hall and other facilities set forth in this section on a new and different site of five acres is barred from receiving aid under this section by reason of the fact that it has received it at some previous time in connection with another building and site. We have had considerable discussion of this question with representatives of the State Department of Education. No definite position has been taken by the Department on the question, and we are left in doubt as to whether we can count on receiving this aid.

"If we are denied aid under this section, the plans heretofore formulated for the location and construction of the new building will be materially interfered with, and we do not like to proceed in the acquisition of a site until we can determine whether this aid will be made available by acquiring a five acre tract.

"We would be glad to have your opinion on this question, and if you are in doubt as to the proper interpretation of this section, would appreciate it if you could secure an opinion from the Attorney General."

We direct your attention to Section 9357, R. S. Mo. 1929, relating to State aid given a school district when selecting a site for the central high school building which is to be erected upon said site within said district. The pertinent part of said section reads as follows:

"Whenever a district organized under the provisions of this article has secured a site of not less than five acres for the central high school building of said district and has erected thereon a school building, suitable for a central school and containing one large assembly room for the meeting of the citizens of the district and has installed a modern system of heating and ventilating, the state shall pay

one-fourth of the cost of said building and equipment: Provided, the amount thus paid by the State shall not exceed two thousand ($2000.00) for any one district.
* * * *"

It is evident from a careful reading of the above section that whenever a district has organized under the provisions of Article IV, Chapter 57, R. S. Mo. 1929, that they will be entitled to receive State aid in the erecting of a school building upon a site of not less than five acres when the building that is erected contains one large assembly room for the meeting of the citizens of the district. It is also required that the building so erected has installed therein a modern system of heating and ventilating.

Since the passage of the Article, which includes Section 9357, supra, this Gallatin School District, which was organized under the provisions of this Article, claimed and received the two thousand ($2000.00) dollar grant from the State of Missouri and this sum was paid on the theory that the Act had been complied with. The size of the site, the assembly room and the statutory building equipment were, at that time, found to be in compliance with the Statute or the two thousand ($2000.00) dollars would never have been paid by the State of Missouri.

By the terms of the Statute the State pays to a school district, complying with the Article, not to exceed "two thousand ($2000.00) for any one district." Here you have a school district, in the face of this limitation, asking if another two thousand ($2000.00) dollars is available to them on a new building project, under the limitations of this Section. By no forced construction of the words above quoted could another two thousand ($2000.00) dollars be available to them, as provided in this Section, and such is our opinion.

Very truly yours

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

INTOXICATING LIQUOR: Licenses employing persons under the age of 21 years to sell or assist in the sale or dispensing of intoxicating liquors are guilty of violating Section 9 of the Liquor Control Act.

November 4, 1935.

11-4

FILED
32

Hon. M. Stanley Ginn
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"I would like to ask an opinion from your office on the following question concerning the New Liquor Law.

"FACTS: 'A is a holder of a license to sell 5% beer. He has in his employ B a minor, who, dispenses and sells the said intoxicating malt liquor, to the customers, who come into his place of business.'

"QUESTION: 'Is A guilty of a criminal offense for employing B to sell and assist in the sale of said liquor?'

"On page 32, of your interpretation of the liquor control act issued June 1, 1935, you list under the criminal law offenses number 3, 'Employing a Minor to Sell Intoxicating Liquor.' (sec.9)

"However, section 9 reads thus: 'No person under the age of 21 years, shall sell or assist in the sale or dispensing of intoxicating liquor.' Since criminal statutes are strictly construed, my question is, under the act, how the employer could be held when the law only states that 'no person under the age of 21 shall sell -----'."

We direct your attention to Section 9 of the Liquor Control Act relating to the sale or dispensing of intoxicating liquors by persons under twenty-one years of age. Said section reads in part as follows:

> "**** No person under the age of twenty-one years shall sell or assist in the sale or dispensing of intoxicating liquor."

This inhibition of the statute, when construed strictly, is directed to persons under the age of twenty-one years; however, it is possible for a licensee to be guilty of violating this section of the act by employing a person under twenty-one years of age to sell or aid in the sale of intoxicating liquors. The procuring or employing of persons under twenty-one years of age to sell and dispense intoxicating liquors by a licensee in his place of business, would make the licensee liable as a principal.

In the case of State v. Wagster, 75 Mo. 107, the Court had before it for consideration one Mr. Wagster who was indicted for running a horse race on a public road. Mr. Wagster was tried and convicted as a principal although he had employed another to ride his horse. The Court, in discussing the matter said at page 108:

> "**** Wagster made and ran the race, although Jones rode his horse. He was just as guilty as if he, instead of Jones, had ridden his horse. **** It is not necessary to cite the numerous authorities to the effect, that, in misdemeanors, all who procure or participate in their commission are principals. ****"

In the case of State v. Brown, 151 Mo. App., loc. cit. 351, the Court said:

> "**** Where a person acts as the clerk or agent of another in selling intoxicating liquors in violation of law, either may be indicted. ****"

Your attention is directed to Section 30 of the Liquor Control Act, which provides in part as follows:

> "Any person convicted of violating any of the provisions of this act shall be adjudged guilty of a misdemeanor."

CONCLUSION.

It is the opinion of this department that "A", as stated in your hypothetical question would be guilty of violation of Section 9 of the Liquor Control, Act.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

STATE BOARD OF HEALTH: Oath of office for Local Registrar of Vital Statistics.

6-21

June 21, 1935

FILED
33

State Board of Health
Jefferson City, Missouri

Attention of Doctor Herman S. Gove.

Gentlemen:

We acknowledge receipt of your request for an opinion of this office reading as follows:

> "Apparently there has been some controversy throughout the state regarding the registration and appointment of Local Registrars of Vital Statistics. It has been the practice of this Department in the past to use a routine printed form in making these appointments, but the Supreme Court will not accept this method of appointment of Local Registrars as being legal, and will not stand in the Court without a sworn affadavit of said appointment.
>
> I am herewith enclosing the forms for your verification and revision."

I have examined your "Form V.S. No. 3," "Form V. S. No. 4," and "Form V. S. No. 5", and find that the same are satisfactory in form except that they do not contain the oath of office which is required to be taken by all officers under the authority of this State. Section 6 of Article XIV of the Constitution of Missouri provides:

"All officers, both civil and military, under the authority of this State, shall, before entering on the duties of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office."

This section was held applicable to local registrars of vital statistics in the case of State ex rel. McKittrick vs. Langston, not yet officially reported.

We suggest that there be printed on the back of forms "V.S. No. 3" and "V.S. No. 4" the following oath:

"State of Missouri)
(SS
County of_____)

I,_____, being duly sworn upon my oath, say that I will support the Constitution of the United States and the Constitution of the State of Missouri, and that I will faithfully demean myself in the office of Local Registrar of Vital Statistics for the _____ ___registration district, comprising the primary registration districts of_____, in the county of_____, State of Missouri.

_____

Subscribed and sworn to before me this ___day of _____, 19___.

_____
Notary Public.

My commission expires the ___day of _____, 19___."

On the back of form "V. S. No. 5" there should be printed the following affidavit:

"State of Missouri)
(SS
County of _____)

I,_____, being duly sworn upon my oath, say that I will support the Constitution of the United States and the Constitution of the State of Missouri, and that I will faithfully demean myself in the office of Deputy Local Registrar of Vital Statistics for the _____ registration district, comprising the primary registration districts of_____, in the county of_____, State of Missouri.

_____

Subscribed and sworn to before me this ____ day of _____, 19____.

_____
Notary Public.

My Commission expires the ___day of _____, 19___."

You should of course require that when your forms "V. S. No. 4" and "V. S. No. 5" are returned to you that this affidavit be made by the appointee.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

_____
JOHN W. HOFFMAN, Jr.,
Acting Attorney General

HGW:MM

RECORDS: Records of local registrars of births and deaths are open to inspection to a person having a proper interest therein.

6-29

June 29, 1935.

FILED
33

Dr. H. S. Gove
Assistant Registrar
The State Board of Health
Division of Child Hygiene
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "This Department has had a number of inquiries from Deputy Local Registrars throughout the State, wanting to know whether or not their records are open to the public for inspection.
>
> "We contend these records are incomplete until they are received in this office and filed as permanent records.
>
> "We would like your opinion as to whether or not Deputy Local Registrars files would be open for inspection, and would said Registrar be compelled to let such records be inspected."

Section 9058, R. S. Mo. 1929, which relates to the duties of local registrars reads in part as follows:

> "***** He shall then number consecutively the certificates of birth and death, in two separate series, beginning with

> the number one for the first birth and the first death in each calendar year, and sign his name as registrar in attest of the date of filing in his office. He shall also make a complete and accurate copy of each birth and death certificate registered by him in a record book of approved form, to be kept and permanently perserved in his office as the local record of such birth and death, in such manner as directed by the state registrar. And he shall, on the tenth day of each month, transmit to the state registrar all original certificates registered by him during the preceding month. And if no births or deaths occur in any month, he shall on the tenth day of the following month report that fact to the state registrar on a card provided for this purpose."

It is plain from the above section that the local registrar must keep and permanently preserve a copy of each birth and death certificate registered by him in his office as a local record of such birth and death.

There can be no doubt, therefore, that the record kept by a local registrar is a public record. We will now answer your question which is, whether or not such records are open to the public for inspection.

We find no statutory provision covering the question and must therefore look to the common law. 53 Corpus Juris, Section 40, page 624, states the law as follows:

> "At common law a person may inspect public records in which he has an interest or make copies or memoranda thereof, when a necessity for such inspection is shown and the purpose does not seem to be improper, and where the disclosure would not be detrimental to the public interest; but the gratification of mere curiosity, or motives merely speculative, or the creation of scandal, will not entitle a person to inspection or to make copies or memoranda. ****"

23 R. C. L., Section 10, page 160, reads in part as follows:

> " It is quite generally conceded that there is no common law right in all persons to inspect public documents or records; and that right, if it exists, depends entirely on the statutory grant. But at common law, every person is entitled to the inspection, either personally or by his agent, of public records, including legislative, executive, and judicial records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. Any person who by law is given authority to perform certain work on the public records is entitled to access thereto, so that it is necessarily implied that the person or persons authorized to index the records should have free access to them. It has been held, however, that no one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal. ****"

In view of the above, it is the opinion of this department that the records of a local registrar are public records and are open to inspection to any person who has a proper interest therein. A person has no right to inspect such records for the gratification of mere curiosity or for the purpose of creating public scandal.

Yours very truly,

APPROVED:

J. E. TAYLOR
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JET/afj

APPROPRIATIONS: An appropriation act cannot legislate -- "Revolving Fund" of State Fair cannot be appropriated until statute is amended.

January 21, 1935.

FILED 54

Hon. Chas. W. Green
Secretary
Missouri State Fair
Sedalia, Missouri

Dear Mr. Green:

This is to acknowledge your letter of January 18, 1935, as follows:

> "I am enclosing you a copy of a bill for a Revolving Fund to be used at the Missouri State Fair, that I have drawn up, asking if you will give me an opinion as to whether we can use this, if and when the Legislature would pass it.
>
> It would certainly be of great benefit to me here, if it could be used."

The copy of the proposed bill for a "revolving fund" to be used by the Missouri State Fair is quite lengthy and we will not quote same. The proposed bill provides for an emergency revolving cash fund to be used to pay miscellaneous small accounts. The effect of said appropriation act would be that an amount not to exceed $5,000.00 at any one time would be drawn from the general revenue fund of the state treasury and placed in a local bank at Sedalia, Missouri, and checks drawn on said account to pay small incidental bills.

On September 14, 1933, this Department rendered to Honorable J. C. Breshears, Commissioner of the State Department of Agriculture, an opinion to the effect, "From the foregoing, it is our opinion that you should file the State Fair accounts with the State Auditor and payment of same should be by state warrants drawn on the funds applicable to their payment." Such

an arrangement we agree is quite unsatisfactory and hampers the State Fair in its activities because many day laborers do not like to wait for their compensation and if a revolving fund could be provided the salaries and small expenses of persons performing services and labor to the State Fair could be paid at the completion of their work. However, we are powerless to legislate and can only interpret the law as enacted.

Article 7, Chapter 87, R. S. Mo. 1929, pertains to the "State Fair", and Laws of Missouri, 1933, page 166, repealed many of the sections found therein.

Section 12353, Laws of Missouri, 1933, page 168, in part provides as follows:

> "The State Commissioner of Agriculture shall be and is hereby constituted the official who shall have supervision of the State Fair and of all the legalized departments of the state which are of a regulatory nature for the advancement of horticulture and agriculture."

Section 12355, Laws of Missouri, 1933, page 168, provides:

> "Upon the filing of proper vouchers and requisitions, duly certified by the Commissioner, the State Auditor shall issue his warrants monthly upon the State Treasurer for the payment of all approved salaries and accounts under the jurisdiction of the State Department of Agriculture."

Laws of Missouri, 1933, page 415, in part provides:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state

> government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated."

See also, Sections 11465 and 11471, R. S. Mo. 1929.

A reading of the Laws of Missouri, 1933, page 415, supra, shows that the Legislature intended that the State Treasurer should at all times be in possession of all funds of the State. In fact, it makes it mandatory that all funds be placed in the treasury to the credit of the board, bureau, etc., as the case may be. Thus, if the money is in the treasury, how may it be withdrawn?

The propsed revolving fund would allow same to be drawn out by the Commissioner of Agriculture and deposited in a local bank at Sedalia, Missouri. However, present Section 12355, supra, provides that the State Auditor shall issue his warrant monthly upon the state treasurer for the payment of salaries and accounts after the filing of vouchers and requisitions by the Commissioner of Agriculture. If a revolving fund is provided by an appropriation act, in our opinion, it would contravene and be opposite to Section 12355, supra.

The question now arises as to whether or not an appropriation act can change the terms of Section 12355.

In State ex rel. Davis v. Smith, 75 S. W. (2d) 828, l. c. 830, the Supreme Court of Missouri, en Banc, said the following:

> "The Legislature could, at any time, provide a different method for paying the salaries and expenses of

this board by amending section 13525 or by repealing it and enacting a new law in lieu thereof, but until it does so, section 13525, R. S. 1929 (Mo. St. Ann. Sec. 13525, p. 637), remains the law of the state. We cannot escape the conclusion that if section 13525, R. S., is still the law, and if it provides that the salaries and expenses of the board shall be paid out of the fund created from the fees collected by the board, and out of that fund only, the attempt to appropriate money out of the general revenue fund to pay any part of such salaries or expenses is contrary to the existing law of the state, as declared in section 13525, supra."

From the above it is our opinion that until the above Section (12355) is amended that the Legislature could not by appropriation devise any other means or method for the payment of warrants or accounts of the State Fair. It thus follows that the revolving fund, if provided for by the Legislature, would be void. If you desire a revolving fund, then the statute should be amended.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

INHERITANCE TAX: A step-child is considered as a stranger in blood under Mo. inheritance tax laws and the inheritance tax must be paid upon succession provided by statute for a stranger in blood.

1-28

January 22, 1935.

FILED
34

Hon. J. D. Greer,
Judge of Probate Court,
Mexico, Missouri.

Dear Sir:

This department is in receipt of your letter of January 15 requesting an opinion as to the following state of facts:

> "I have an estate like this: A Mr. Wilkins, being along in years, had a little 40-acre farm and his sons paid off a deed of trust for him; his wife died and he married another and willed his farm to her and died. Now the widow has died after willing it to a son by a first marriage and he hardly able to take care of himself.
>
> This farm, as you see, comes from his father to him thru his step-mother and is valued at $300.00 by the appraisers of the widow's estate. This man is not strong minded and needs badly all he can make, and I am wondering if I will be compelled to assess inheritance tax when it came from his father in this indirect way."

At the outset, we wish to respectfully call your attention that under the facts as outlined in your letter, there can be no doubt but that the step-son takes this property by reason of the death of his step-mother, there being no succession whatsoever from the father to the son. The precise question, therefore, involved in this estate is whether or not a step-child is possessed of the same exemption under the inheritance tax laws of Missouri as is a child of the blood.

It has been generally held that the word "children", as contained in inheritance tax statutes, cannot be construed to include "step-children" unless such "step-children" should have been legally adopted or brought within the conditions imposed by the statute to establish the relationship of a mutually acknowledged child. Kidder "State Inheritance Tax."

Pinkerton in his work on Inheritance Taxation states the following rule:

> "Step-children named as beneficiaries under a will have often sought to receive the benefit of the low rates and high exemptions given to children, but this is denied them unless they stand in the mutually acknowledged relationship of parent and child for a period not less than ten years beginning at a time prior to the child's fifteenth birthday and subsequent to the death of both parents of the child, or were proven to have been legally adopted. This is true even if the step-parent received the property in question from the step-child's own parent."

In the case of Marshall's Estate, 184 Pac. 43, a step-daughter inherited property from her step-mother, the same property having been inherited by the step-father from the step-daughter's mother. Inasmuch as said property had been originally owned by the mother, the step-daughter claimed the exemption of a natural child. The Court held, however, that the step-child was none the less a stranger in blood to the step-father, and the tax being upon the right of succession, and the succession of the property coming from the step-father, the same was taxable under the rate awarded by the California Statute to a stranger in blood.

CONCLUSION

In view of the foregoing, it is the opinion of this department that under the inheritance tax laws of the State of Missouri a step-child is to be considered as a stranger in blood, and the inheritance tax must be paid upon the succession provided by the statute for a stranger in blood.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

PROSECUTING ATTORNEY: Entitled to no fee from Coun for examination of abstracts for School Fund Loans.

2-20

FILED 34

February 19, 1935

Honorable W. D. Griffin
County Clerk Barton County
Lamar, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of February 6, with request for an opinion, which letter is as follows:

> "The County Court would like your opinion in regards to our County Attorney fees for examining abstracts for School loans. The Court would like to know if they are to pay him? If so, how much?
>
> Would you please let me know at once?"

I.

Sections 9243, 9244 and 9245 R. S. Mo. 1929, provide how and in what manner the county school funds, township school funds and capital school funds shall be loaned by the county courts of the respective counties, and section 9251 provides, among other things,

> "When any monies belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond* * *.

> But before any loan shall be effected, the borrower shall file with the county court an abstract of title at the time he files his bond and mortgage to the real estate which is to be mortgaged."

The statutes place the obligation for the making of county school fund loans on the county court and it is their duty to see that all of the requirements of the law have been complied with,and,necessarily,the abstract of title furnished by the borrower of school monies must be examined by one competent to pass on same and this duty devolves upon the prosecuting attorney.

II

Your inquiry is whether or not the prosecuting attorney is entitled to any fee from the county court for examining abstracts for school loand, and, if so, how much he may charge.

The prosecuting attorney is the legal adviser of the county court, as well as all other county officials, in all matters pertaining to their official duties. For any service that the prosecuting attorney performs for any county official, such as the county court in this instance, he must be able to point to the statute which allows him any fee or compensation for that service.

The rule is stated in C. J. 18, page 1319,

> "At common law those who accepted public office were presumed to give their services. The right of a prosecuting attorney to compensation is therefore purely statutory; he is not entitled to any salaries, fees or costs except as expressly provided by law."

The rule has been stated in Missouri in the case of King v. Riverland Levee District 279 S. W. 195, l. c. 196,

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. State ex rel. Evans v. Gordon, 245 Mo. 12 loc.cit. 27, 149 S. W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504. Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

Section 11318 R. S. Mo. 1929, enumerating some of the duties of the prosecuting attorney, says the following:

> "He shall prosecute or defend,as the case may require, all civil suits in which the county is interested,represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor * * * * * * *."

We do not find any statute in Missouri whereby the prosecuting attorney can charge any fee to the county court for examining abstracts of title for school fund loans, and we think that it is one of the general duties of the prosecuting attorney and that he is entitled to no fee, from the county court, for examining such abstracts of title.

CONCLUSION

It is therefore our opinion that the prosecuting attorney cannot charge the county court a fee for examining abstracts of title for school fund loans.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:LC

SCHOOLS: Rules and regulations if reasonable may be promulgated by School District.

February 21, 1935.

FILED
34

Hon. W. W. Graves
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Mr. Graves:

This is to acknowledge your letter as follows:

"I am enclosing herewith a letter from Mr. H. McMillan, Superintendent of Public Schools at Lee's Summit, Missouri, which I will please thank you to answer."

Mr. McMillan's letter reads as follows:

"I should like to be legally advised upon the following matters:

(1) A rural school district legally owes Lee's Smmit District 79 tuition for the year 1931-'32. What steps should be taken to collect the money? Who would pay the cost of collection, the rural district or our district? By way of explanation, this item is under the 16th section of the 1931 School Law.

(2) Do school officials have the right to search school lockers that have been and are used by pupils in which to keep their books, clothing, and other personal belongings.

"(3) Do school officials have the legal right to require non-resident pupils to leave the keys to their automobiles in the office during the hours of school, namely from 9:00 to 4:00. It is assumed that non-resident pupils, as well as others, are under the jurisdiction of the school from the time they leave home until they return home, and therefore the school has a legal right to enforce rules (reasonable) pertaining to their discipline and management. Does the school have a legal right to require some non-resident pupils to leave their keys in the office and not require others to do so? The explanation, of a possible difference of treatment, being that some pupils drive carelessly during the noon hour and also go joy riding and thus go many miles from school premises with a possibility of having a serious accident, while other students use their automobiles wisely.

I should like to receive legal information covering the above problems. In case your office does not care to decide, will you please forward my request to the Attorney General of Missouri and request that an early reply be given?"

I.

On September 14, 1934, this Department rendered an opinion to Honorable Chas. A. Lee, wherein it was held, among other things, the following (page 4):

"Section 16, Laws of Missouri, 1931, page 343, amended Laws of 1933, page 393, provides in part as follows:

'The board of directors of each and every school district in the state

> " '* * * * * * * shall pay the tuition of each and every pupil * * * * *.' (that attends a high school in an adjoining district.)
>
> "The above section is mandatory upon the board of directors and if such do not pay the tuition of a pupil resident in their district who attends a high school located in an adjoining district, then, in our opinion, a debtor and creditor relationship exists between the sending district and the receiving high school, and such receiving high school could maintain an action at law for debt against the sending school district."

See also,
State ex rel. Mildred Burnett v. School District of City of Jefferson, 74 S. W. (2d) 30.

In answer to your first question, it is our opinion Lee's Summit District, debtor, could sue the creditor school district for debt and such suit would be the same as any other civil action. Costs incurred would be taxable according to the provisions relating to civil actions.

II.

Your second and third questions are related, hence we shall treat them as one question in our discussion.

Section 9207, R. S. Mo. 1929, in part provides as follows:

> "The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district--said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose

> "duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, * * * * * * *."

Volume 56, Corpus Juris, page 852, Section 1088, reads in part as follows:

> "As a general rule a school teacher, to a limited extent at least, stands in loco parentis to pupils under his charge, and may exercise such powers of control, restraint, and correction over them as may be reasonably necessary to enable him properly to perform his duties as teacher and accomplish the purposes of education, subject to such limitations and prohibitions as may be defined by legislative enactment, * * * * * * * *. The teacher's power and duty extend beyond the teaching and preservation of order and discipline to matters affecting the morals, health, and safety of his pupils. He may and should do everything he deems necessary to these ends, when they are not in conflict with the primary purposes of the school or opposed to law or rule of the school board."

Section 1089 reads as follows: (C. J. Vol. 56)

> "In the exercise of his power to control and maintain discipline in his class, a teacher may adopt any reasonable rule or regulation concerning matters not provided for by the rules prescribed by the school board, and not inconsistent with some statute or other prescribed rule.

> "The teacher's rules may be supplemented by rules promulgated by the superintendent of schools, where, under a board rule, it is his duty to visit the schools periodically and to supervise and direct the teachers in their methods of instruction."

Section 1090 provides in part: (C. J. Vol. 56)

> "As a general rule the school board which by statute has the general charge and superintendence of the public schools has power to adopt appropriate and reasonable rules and regulations for the discipline and management of such schools, such as a rule requiring that there shall be prompt attendance, diligence in study, and proper deportment, and the decision of such board, if exercised in good faith, on matters affecting the good order and discipline of the school is final so far as it relates to the rights of pupils to enjoy school privileges, and the courts will not interfere with the exercise of such authority unless it has been illegally or unreasonably exercised; * * * * * *."

Section 1091 provides in part as follows: (C. J. Vol. 56)

> "A rule or regulation in regard to the discipline and management of a public school, whether adopted by the teacher or by the school board must be reasonable in itself. * * * * * Whether a rule or regulation is reasonable and valid is a question of law for the court."

In Pugsley v. Sellmeyer, 250 S. W. 538, the Supreme Court of Arkansas held that the following rule promulgated by a school board was not unreasonable:

> "'The wearing of transparent hosiery, low-necked dresses or any style of clothing tending toward immodesty in dress, or the use of face paint or cosmetics, is prohibited.'"

In the above case the pupil infringed the rule by using talcum powder and was expelled. The court, page 539, said:

> "Was the rule in question a reasonable one, and did the directors have the right to make and enforce it? We answer this question in the affirmative."

And further,

> "In the discharge of the duty here imposed upon us it is proper for us to consider whether the rule involves any element of oppression or humiliation to the pupil, and what consumption of time or expenditure of money is required to comply with it."

And further,

> "The courts have this right of review, for the reasonableness of such rule is a judicial question, and the courts will not refuse to perform their functions in determining the reasonableness of such rules, when the question is presented. But, in doing so, it will be kept in mind that the directors are elected by the patrons of the schools over which they preside, and the election occurs annually. These directors are in close and intimate touch with the affairs of their respective districts, and know the conditions with which they have to deal."

In King v. Jefferson City School Board, 71 Mo. 628, the court held (quoting from the syllabus):

> "The court will interfere to prevent the enforcement by a district school board of a rule which manifestly reaches

> "beyond their sphere of action, and relates to subjects nowise connected with the management or successful operation of the school, or which is plainly calculated to subvert or retard the leading object of our legislation on this subject; but the case should be a plain one. A rule which subjects any pupil absent six half days in four consecutive weeks, without satisfactory excuse, to suspension, does not belong to either of these classes, and will be enforced by the courts without inquiry whether it is a reasonable and proper one or not. This court, however, is of opinion that such a rule is reasonable and proper."

We quote from the syllabus of the case of Wright et al. v. Board of Education of St. Louis, 246 S. W. 43 (Mo. Sup.):

> "A regulation of the St. Louis board of education, forbidding membership of high school pupils in secret organizations, and not allowing pupils violating the regulation to represent the school in any capacity or to participate in graduation exercises, held not authorized by Rev. St. Sec. 11457, as to powers of such boards of education; for no rule should be adopted which attempts to control the conduct of pupils out of school hours after they have reached their homes which does not clearly seek to regulate actions, which, if permitted, will detrimentally interfere with the management and discipline of the school."

A review of many cases shows that the courts look to the facts in determining whether or not a rule promulgated by a school board is proper. It may safely be said that a rule that does not discriminate or is not unreasonable or does not cause

humiliation to the pupil and is for the purpose of promoting the interest of the pupil, will be held valid by the courts. In this connection, however, it should be borne in mind that when the pupil is in attendance at school the board exercises a degree of peternalism toward the pupil. However, after the pupil leaves the school premises the right of supervision over the child is reverted to the parents.

You inquire if the school officials have the legal right to search school lockers? In our opinion, we believe that the board could make a rule or regulation to the effect that all school lockers shall be subject to inspection at reasonable times. Of course, this rule should not be abused.

As to the right of the school officials to require pupils to leave car keys to their automobiles in the office during school hours, we are constrained to hold in the negative. However, we do believe that the board would have the right to promulgate a rule requiring that no pupil shall, during school hours, be permitted to use an automobile except with special permission. If such a rule is promulgated it will have the same effect as requiring the pupils to leave the keys to their automobiles at the office during school hours. The cooperation of the parents in regard to these matters should be solicited.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

MEDICINE: STATE BOARD OF HEALTH: Persons practicing the profession of Naturopathy are subject to the regulations of State Board of Health and require a license under Section 9118 R. S. Mo. 1929.

March 25, 1935.

FILED 34

Hon. W. W. Graves
Prosecuting Attorney
Kansas City, Missouri

Dear Sir:

This department wishes to acknowledge your request for an opinion under date of March 9th, wherein you state as follows:

> "There is located here in Kansas City an institution styling itself as the Columbia College of Naturopathy, which prepares its students to heal the sick by administering concoctions of herbs.
>
> "They have requested me to obtain an opinion from you as to whether or not they would come under the regulation of the State Medical Board and whether or not they would have to have a license to practice. They do not write any prescriptions for medicine or attempt to cure except by administering different concoctions of herbs.
>
> "I wish you would advise me whether or not they can be proceeded against for practicing medicine without a license."

Section 9118, R. S. Mo. 1929, reads in part as follows:

> "Any person practicing medicine or surgery in this state, and any person

> attempting to treat the sick or others afflicted with bodily or mental infirmities, and any person representing or advertising himself by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat the sick or others afflicted with bodily or mental infirmities, without a license from the state board of health, as provided in this article, or after the revocation of such license by the state board of health, as provided in this article, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than one year, or by both such fine and imprisonment for each and every offense; and treating each patient shall be regarded as a separate offense. *****

In order that we may have a clear understanding of the practice of "naturopathy", it will be necessary that we attempt to define its meaning.

In the case of Ex Parte Gerber, 206 P. 1004, loc. cit. 1005, 57 Calif. App. 141, the Court said:

> "Counsel for both petitioner and respondent tell us that the word 'naturopathy' has never been defined in any dictionary, but notwithstanding that fact we shall experience no great difficulty in determining whether petitioner, in practicing that system, if we may for the moment so designate it, has been following the calling of a physician and surgeon, and also whether he has been licensed to do so. **** Webster's definition of 'therapeutics' is: 'That part of medical science which treats of the discovery and application of remedies for disease.' He defines the adjectives 'therapeutics' and 'therapeutical': 'Of or pertaining to the healing art; concerned in discovering and applying remedies for disease; curative,' The same lexicographer defines 'treatment' as the 'act

> or manner of treating; management; handling; usage; as, unkind treatment; medical treatment'; and one of his definitions of the verb 'treat' is, 'to care for medicinally or surgically.' This, be it noted, is the only meaning given by him to the word 'treat' which can by any possibility fit the expression 'treatment of the eye.' It is not difficult, then from the facts given us, and with the aid of Webster, to formulate the definition that naturopathy is a process or system whereby remedies for disease are discovered and whereby they are applied to the healing of disease."

Again, in the case of Millsap v. Alderson, 219 Pac. 469, loc. cit. 473, 63 Cal. App. 518, the court said:

> "By reference to the above paragraph of said articles of incorporation, it will be observed that one of the purposes of said association is 'to teach naturopathy in its theoretical and practical modes of restoring and maintaining health' and that 'the materia medica shall consist of light, air, water, clay, heat, rest, diet, herbs, electricity, massage, Swedish movements, suggestive therapeutics, chiropractic, magnetism, physical and mental culture, etc.' 'Materia medica' is defined as 'the substances employed as remedial agents.' Therefore, the substances employed by one practicing naturopathy in the treatment of the sick and afflicted would be light, air, water, etc., and a naturopath or a doctor of naturopathy would be a person who holds an unrevoked certificate from the board of medical examiners, authorizing him to treat the sick and afflicted by the use of the substances above enumerated."

From the foregoing cases it may be said that the practice of naturopathy consists of discovering remedies and applying them to the healing of disease. The "materia medica" of a doctor of naturopathy may consist of a number of things including light, air, water, clay, heat, rest, diet, electricity, massage, herbs and other substances. In the case before us, the substances

employed for the treatment of the sick and afflicted consist of a concoction of herbs.

Laws of Missouri, 1901, Section 5, page 207, made it a misdemeanor for any person to practice medicine or surgery or to attempt to treat the sick without first obtaining a license from the State board of health. This section is in accord with Section 9118, R. S. Mo. 1929, supra. The latter section has merely been broadened in its scope.

The case of State v. Smith, 135 S. W. 465, loc. cit. 469, 233 Mo. 242, was decided under the former section and the Court, in discussing what constituted the practice of medicine, said:

> "It is a serious question whether defendant would not come within the original statute, as one practicing medicine or surgery. The practice of medicine is not confined to the administration of drugs; nor is surgery limited to the knife. When a physician advises his patient to travel for his health, he is practicing medicine. Broadly speaking, one is practicing medicine when he visits his patient, examines him, determines the nature of the disease, and prescribes the remedies he deems appropriate. ****"

Section 9118, R. S. Mo. 1929, provides in part as follows:

> "Upon receiving information that any provision of this section has been or is being violated the secretary of the state board of health shall investigate the matter and upon probable cause appearing, shall, under the direction of the board, file a complaint with the prosecuting or circuit attorney in the county or city where the alleged offense occurred. ****"

In view of the foregoing definitions of the practice

of naturopathy as consisting of discovering remedies and applying them to the healing of disease, we are clearly of the opinion that such practice constitutes the practice of medicine as interpreted by the Missouri courts. Persons desiring to practice the profession of naturopathy are subject to the regulations of the State board of health requiring a license, and may be proceeded against under provisions of Section 9118, supra.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

MW/WOS:afj

SCHOOLS: Any person between the age of 6 and 20 years, unless defective, has a right to attend public schools.

9-17

September 10, 1935.

FILED
34

Hon. W. W. Graves
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Mr. Graves:

This is to acknowledge your letter as follows:

"I am enclosing herewith copy of a letter from Mr. H. McMillan, Superintendent of Schools, Lees Summit, Missouri, which is self explanatory.

"Will you kindly furnish Mr. McMillan with the information he desires."

Mr. McMillan's letter, in part, reads as follows:

"The compulsory age of school attendance begins at SEVEN. Free education begins at SIX. Does a school board have the legal right to keep pupils from attending school until they are seven?

"The background for this question is as follows: When pupils are permitted to enter the First Grade at the chronological age of six, there are those whose mental age, or the age of the mind, is not six, and therefore cannot do First Grade work and they FAIL, Get A DISLIKE FOR SCHOOL, AND HAVE TO REPEAT THE WORK. For example, it is possible, AND IT DOES HAPPEN, that a child, who has

> lived six years and has a mind of an average four or five year old child, enters the First Grade. It is obvious that the child cannot do the work required of children whose minds are six years of age. It would be better to keep this child out of school another year to let his mind grow older so that he could come more nearly doing good First Grade work and consequently get a better foundation for later work. In some cases, some children should not start to school until the age of eight. Of course, this case could not be enforced on account of the compulsory attendance law. However, if it is legally possible to keep children out of school until age seven, chronologically, the exceptional cases will eventually receive better education."

I.

Does a School Board have the legal right to keep pupils from attending school until they are seven?

Article XI, Section 1, Constitution of Missouri, provides as follows:

> "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

In the case of Wright v. Board of Education of St. Louis, 246 S. W. 43, the Supreme Court of Missouri, page 44, said the following:

> "In view of the beneficient purpose of public education, it was not attempted in the Constitution (article 11) to place any restriction upon legislative action in regard thereto other than an age limit within which the rights granted were to be enjoyed."

In Rogers v. McCraw, 61 Mo. App. 407, the St. Louis Court of Appeals, page 409, said:

> "To entitle the plaintiff to maintain the action, she must have been within the school age (as fixed by the constitution) at the time she was prohibited from attending the school. Roach v. Board of Public Schools, 77 Mo. 484."

It is our opinion that any pupil between the ages of six and twenty years has a legal right to attend school and the board is not justified in denying attendance to pupils until they attain the age of seven. It is our further opinion that the facts stated in your letter would be no excuse or justification to deny certain children the right to attend school until such attain the age of seven. However, if a child is feeble-minded, deaf, blind or crippled, such would not have to be admitted to the same school of instruction provided for normal children, but when ten or more of such defective children are found in the district a special class of instruction shall be provided for same. Sections 9218, 9219, 9220 and 9434, Revised Statutes of Missouri, 1929.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

JLH:EG

COSTS IN CRIMINAL CASES: County Treasurer cannot withhold fees payable to county judges and county clerk, indebted to county on school fund mortgages, because school fund mortgages are not included in provisions of Sec. 3854, R.S. 1929.

October 17, 1935.

FILED
34

Honorable L.G. Graven,
Treasurer of Lincoln County,
Troy, Missouri.

Dear Sir:

This department is in receipt of your letter requesting an opinion as to the following state of facts:

> "My attention has been called to the sections of law as shown herewith. (Secs. 3854, 3853 to 3858, R.S. Mo. 1929)
>
> "I do not thoroughly understand this and would like to have your written opinion, as I cannot get any satisfaction from talking with our prosecuting attorney.
>
> "The county clerk and one of the county judges owes the county on school fund mortgages and I want to know if under the law I will have to hold their fees and salary to apply on their respective debts."

Section 3854, R.S. Mo. 1929 provides in part as follows:

> "The county treasurers shall pay out all such fees to the proper owners as the same may be called for: Provided, that before any such fees shall be paid the party to whom the same is due shall furnish satisfactory evidence to the treasurer that he or she, as the case may be, is not at the time indebted to the

state or county, on account of delinquent back taxes, or is indebted to the state or county on account of any fine, penalty, forfeitures or forfeited recognizances, or costs for a violation of any criminal statute of this state, or for contempt of any court, no matter if the same shall have been paid by oath of insolvency as provided by law; or is indebted to the state or any county on account of any funds coming to his hands by reason of any public office: * * * *"

CONCLUSION

In view of the foregoing, it is the opinion of this department that you have no authority to hold the fees payable to the county judge in question or to the county clerk for the reason that they are indebted to the county on school fund mortgages inasmuch as school fund mortgages are not included within the provisions of Section 3854, R.S. Mo. 1929.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

SALES TAX: HOTELS: Rooms occupied by the same guest for thirty days or more, the receipts exempt from the tax.

1935

October 26, 1935.

FILED
34

Honorable W. W. Graves
Prosecuting Attorney
Kansas City, Missouri

Dear Sir:

On September 30, 1935, you wrote this department requesting an opinion regarding the sales tax act as it may apply to permanent guests of hotels. Your letter is as follows:

> "The Kansas City Hotel Association has requested me to secure an opinion from you as to whether or not patrons who live permanently at hotels here in Kansas City and who pay their bills by the month or week should be charged the sales tax on such bills."

The section of the act levying the tax at one per cent on rooms in hotels is Section 2, Subsection I, which is as follows:

> "A tax equivalent to one (1) per cent. on the amount of sales or charges for all rooms, meals and drinks furnished at any hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist cabin, tourist camp or other place in which rooms, meals or drinks are regularly served to to public."

In order to subject rooms furnished by hotels, taverns, inns, etc., it is necessary that such rooms be "regularly served to the public." It must be conceded that if a person is operating a hotel, the very fact that he calls it a hotel would indicate that the rooms are regularly open to the public.

To determine the taxability or non-taxability of a hotel, the method of operation should be the determining factor. Some hotels are operated by catering solely to families and permanent guests for their income. Others rely solely on transient public. In order to subject the individual rooms of the hotel to a tax of one per cent., we are of the opinion that when a room is occupied permanently by a guest, the same constitutes his home, residence, domicile, the same as if he were living in a private residence, and that no tax should be exacted from the receipts of the rental of such room.

As to when a guest of a hotel may be termed a permanent guest, is mainly to be determined by the intention of the guest. We think a fair test as to whether or not a guest is a permanent guest of a hotel, is the length of time for which he contracts for the room or remains in the room, and if said guest remains thirty days or more, we are of the opinion that he is a permanent guest.

This ruling shall apply only to the rooms of a hotel rented in the manner as above outlined. All other rooms of any hotel which are regularly open for occupancy by paying guests shall be subject to the tax.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

OWN:PE

OPTOMETRY: Proposed law Re: House Bill No. 247, Paragraph "(d)".

February 4, 1935.

FILED
35

Dr. F. J. Guilbault, President
Missouri State Board of Optometry
423 North Broadway
St. Louis, Missouri

Dear Dr. Guilbault:

This is to acknowledge your letter of February 2, 1935, as follows:

"My attention has been called to the proposed amendment to the optometry law, Section 13501, paragraph D, to wit:

'With or without prescription, the transferring, replacing, adjusting, changing or duplicating lenses in spectacles or eyeglasses, adjusting lenses in frames, or adjusting frames or spectacles, or dealing in lenses or eyeglasses at retail, all for the purpose of other persons to wear.'

A. Does this paragraph take in or affect jobbers or wholesalers or manufacturers of eye glasses?

B. Does it prohibit jobbers or wholesalers dealing in eye glasses from filling prescriptions for oculists or optometrists for eye glasses or spectacles?

C. Does this proposed amendment to the optometry law prevent licensed physicians or surgeons from testing eyes or treating same?

"D. Is the medical act sufficiently broad to protect physicians and surgeons from the operation of this propsed amendment to the optometry act?

I shall be pleased to have this opinion ready for me for Tuesday morning, February 5, when I will be in Jefferson City, which opinion I would like to have at hand when I discuss this proposed law with the members of the Legislature."

House Bill No. 247 is an act to amend certain provisions in Article 1, Chapter 101, R. S. Mo. 1929, pertaining to "State Board of Optometry." Section 13501 appearing in House Bill No. 247 defines what constitutes "practice of optometry." It repeals Section 13501, R. S. Mo. 1929, and enacts in lieu thereof practically the same section and eliminating therefrom provision relative to "registered apprentices" and clarifies a practice now existing under the old law. This section in part provides as follows:

"Section 13501. Any one or any combination of the following practices shall constitute the practice of optometry:

* * * * * * * *

(d) With or without prescription, the transferring, replacing, adjusting, changing or duplicating lenses in spectacles or eyeglasses, adjusting lenses in frames, or adjusting frames or spectacles, or dealing in lenses or eyeglasses at retail, all for the purpose of other persons to wear."

Your inquiry concerns Paragraph "(d)". We invite your attention to the word "retail" found in the above section. If a jobber or wholesaler or manufacturer of eyeglasses do the things provided for in Paragraph "(d)", then, of course, such would be practicing optometry. However, said paragraph does

not affect jobbers or wholesalers or manufacturers of eyeglasses if such do not deal in same at retail, that is, if such jobbers or wholesalers, as agents for an oculist or optometrist, replace, transfer, adjust, change or duplicate lenses in spectacles or eyeglasses for the optometrist, then such would be, in effect, an agent for the optometrist or oculist and would be without the provisions of Paragraph "(d)", supra.

We answer your question "A", then, in the negative, with limitations as above set out.

In answer to your question "B", in our opinion, the answer is "No."

In answer to your questions "C" and "D", in our opinion this proposed amendment does not prohibit, restrain, or place any restriction upon licensed physicians or surgeons to treat ailments of the eye. The medical doctors now may do more in treating eyes than an optometrist, and this act would in nowise limit them in their practice.

Trusting the above answers your inquiry, we are

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKittrick
Attorney-General.

JLH:EG

COUNTY CLERK - Compensation of deputies.

2-20

February 19, 1935.

FILED 35

Hon. Guy C. Gwyn,
Clerk of County Court,
Paris, Missouri.

Dear Sir:

This department is in receipt of your letter of February 3 wherein you make the following inquiry, and request an opinion as to the following matter:

> "The State Auditor has his examiners here working on Monroe County at the present time. *** The examiners say that they have been informed from the office that the Clerk was not entitled to retain the extra $500.00 for extra deputy hire under Sec. 11811, R.S. 1929; that the same was repealed in the Laws of Missouri, 1933.
>
> I do not feel that this is correct and am asking if your office has rendered an opinion to that effect? If you have not rendered an opinion in regard to this part of the deputy hire, I would appreciate it if you would do so if you have time. The Court allowed me the extra $500.00 for the year 1934. However, I only used $152.50 of the amount, but I would hate to have to repay it to the county as I did not retain any of it for myself."

The pertinent part of Sec. 11811, which was passed by the Legislature in 1933, is as follows (Laws of Mo. 1933, page 371):

> "Provided, that the county court in all counties in this state having a population of 15,000 and less than 40,000 persons may allow the county clerks to retain, in addition to the amounts herein specified, for deputies' or assistants' hire a further sum not to exceed $500 per annum to be determined by the County Court of such county: Provided, that the County Court shall determine that the work required to be done by such clerk or clerks demand or require such extra remuneration and that the fees collected and taken in by such clerks is sufficient to pay the same but in no event shall any such allowance be made by the county court where the fees collected by such clerk is not absolutely sufficient to meet such demand: and provided, further, that in counties in which the clerk of the county court is ex officio recorder, said clerk shall be allowed to pay for deputies or assistants not exceeding the sum of $500 in addition to the amount provided in this section. Provided, further, that until the expiration of their present term of office, the person holding the office of County Clerk shall be paid in the same manner and to the same extent as now provided by law provided that this act shall not apply to counties in which such clerks now or may hereafter receive a fixed salary in lieu of all fees, commissions and emoluments."

The original section, 11811, R.S. Mo. 1929 contained the following proviso:

> "Provided, that the county court in all counties in this state having a population of seven thousand and less than forty thousand may allow the county clerks and circuit clerks of such counties, or either of them, to retain in addition to the amount now allowed them for deputy or assistant hire a further sum not to exceed five hundred dollars per annum, to be determined by the county court of such county: Provided, that the county court shall determine that the work required to be done by such clerk or clerks

> demand or require such extra remuneration and that the fees collected and taken in by such clerks is sufficient to pay the same, but in no event shall any such allowance be made by the county court where the fees collected by such clerk or clerks is not absolutely sufficient to meet such demand."

We are confronted with the question of what the Legislature had in mind regarding deputies in the proviso: "Provided further that until the expiration of their present term of office, the person holding the office of county clerk shall be paid in the same manner and to the same extent as now provided by law." Clearly, the compensation of the Clerk was to remain without change until the expiration of the term, which was December 31, 1934. The proviso, having made no reference to the deputy, this department has ruled that the new section, 11811, Laws of Mo. 1933, became effective 90 days after the adjournment of the Legislature, which was in July, 1933; hence, since that time there has been no change in the compensation of the deputy. This ruling was made on the theory that the proviso heretofore quoted made no mention of the deputies.

The new section, 11811, Laws of Mo. 1933, p. 370, relating to the salaries of the Clerk and deputy in counties of the population of Monroe County, is as follows: "in counties having a population of 12,500 and less than 15,000 persons, the clerks shall be allowed to retain $1500.00 for themselves, and shall be allowed to pay for deputies and assistants $1300.00;"

We must next determine whether or not the extra compensation of $500.00 which the clerk is permitted to pay his deputies in addition to the compensation to his regular deputy is on an equal footing with that of the regular deputy after the passage of Section 11811 in 1933. Is the $500.00 a part of the compensation of the deputy when the work is burdensome and the fees are absolutely sufficient to take care of the same? From the language of the statute, it would appear that the extra $500.00 which may be allowed the Clerk under the old section is purely under the control and discretion of the Clerk himself. It is for a specific purpose by order and approval of the county court. He may hire an extra deputy or more at any salary he wishes to pay. It is true the Clerk does not receive the $500.00 personally as a part of his own salary, but as stated before, he has absolute control of the fund.

CONCLUSION

We think the Legislature in enacting the proviso that the County clerk should, until the expiration of his term be paid in the same manner and to the same extent as now provided by law, included the provisions as made respecting the additional clerk

in that not more than $500.00 should be paid as compensation, and this view is further strengthened by the fact that your county court made the order and permitted you to pay the sum of $152.50 for such additional services.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

SUPPLEMENTAL COST BILLS: Cannot include claims for Sheriffs fees where the sheriff failed to claim same during the term of the trial.

5-13

May 9, 1935.

FILED
35

Hon. Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion of this office on the following matter:

> "Is it lawful to make a supplemental cost bill where witnesses fail to claim their witness fee at the term of court they were subpoenaed for and then put in their claim afterwards."

In reply to the above inquiry, we have examined the pertinent statutes, the condition existing prior to the enactment thereof, the apparent reason for the enactment by the Legislature of the statutes, with the object of determining the legislative intent.

We assume that your inquiry pertains to claims for witness fees for witnesses who were legally subpoenaed in a criminal case, attended the trial, testified therein and failed to claim their attendance fees and mileage during the term of court at which the trial was had, then after the term had ended presented themselves before the clerk and claimed their attendance and thereupon made the statutory affidavit.

Section 11799 R. S. Mo. 1929, provides:

> "The clerk of each court of record shall, on the application of any witness to have his fees allowed, enter on his book, under the title of the cause in which the witness was summoned or recognized, or if before the grand jury, the name of the witness, the number of days he has attended and the number of miles he has necessarily to travel in consequence of the summons or recognizance, and shall swear the witness to the truth of the facts contained in said entry.* * * * **

Section 3830 R. S. Mo. 1929, provides in what instance the county shall pay the costs.

Sections 3831, 3832 and 3833 provide that in certain contingencies the prosecutor or person on whose oath the prosecution was instituted shall pay the costs.

Section 3834 R. S. Mo. 1929, provides the formality necessary for issuance of subpoenas and this Section has been construed by the Courts to be a safeguard as to the question of payment of costs. State vs. Rosco, 289 Mo. 535, 144 S. W. 449.

Section 3835 R. S. Mo. 1929, requires the clerk to attach to each fee bill a certified copy of the names of all the witnesses and all orders of the prosecuting attorney and affidavits of the prosecutor and provides that no costs shall be paid any state witness not therein.

Section 3838 R. S. Mo. 1929 provides that all costs unnecessarily incurred by violation of Sections 3834 and 3836 shall be taxed against the clerk or justice causing the same.

Section 3840 specifies that the County Court may, when satisfied of the necessity, make certain allowances and pay them from county funds.

Section 3841 R. S. Mo. 1929, provides:

> "The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Section 3842 R. S. Mo. 1929, makes it the duty of the Prosecuting Attorney and Judge to carefully scrutinize and correct the fee bills.

Sections 3843 to 3848 R. S. Mo. 1929, further throw safeguards around the State and County against improper payment of costs.

Section 3849 R. S. Mo. 1929, states:

> "When the clerk shall send a bill of costs to the state auditor or county court as provided in the next preceding section, he shall expressly state in his certificate that he has not at any previous time certified or sent a copy of the same bill, or part thereof, for payment: Provided, that if the clerk shall, by oversight or mistake, fail to include any costs properly chargeable against the state or county in any fee bill, he may make out and present, as hereinbefore provided for making out bills of costs, a supplemental bill for the costs so omitted: Provided, that the clerk shall in no case charge or receive any fee or fees whatsoever for the issuance of such supplemental fee bill."

At common law witnesses were not entitled to any fees whatever, and the statutes passed allowing fees are strictly construed.

In the case of Veidt vs. Missouri, Kansas & Texas Railway Company, 109 Mo. App. 102, the Court having under consideration the construction of such a statute says, l. c. 103:

> "* * * At common law no recovery of costs was allowable, and when statutes were passed authorizing their allowance they--the statutes--were always strictly construed. State ex rel. vs. Seibert, 130 Mo. l. c. 213, and cases there cited. And this rule of statutory construction obtains in this State. Steele v. Wear, 54 Mo. 531; Shed v. Railroad, 67 Mo. 687; Sinclair vs. Railroad, 74 Mo. App. 500; Houts vs. McCluney, 102 Mo. 13; Thompson vs. Elevator Co. 77 Mo. 520; St.Louis vs. Meintz, 107 Mo. 611; Hoover vs. Railroad, 115 Mo. 77, State ex rel. vs. Oliver, 116 Mo. 188; State ex rel. vs. Seibert, 130 Mo. 202."

In the case of State vs. Oliver, 116 Mo. 188, l. c. 191, the Court in construing statutes relating to fees (and whether mandamus would lie) says:

> "The right of a witness to have his fees taxed as costs against one party or the other, if it exists at all, must be found within some statutory provision. 'No final costs were recoverable by the plaintiff or defendant at common law.' Tidd's Practice (3 Am. Ed.) 945; Hoover vs. Railroad, 115 Mo. 77, and cases cited. The statute makes provision that 'in all civil actions or proceedings of any kind the party prevailing shall recover his costs against the other party except in those cases in which a different provision is made by law.' Provision is also made for taxing as costs, the fees of witnesses attending the trial of all civil cases under process of the court, and for the collection of the same. Under these provisions the clerks of courts of records, under the supervision of the court, examine and audit the fees of all witnesses. Secs. 2920, 2925, 2946, 4980. Under these sections of the statutes, and not otherwise, the witnesses in civil cases are given the right

to their fees as incident to the judgment in the case. But it is held even with these statutory rights that thewitness has no control of the judgment, independent of the party in whose favor it was rendered. * * * * * *

"In civil actions the parties to the suit are present, at every step in the proceeding, watching its progress and guarding against unnecessary cost and expense, not knowing upon whom it may fall. A plaintiff may be required to give security for the payment of costs, or, if unable to do so, may be allowed, in the discretion of the court, to prosecute his suit 'without fees, tax or charge.' Sec. 2918. It is manifest that these provisions under which litigants are able to protect themselves against improper and unjust allowance of cost would afford no safeguard against extravagance, impositions and frauds in case the costs should be payable out of the public treasury. A more careful investigation in the allowance of costs in criminal cases and proper limitation upon the number of witnesses in whose favor costs should be taxed became therefore necessary.* * * *"

(Here are set out Sections 3841, 3942 and 3850, Revised Statutes of Missouri, 1929.)

"The proceedings through which the witnesses, after properly making their claim, were to secure payment of their fees, out of the state treasury, were confined to these sections of the statutes.* * * * *"

l. c. 195:

"No witness has a right, independent of the statute, to enforce a claim against the state for fees for attendance upon the trial of a criminal case. The question of justice or injustice to the witness is not a matter for consideration."

In the case of State ex rel. Johnson vs. Draper, 48 Mo. 56, the Court had under consideration the question of payment of a supplemental cost bill which had not been presented to the State Auditor within two years after the claim accrued and a construction of the statute prohibiting payment of claims if not so presented to the Auditor within that time. (We do not understand such a statute to enter into the question now propounded). In ruling against the payment in the above case the Court says, l. c. 58:

> "It is admitted that these supplemental costs bills were not presented until after the expiration of two years from the final determination of the prosecutions, and I can see no reason for excluding this chass of claims from the operation of the statute. The langauge is general, and if the statute should be held not to apply to the claims of those interested in costs bills, I know not whose should be included, or how to fix any rule for enabling the auditor to decide what must be presented within two years, or what may lie by for an indefinite period. The reason of the requirement certainly applies with as much force to this as to any other class of claims, and we have no authority to say that the Legislature did not intend to require their prompt presentation. It is clear that the legislature intended to limit the power of the auditor to recent and fresh claims, reserving to itself the power, if any strong equity should be shown in favor of an older one, to pass upon it by a special act."

We think that the legislative intent is clearly evidenced by the statutory enactments to take away the harsh treatment of the common law which allowed no fees to witnesses and to provide that witnesses in criminal cases may receive the statutory fee if they follow the steps set forth by the statutes, but only in that event.

The law provides with great detail the steps necessary and throws many checks and safeguards about the payment of such fees and watches with a zealous eye against improper payments.

The witness claiming fees must present himself to the clerk and make the statutory affidavit. It provides that the clerk shall

> "immediately after the adjournment of the court and before the next succeeding term, tax all costs."

It is his duty to "forthwith" deliver to the Prosecuting Attorney the completed fee bill.

The idea of speedy ascertainment of what charges the County or the state may be called on to pay is emphasized and unmistakably given prominence throughout the enactments relating to witness fees.

As is said by McFarland, J. in the Oliver case supra:

> "A more careful investigation in the allowance of costs in criminal cases**** became therefore necessary."

In addition to the fact that statutes such as now under consideration are strictly construed, they are also construed in the light of the conditions existing prior to the enactment and which its remedial provisions are designed to correct. State ex rel. Collins vs. St.Louis San Francisco Railroad Company,142 S. W. 279, 238 Mo. 605:

We do not think the statute contemplates that a witness may either negligently or ignorantly fail to properly claim his attendance at the term and thereafter be entitled to it.

The matters referred to by the statute providing for supplemental costs bills mean that such as therein contained was therefofore properly made a charge in the case but the clerk overlooked placing them in the original bill of costs. The situation you inquire about is quite different and where the clerk did not overlook anything.

It is our opinion that such a supplemental cost bill containing claims of witnesses made later than the term of court to which they were subpoenaed and appeared, is not lawful.

Respectfully submitted,

James L. HornBostel,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JLH:DW/mm

INTOXICATING LIQUORS: Permittee or Licensee cannot change location of their business and operate under a license issued for a former place of business.

8-16

August 13, 1935.

FILED
35

Honorable Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "In construing sections 5 and 20 of the new intoxicating liquor laws, does it prohibit a licensee from moving his place of business into another building in the same town without obtaining another license."

Section 5 of the Liquor Control Act provides that no person shall sell intoxicating liquor in any other place than that designated in the license, and reads as follows:

> "No person, agent or employee of any person in any capacity shall sell intoxicating liquor in any other place than that designated in the license, or at any other time or otherwise than is authorized by this act and the regulations herein provided for."

It is evident from the careful wording of the above section that a person is limited to the sale of intoxicating liquors at the place for which the license expresses.

Section 20 of the Liquor Control Act provides that the premises upon which intoxicating liquors shall be sold are to be particularily described in the permit. Said section provides in part as follows:

> "Every license issued under the provisions of this Act shall particularly describe the premises at which intoxicating liquor may be sold thereunder, and such license shall not be deemed to authorize or permit the sale of intoxicating liquor at any place other than that described therein."

It is the opinion of this Department that if a person obtains a permit for the sale of intoxicating liquors covering one place of bussiness at a particular street address, that said licensee cannot move his place of business to another street address and engage in the sale of intoxicating liquors without obtaining a new license covering the latter premises.

Yours very truly

RUSSELL C. STONE
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

RCS:H

CIRCUIT CLERKS - Back salaries under Section 11786, R. S. Mo. 1929 can only be paid from back taxes.

November 13, 1935

11-19

FILED 35

Honorable Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Sir:

We have your request of November 12, 1935 for an opinion as follows:

"The Circuit Clerk of this County filed with the County Court his account wherein he asked for payment of sum of $350.00 for year 1933 and the sum of $350.00 for year 1934 as additional pay he claims to be entitled to. The account was turned down by the County Court and the Circuit Clerk then appealed to Circuit Court.

"The Clerk bases his claim for this additional pay on following facts: for the years 1933 and 1934 he received an annual salary of $1600.00, at the 1932 Presidential Election our largest vote in county was approximately 4,378; the Clerk contends his salary should have been increased the $350.00, as multiplying largest vote by 5 would give population of county at more than 20,000. Prior to these years there is no contention about proper salary of $1600.00 annually.

"Will you please advise me if you consider this claim proper and a legal claim against county?

"In the event you decide the claim should be allowed, will you please advise me if you think the Circuit Court should render judgment for these sums on respective years of 1933 and 1934, to be paid out of revenue of those years, or would it be a claim to be paid out of current revenue. Under our budget plan no provision is made for payment of such judgment and the Court would not want to issue warrants in excess of that sum allowed under their budget."

We shall subdivide this opinion, for convenience, as follows:

(1) Salary of circuit clerk for 1933-1934.

(2) Payment of past indebtedness.

I.

SALARY OF CIRCUIT CLERK FOR 1933-1934.

The question of determining the circuit clerk's salary has heretofore been passed upon by this office, namely, that for the years 1933 and 1934, a circuit clerk is entitled to a salary based upon Section 11786, R. S. Mo. 1929, and a copy of an opinion written by the late Carl C. Abington of this office is enclosed herewith.

II.

PAYMENT OF PAST INDEBTEDNESS

Since the circuit clerk, under the above facts in this case, is entitled to the additional

$350.00 for each of the years 1933 and 1934, the question arises as to how this back salary can be paid.

Under the county budget act and the Constitution of this State (Article X, Section 12) no county is permitted to become indebted for any amount in excess of its current revenue. It therefore follows that the unpaid salary for 1933 can be paid only from 1933 income and the 1934 back salary can only be paid from 1934 income; the amount of the back salary for these two years cannot be paid from 1935 income unless at the end of the year there is a surplus remaining after all expenses for the current year have been met.

It is, therefore, the opinion of this office that the amount of back salary involved herein can only be paid from the amount collected in back taxes for the years involved, unless at the expiration of this year there is an unused surplus in the county revenue fund.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE
Enc.

COUNTY CLERK: Sections 12165 and 12166 Laws of Mo. 1933 became effective 90 days after approval by Governor and compensation of County Clerk since that time, if appointed to prepare a financial statement of the county, is not to exceed 10¢ per 100 words and figures.

March 18, 1935.

FILED
36

Hon. Raymond Hall,
Clerk of County Court,
Schuyler County,
Lancaster, Missouri.

Dear Sir:

This department is in receipt of your letter of some time ago relating to payment of the county clerk for the preparation of the financial statement of the county, as follows:

> "I would like to have your opinion on the price to be paid to the agent, appointed to prepare the financial statement for publication.
>
> From what I gather the agent is to receive 10¢ per hundred words and figures for the preparation and no more and that also this applied to last year.
>
> However, the Clerk of last year received $150.00 for the preparation and it contained less than 60,000 words and figures;according to that he should have received only about $60.00 instead of the $150.
>
> Or is this due to the fact that this is an unaccountable fee the court can pay what they choose?"

Section 12165, Laws Mo. 1933 page 355, referring to the preparation of the county financial statement, provides: "Or if no one has been designated said statement having been prepared by the county clerk, signature shall be in the following

form: Clerk of the County Court and ex-officio officer designated to prepare financial statement required by Section 12165 Revised Statutes 1929."

The next section, 12166, Laws of Mo. 1933, page 356 contains the following provision for the compensation for the preparation of the statement:

> "For the preparation of the copy for the statement the court may allow not to exceed the price per hundred words and figures permitted to the clerk of the court for the writing of the record and no pay shall be allowed for pasting printed copy in the record. In submitting bill to the county court the person preparing the statement and the publisher shall itemize the amount as properly chargeable to the several funds and the county court shall pay out of each fund in the proportion that each item bears to the total cost of preparing and publishing said statement and shall issue warrants therefor."

The time for preparing and publishing the statements is contained in the first sentence of Section 12165, Laws of Mo. 1933, page 353 and is as follows:

> "On or before the first Monday in March of each year after the taking effect of this act the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county, if such there be, and if not by notices posted in at least ten places in such county, a detailed financial statement of the county for the year ending December 31, preceding.****"

This Act repealed the old Sections 12165 and 12166, R.S. Mo. 1929 and was approved April 7, 1933 and became effective 90 days thereafter.

The new section 12166, Laws of Mo. 1933, page 356-357 contains the following provision: "Within twelve months after the effective date of this act the State Auditor shall prepare sample

forms for financial statements and shall mail the same to the county clerks of the several counties in this state, but failure of the auditor to supply such form shall not in anywise excuse any person from the performance of any duty imposed by this act."

Irrespective of the above provisions, we hold that the Act became effective 90 days after its approval by the Governor on April 7, 1933. As heretofore quoted, the compensation for preparing the statement shall not exceed the price per 100 words and figures permitted to the clerk of the county court for the writing of the record. It will therefore be necessary to determine what the Legislature intended that statement to mean.

Section 11781, R.S. Mo. 1929 is the guide for the county clerk in the matter of his fees. Among others, we find the following:

> "For copying the petitions, orders, plats and surveys of roads and all other records pertaining thereto, for every hundred words and figures, to be paid by the petitioners.....10¢
>
> For copies of records and papers not hereinbefore provided for, for every hundred words.....10¢
>
> For recording every paper not hereinbefore provided for, for every hundred words.....10¢"

The statute makes no specific provision for compensating the county clerk "for the writing of the record"; hence, we are confronted with the question of what the Legislature's intent was for the compensation of the county clerk. We quote the above provision of Section 11781 for the reason that the provisions appear to be similar in compensating the county clerk for his duties in preparing the financial statement of the county.

CONCLUSION

As stated above, there is no statutory fee allowed the county clerk for the writing of the record, but in view of the provisions hereinabove quoted relating to the fees of the county clerk, it is the opinion of this department that Sections 12165 and 12166, Laws of Mo. 1933 became effective 90 days after the date of their approval by the Governor, and that the compensation of the county clerk since that time, if he has been designated and appointed to prepare a financial statement of the county is

not to exceed 10¢ per hundred words and figures. This, we believe, to have been the intention of the Legislature in fixing the fees of the county clerk, and we accordingly so hold.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

Under section 10481 R. S. Mo. 1929, the amounts as set forth may be expended by all candidates in the primary and a successful candidate may then expend the same amount in the general election.

FILED
37

March 1, 1935

Honorable Roy Hamlin
House of Representatives
Jefferson City, Missouri

Dear Sir:

This Department acknowledges your request for an opinion on the construction of Section 10481 R. S. Mo. 1929. The precise question involved being as to whether or not the amount to be expended by candidates, and the determination of that applies to a candidate's expenses in the primary or general election, or both.

Section 10481, R. S. Mo. 1929, is as follows:

"No candidate for congress or for any public office in this state, or in any county, district or municipality thereof, which office is to be filled by popular election, shall by himself or by or through any agent or agents, committee or organization, or any person or persons whatsoever, in the aggregate pay out or expend, or promise or agree or offer to pay, contribute or expend any money or other valuable thing in order to secure or aid in securing his nomination or election, or the nomination or election of any other person or persons, or both such nomination and election, to any office to be voted for at the same election, or in aid of any party or measure, in excess of a sum to be determined upon the following basis, namely: For five thousand voters or less, two hundred dollars; for each one hundred voters over five thousand and under twenty-five thousand,

> four dollars; for each one hundred voters over twenty-five thousand and under fifty thousand, two dollars; and for each one hundred voters over fifty thousand, one dollar - the number of voters to be ascertained by the total number of votes cast for all the candidates for president in the state, or in any county, district or municipality thereof at the last preceding regular election held to fill the same; and any payment, contribution or expenditure, or promise, agreement, or offer to pay, contribute or expend any money or valuable thing in excess of said sum, for such objects or purposes, is hereby declared unlawful."

We are confronted with the question of the intention of the legislature and the meaning of the phrases, "or aid in securing his nomination or election, or the nomination or election of any other person or persons, or both such nomination and election, to any office to be voted for at the same election." Are the conjunctions "and" and "or" interchangeable, or mean the same thing, or is the conjunction "or" to be used in the conjunctive or disjunctive. Volume 5, Words and Phrases, at page 654 offers enlightening decisions, as follows:

> "The words 'and' and 'or' are frequently used interchangeably. State v. Harwi, 230 P. 331, 332, 117 Kan. 74.
>
> Word 'or' in contract may be read as 'and,' and vice versa, as necessity of harmonizing provisions may require, and in order to effectuate intention of parties. Weisman v. Continental Life Ins. Co., 267 S. W. 21, 23, 216 Mo. App. 13.
>
> Words 'or' and 'and' in statutes may be used interchangeably,where

> it is necessary to effectuate legislative intent. People v. Trustees of Northwestern College,152 N.E. 555,557,322 Ill. 120.
>
> In construing a statute 'and' may be interpreted to mean 'or', and vice versa, where, by so doing, effect in harmony with legislative intent may be given the statute. Conway's Estate v. State, 120 N. E. 717, 721, 72 Ind. App. 303.
>
> The words 'or' and 'and' in statutes are often used incorrectly, and where a strict reading renders the sense dubious, one may be read in place of the other, in deference to the meaning of the context, in view of St. 1919,sec.1770b -10. State v. Circuit Court of Dodge County, 186 N. W. 732,734, 176 Wis. 198.
>
> While 'or' is properly disjunctive, and 'and' conjunctive, they are so frequently used interchangeably that, in construing a statute, 'or' may be read as 'and' if to give it its usual meaning would lead to a manifest absurdity. State v. Steiner,151 N. W. 256, 267, 160 Wis. 175."

From a complete reading of the statute above, it is evident that it was the intention of the legislature to limit the amount of money or other valuable thing the candidate could expend in seeking the nomination for any office. The terms of the statute must be construed, if possible, so that the meaning gleaned therefrom shall not appear absurd. The two main elections under our election laws of Missouri are, that of primary, wherein party nominees are selected, and general, wherein the nominee of some party is finally elected to the office. We think the amounts set forth in the statute, as a legal expenditure for candidates, apply to each of the elections, namely, primary (nomination)

and general; that is to say, that a candidate, in his zeal and effort to obtain the nomination for office, may expend the amounts set forth in the statute as legitimate expenses, and if he is successful in obtaining the nomination he may again expend the sums set forth in his attempt to be successful at the general election. To conclude that the sums set forth in the statute could only be used for both elections, would place the candidates in the absurd position of expending one-half of the amounts set forth in the primary (nomination) election and the other half in the general election, and if defeated in the primary would have been precluded from expending the sums he would have been entitled to spend in order to do his campaign full justice.

We believe that the legislature intended that the sums set forth in the statute are at his command, provided he has them, for the purpose of getting a true estimate of his political strength in the primary, and if such estimate becomes a reality and he is so fortunate as to obtain more votes than his opponents, then he is at liberty to again expend the same amount in seeking his final election to the office at the general election. To place any other construction on the statute would be an absurdity and make the statute meaningless.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

OWN:LC



PUBLIC OFFICERS: Office of Probate Judge and member of Board of Education not incompatible or in conflict and same party may hold both offices.

1-21

FILED
38

January 15, 1935.

Hon. T. H. Harvey,
Judge of Probate Court,
Marshall, Missouri.

Dear Sir:

This department is in receipt of your letter of January 7 wherein you make the following inquiry:

> "I was elected Judge of our Probate Court in the last election and I have been a member of our Board of Education for a number of years. I am writing you asking your opinion as to whether or not the office of Probate Judge and of School Director are incompatible, that is, whether or not there is any constitutional inhibition for holding the two positions."

It is a conceded fact that a Probate Judge is a public officer within the meaning of the law. It has likewise been held, in the case of State v. Whittle, 63 S.W. (2d), l.c. 102, that a member of a school board is a public officer. In that case the Court said:

> "****Respondent next contends that a school director is not a public officer within the meaning of said section of the Constitution. We have ruled the question as follows: 'A public office is defined to be "the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions

> of the government, to be exercised by him for the benefit of the public." Mechem, Pub. Off. 1. The individual who is invested with the authority, and is required to perform the duties, is a public officer.
>
> The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer.' State ex rel. v. Bus, 135 Mo. 325, loc. cit. 331, 332, 36 S.W. 636, 637, 33 L.R.A. 616. To the same effect, State ex rel. Zevely v. Hackmann, 300 Mo. 59, loc. cit. 66, 67, 254 S.W. 53; Hasting v. Jasper County, 314 Mo. 144, loc. cit. 149, 150, 282 S.W. 700.
>
> Thus it also appears that a school director is a public officer within the meaning of said section of the Constitution."

The holding of two offices, such as Probate Judge and School Director, is not expressly forbidden in counties and cities under 200,000 population by the Constitution of the State of Missouri.

We think your precise question is well answered in the case of State ex rel. v. Bus, 135 Mo., l.c. 338-339, wherein the Court said;

> "The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and

> consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.
>
> It was said by Judge Folger in People ex rel. v. Green, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."

You will note from the above decision that a question arose as to a deputy sheriff also holding the office of school director in the City of St. Louis. We believe there is no more inconsistency and incompatibility in the above case than there would be in your case, i.e., holding the office of Probate Judge and being a member of the Board of Education.

CONCLUSION

The office of School Director, or member of the Board of Education, is one without remuneration or emolument. It is a

gratuitous service rendered usually by the outstanding citizens of a community or city. The duties in no wise conflict or are inconsistent or incompatible with the duties of the office of Probate Judge, and it is the opinion of this department that you may hold both offices.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

SCHOOL BOARDS: May not employ counsel by the year.

January 24, 1935.

FILED
38

Hon. James J. Harutun
Member of Legislature
Jefferson City, Missouri

Dear Mr. Harutun:

This is to acknowledge your request for an opinion as to whether or not a school board has the power to employ an attorney by the year.

Corpus Juris, Vol. 56, Paragraph 504, pages 479-480, has the following to say relative to the capacity and power of school boards to contract:

> "School districts or other local school organizations have the power of entering into such contracts, and such only, as are expressly or impliedly authorized by statute. The authority of school boards or officers to bind the district by contracts relative to school matters is also controlled by statute, and is such only as is conferred, either expressly or by necessary implication, by statute; and generally a school district or other local school organization cannot be held liable on contracts of its board or officers which such board or officers had no legal authority to make, subject to an exception as to bona fide holders of negotiable instruments. A de facto school officer may bind the school organization by a contract otherwise within his power."

We find no Missouri statute that authorizes the school boards to employ an attorney by the year. School

boards, however, have a great many powers and duties conferred upon them by law, namely, they have a right to hire teachers, employ janitors, purchase supplies, rent buildings for school purposes, make rules and regulations for the use of the buildings and for the governing of the school, suspend pupils and do all things necessary to carry out the purposes of the school laws. Thus, if an attorney was employed by the year under certain circumstances it might be that such employment would be within their implied powers. However, we refrain from ruling that it is a matter of right for the school board to employ counsel by the year, absent facts.

Section 2962, R. S. Mo. 1929, reads as follows:

> "No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

If a school board is confronted with the necessity of defending or bringing an action at law, then, in order to do such we believe it would be within the scope of its powers to employ counsel, and while we do not find any case in Missouri squarely on that point, yet there are a number of cases which in effect so hold. However, we desire you to bear in mind that the majority of these cases were decided prior to the enacting of the above statute.

In Henry C. Page v. The Township Board of Education, 59 Mo. 264, the court said:

> "This was a suit to recover an attorney's fee of fifty dollars. There was no dispute that the services were rendered, and that the fee was a reasonable one; but the court gave judgment for the defendant on the grounds that there was no written contract made with said school board, and no order entered on the minutes of the board at a regular or stated meeting of said board. The proof was that the attorney was employed verbally.
>
> The judgment will be reversed and the case remanded, with directions that a judgment for the $50 be entered for the plaintiff;"

In Thompson v. School District, 71 Mo. 495, l. c. 499, the court said:

> "Managing officers of other corporations may engage the services of attorneys without express delegation of power or formal resolutions to that effect. Western Bank v. Gilstrap, 45 Mo. 419; Turner v. C. & D. M. C. R. R., 51 Mo. 501; Southgate v. A. & P. R. R. R., 61 Mo. 89. and no good reason is perceived why the same rule should not obtain in instances like the present one. Exigencies may arise, even in the concerns of a school board, which would compel the immediate employment of an attorney, when delay might prove greatly detrimental to

> the interests of the board. We, therefore, hold the reason of the rule above noted, applies as well here as in other instances. Of course, if we concede the power, without formal resolution, to employ an attorney, the usual results of such employment will follow as a necessary consequence."

However, in the case of Terry v. Board of Education of City of St. Louis, 84 Mo. App. 21, the St. Louis Court of Appeals, l. c. 25, said the following:

> "The legislature had full power to prescribe this mode of authenticating the contracts of school districts, and also to condition the enforcibility of such contracts upon compliance with these requirements. It has done so. Hence the contract of plaintiff not being in accordance with the statute, imposed no obligation upon the former school board, nor upon the defendant as its successor, in duty, as well as in right. * * * * * There is no way of evading the application of this statute to the school board under either charter without denying it the distinctive character as a school district which is possessed under both incorporations."

And further,

> "The case of Page v. Township Board of Education, 59 Mo. 264 (cited by appellant) evidently arose prior to the enactment of the above statute, or was inadvertently decided, for the Act of 1874, in express terms, applies to 'school townships,' and requires their contracts to be evidenced according to its provisions. The decision in that case was rendered in 1875. It

> is reasonably certain, therefore, that the services sued for accrued under a contract made before the Act of 1874, elsewise the case would not have reached the supreme court when it did. The learned counsel for appellant cites Thompson v. School Dist., 71 Mo. 495. That case has no bearing whatever upon the application of the statute of 1874, for it distinctly appears from the statement in the opinion that the causes of action therein sued for arose in the years 1867, 1868 and 1869. At that time there was no statutory restriction upon the power of such corporations to contract orally, and the remarks of the learned judge in that case have therefore no bearing whatever on the point under review."

It may be reasonably inferred, then, from the above cases that a school board would have the right to employ counsel in emergency cases just so long as the mode, manner and method of employment comply with Section 2962, supra.

A late case on the subject of contracts made by a school board, which lays down a rule of law to be considered and borne in mind, is the case of Miller v. Alsbaugh et al., 2 S. W. (2d) 208, wherein the Springfield Court of Appeals, l. c. 212, said the following:

> "No recovery can be had against a school district upon quantum meruit nor upon an implied contract. The fact that the school district got the benefit of the work and continues to use the well does not give any right of action against the district (Cases cited)."

From the foregoing it is our opinion that as a general rule a school board does not have the power to employ

an attorney by the year to represent it. However, this rule might have exceptions upon proper showing as to the facts surrounding the employment. In other words, the board at each meeting could have emergencies arise that would necessitate the use of an attorney and the employment then would be a series of single transactions and not a yearly contract. Therefore, in order to give the board power to employ counsel by the year, we are of the opinion that the law should provide for it.

Respectfully yours,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

BAIL BOND - Sheriff to take and approve when amount is fixed by Justice; otherwise, a court of record fixes amount and approves bond.

March 15, 1935

FILED
38

Honorable Will H. Hargus
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

We have your request of February 18, 1935 for an opinion as follows:

> "Will you please give me the office's opinion as to whether or not under Section 3495, Revised Statutes of Missouri, 1929, the Circuit Judge has the same power to take and approve the defendant's bond that the sheriff has under Section 3576, Revised Statutes of Missouri, 1929? That is, under Section 3495 if the defendant is committed to jail by a Justice of the Peace for failure to make bond and the transcript is then filed in Circuit Court can the defendant before the return term of the Circuit Court go directly to the Circuit Judge to make bond or must he first go to the sheriff under Section 3576?"

Where defendant is given a preliminary hearing and is bound over by the Justice, it is the duty of said Justice to fix the bond. This duty is plainly set out in Section 3488, which reads as follows:

> "Whenever any person shall be committed to jail for a bailable offense, it shall

> be the duty of the magistrate to indorse on the warrant of commitment the sum in which bail was required."

If the defendant is unable to give bond, it is the duty of the Justice to issue a commitment, committing the defendant to jail pending the giving of a bond, and when the defendant is able to procure bond, the sheriff may take and approve it under Section 3576, R. S. Mo. 1929. This section reads in part as follows:

> "When any sheriff * shall have a person in custody under a warrant of commitment on account of failing to find bail, and the amount of bail required is specified on the warrant, * such officer may take bail, which in no case shall be less than one hundred dollars, and discharge the person so held from actual custody."

This statute has heretofore been construed in State v. Grant, (1913) 252 Mo. 602, l.c. 607, wherein it was held that the fixing of the amount of bond by a Justice of the Peace in his justice docket, was sufficient fixing of the amount of bond, even though the amount was not actually endorsed or written upon the warrant.

If the Justice, in binding a prisoner over, fails to fix the amount of bond, then the sheriff is without authority to take and approve a bond, and the taking of any such bond by the sheriff would be void. State v. Crosswhite (1905) 195 Mo. 1. A bond of a prisoner, when the amount is not determined by a Justice of the Peace after a preliminary hearing, must be fixed by a court of record. After a Justice of the Peace, having in charge the examination of a person under arrest, issues a warrant of commitment and delivers the same to the sheriff, the prisoner can be discharged from custody on bail or otherwise only by a court authorized to issue writs of habeas corpus. State v. Randolph, 24 Mo. 213. However,

it is not necessary for an actual writ of habeas corpus to issue as a condition precedent to a court admitting a prisoner to bail when confined under a commitment from the Justice Court for failure to give bond. State v. McElhaney, 20 Mo. App. 584.

Section 3495, R. S. Mo. 1929 in part provides:

> "Whenever any person * shall be committed to jail on a warrant of commitment by any magistrate for a bailable offense, the recognizance * may be taken by the court or judge of the court having criminal jurisdiction, and in case of the absence of the judge of such court * from the county, such recognizance may be taken by * any judge of a court of record."

Thus, under both the court decisions and the statute, a circuit judge would have authority to fix bond and approve bond when offered by a person in jail under a commitment from a Justice of the Peace court.

It is, therefore, the opinion of this office that where the amount of bail is fixed by the committing magistrate, the bond should be tendered to and approved by the sheriff. It was the intention of the lawmakers, when such was done by the committing magistrate, to relieve the circuit judges of the duty and responsibility of fixing and approving bonds in such cases, except upon an application to the circuit judge under the habeas corpus act, guaranteed by the Constitution. Article II, Section 26, Missouri Constitution.

It is the opinion of this office that when the committing magistrate fails to perform the duties imposed upon him by failing or omitting to fix the amount of bond, the defendant or prisoner may apply directly to the circuit judge to fix the amount of his bond and to pass upon the sufficiency of any bond tendered. In the event the cir-

cuit judge is not in the county at the time such prisoner desires to make bond, where the same has not been fixed by the committing magistrate, the amount of the bond and the security therefor may be taken and approved by any judge of a court of record in the county.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

TAXATION AND REVENUE: House Bill 124, page 166, Laws of Missouri, 1933-34, Extra Session, does not remit Court costs accrued on taxes and suit.

April 4, 1935.

FILED
38

Hon. Geo. Harrington
Collector of Revenue
Jackson County
Court House
Kansas City, Missouri

Dear Mr. Harrington:

Your predecessor in office the Honorable John W. Ransom, requested an opinion of this office on the following matter:

> "I am writing you in regard to the collection of delinquent real estate taxes.
>
> We have a different situation in Jackson County in regard to delinquent real estate taxes than the rest of the state. Suit has been filed here on all delinquent taxes on real estate up to and including the year 1931.
>
> Since House Bill #124 has been in effect our attorneys have made no effort to enforce collection on these suits on account of receiving no fees. The result has been that we are making very light collections on these taxes.
>
> In view of Senate Bill #80 remitting interest, penalties and costs, and House Bill #124 remitting only interest and penalties, leaving out the word "costs", can you give me an opinion from your office which would allow me to proceed under the suits now filed to collect these taxes for the year 1931 and prior years and charge the taxpayer with attorneys' fees, to be assessed as costs."

As this matter is one of considerable interest we will presume that you will be desirous of having the opinion.

The 57th General Assembly passed several laws abating penalties on taxes, the first of these laws was known as Senate Bill 80 and is found at page 423 Laws of Missouri 1933. Under the provisions of this act

> "the collectors of revenue of the counties and cities of this state are hereby empowered and directed to accept the original amount of said taxes as charged against any such person or real estate relieved of the penalties, interest and costs accrued upon the same;" * * *

The phrase "penalties, interest and costs" is used no less than five times in this short act. In passing upon this particular act the Supreme Court In Banc in the case of State ex rel. Crutcher vs. Koeln, 61 S. W. (750), stated, l. c. 753:

> "It is said in 15 Corpus Juris at page 19, right column: 'In their origin costs were known as a punishment of the defeated person* * *rather than as a recompense to the successful party.* * *The latter theory obtains* * *in the legislation in regard to it.' In Volume 7 of Ruling Case Law, page 780, it is stated that 'the terms 'fees' and 'costs' are sometimes used interchangeably as having the same application.' 'Strictly speaking the two terms are not synonymous. The term 'costs' includes fees and reimbursements consisting of fixed and unalterable amounts previously specified by laws, regulations or tariffs,' etc. 15 C.J. p. 21, top 1 col. It follows that as used in the chapter on taxation in the Revised Statutes the expressions 'commissions,' 'interest,' 'fees,' and 'costs' are included in the generic term 'penalty.' "

In this decision the Court specifically held that the term "penalty" covered interest, attorneys fees, commissions, clerks fees and all charges in addition to the amount of the tax. The 57th General Assembly in Extra Session, adopted Committee Substitute for Senate Bill No. 40, page 152, Laws of Missouri Extra Session, 1933-34, which was virtually a reenactment of Senate Bill 80 of the Regular Session but provided additional time within which the taxpayer could take advantage of the privileges extended. The same session of the Legislature enacted House Bill 124 found at page 166, Laws of Missouri Extra Session, 1933-34. This section reads as follows:

> "That all penalties and interest on personal and Real Estate Taxes, delinquent for the year 1932 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

It is to be noted that the Legislature in passing this act did not use the term "penalties, interest and costs" which it had used so fluently in Senate Bill 80 and Committee Substitute for Senate Bill 40. Instead, the act is confined to the phrase "penalties and interest". The Legislature is of course presumed to have known the conditions of the law at the time it passed this enactment and is presumed to know of the construction placed by the Court upon the terms used. Therefore, if it meant to use the term "penalties" in its all inclusive sense, it would not have used the word "interest" in connection therewith, for under the recent decision heretofore cited the term "penalty" by and in itself would have included and covered "interest". We therefore must conclude that the term "penalties" as used in House Bill 124 is not used in its board and all inclusive term but in a special sense. The term "interest" of course speaks for itself and plainly indicates the charge of ten per cent per annum due upon all delinquent taxes. Such laws were enacted by the same Legislature at the same Session. It is generally recognized that a variation in the terms of a revenue law indicates an intent to vary the application of that law. As stated in 69 C. J. Section 570, page 1135:

> "Words must be given their commonly accepted meaning and variations in the phraseology of different statutes must be assumed to be intentional. * * *"

The Supreme Court of Errors of Connecticut in the case of Blodgett vs. Union & New Haven Trust Company, 116 Atl. 908, had before it a tax act which as originally enacted contained the phrase "in possession or enjoyment." Later that phrase was dropped from the statute and subsequnnt thereto was replaced by an amendment. The Court in passing upon this stated, l. c. 910:

> "* * *our first collateral inheritance tax act of 1889 (Act 1889, c. 180) recognized the difference by imposing a tax on gifts 'intended to take effect in possession or enjoyment after the death of the grantor.' In 1897 (Acts 1897, c. 201, Sec. 11) the four words 'in possession or enjoyment' were dropped out of the statute and the tax limited to gifts 'to take effect upon the death of the grantor or donor'; and it was not until 1915 that the scope of the act was again enlarged by reinserting the word 'In possession or enjoyment.' Since the taxing power of the General Assembly, within its constitutional limitations, is plenary, we must assume that these variations in phraseology were intentional and adapted to the changing financial necessities of the state."

We know as a matter of contemporaneous history that one of the principal subjects of legislation considered by the 57th General Assembly was that of tax relief and the acceleration of the collection of the revenue of the state and governmental subdivisions. We must presume that the Legislature knew the status of the law prior to the enactment of House Bill 124, and knew that judicial construction had been placed upon the terms therein used. We can only conclude that the Legislature chose with care the terms used in this Act and that by the change of phraseology in these two tax laws it was intended that House Bill 124 would operate differently in that "costs" were not to be remitted. It should also be noted that House Bill 124 is an act of a permanent nature, and it is not an emergency measure as were Senate Bill 80 and Committee Substitute for Senate Bill 40.

The rule that "the expression of one thing is the exclusion of another" is applicable here. In the drafting of House Bill 124, "penalties and interest" are specifically mentioned but "costs" were omitted.

In the case of State ex inf. Conkling vs. Sweaney, 270 Mo. 685, the Court had before it the construction of Section 10881 R. S. Mo. 1929, which provided in part:

> "All the provisions of Section 10837 relating to the changes of boundary lines of common school districts* * * shall apply to town, city and consolidated districts."

The Court, in holding that the other provision of Section 10837 relating to dividing one district into two districts was not applicable, stated l1 c. 691:

> "But instead of the Legislature saying that all the provisions of section 10837 should apply to town districts, it merely said that 'all the provisions of section 10837 relating to the changes of boundary lines of common school districts' should apply. Referring then to Section 10837 we find that the only express provision therein for changing boundary lines is the provision for changing 'the boundary lines of two or more districts.' Other express provisionsis made for dividing one district into two new districts. It, we think, becomes at once apparent, that the provision for changing the boundary lines of two or more districts could not, by any process of construction, be held to provide a way for dividing one district into two new districts. Section 10881, in its present form, was enacted in 1909 (Laws 1909, p. 819, sec. 130). Prior to that time it had been expressly held by this court that the law providing for division of common school districts did not apply to village school districts. (State ex rel. v. Fry, 186 Mo. 198.) Such being the case the Legislature, when it enacted Section 10881, knew that the provisions of Section 10837, relating to the division of one common school district

> into two new districts, would not apply to town or consolidated districts unless it so provided in the act, and knowing this to be true and failing to so provide it would be but to do violence to the plain language used to hold that it expressed an intention to apply provisions other than those expressly mentioned. To so hold would be to violate the well known canon of statutory construction, viz: That the expression of one thing is the exclusion of another."

So in the instant case the specific mention of penalties and interest with a concurrent failure to specify costs indicates an intention not to remit such costs.

"Costs" as used in these sections evidently mean Court costs such as attorneys fees, sheriffs costs and circuit clerks costs, and other charges incident to a judicial proceeding. "Costs" in its usual and ordinary sense are to be so applied. 15 C. J. page 19, Section 1:

> "Costs are certain allowances authorized by statute to reimburse the successful party for expenses incurred in prosecuting or defending an action or special proceeding. They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights <u>in court.</u>"

Before concluding we desire to point out one additional feature of this problem. Senate Bill 94, Laws of Missouri, 1933, page 425, establishes a new mode for procedure of collection of delinquent real estate taxes in this state. A portion of Section 9862b thereof provides:

> "* * *as to suits for delinquent taxes instituted, ut not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such

> suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

Without a doubt House Bill 124 is in pari materia with this section andboth sections should be construed and read together. By Section 9962b an evident intent is distinguishable to save the valid costs and commissions which have accrued or which may be justly due on taxes upon which suit has been instituted prior to the enactmentof Senate Bill 94. This provision definitely indicates an intention on the part of the Legislature to save the costs for those to whom they may be entitled. It appears that by the wording of House Bill 124, we find evidence of the continuation of this intent. That these sections should be construed together so that one consistent policy is established is an elementary rule of construction.

CONCLUSION.

It is therefore the opinion of this office that suits instituted prior to the effective date of Senate Bill 94, Laws of Missouri 1933, page 425, may be prosecuted to final judgment and taxes collected by execution if necessary, and that the necessary court costs incident to such procedure, including statutory attorney fees, may be collected from the taxpayer.

Respectfully submitted,

HARRY G. WALTHER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

COUNTY COURTS - Acting as road overseers in certain counties.

May 6, 1935.

5-7

FILED
38

Honorable C. M. Hardin
Judge of County Court
Jefferson County
DeSoto, Missouri

Dear Sir:

We have your request for an opinion which is as follows:

"On January 17, 1934, your department issued an opinion for me on Section 7892, relating to Judges of the County Court constituting a Board of Road Overseers. I appreciate it and thank you for the opinion that you gave me.

"At the beginning of our 1931 term, Jefferson County was qualified to come within the terms of Section 7892, as to population, road mileage and taxable wealth. However, the county assessment for 1933 and 1934 was about twenty-four million dollars, yet property is only assessed at about seventy-five percent of its value.

"There is some question to the fact that we didn't organize ourselves into a Board of Road Overseers, whether or not we should draw that salary, yet the Road and Bridge work has been handled in the same efficient way as it would, or could have been, had we been organized as a Board.

#3 - Honorable C. M. Hardin

From this letter it does not appear what the total road mileage was in your county for 1933, 1934, but we assume from your letter that your county, which had the required road mileage for 1931 and 1932, continued to possess the same road mileage for the years 1933, 1934.

However, from your letter it appears that Jefferson County during 1933, 1934 did not possess an assessed valuation of $25,000,000.

While your county, during the year 1933, 1934 may have possessed requirements numbered (1), (2) and (4), as above set out, it does not possess the requirement set out in (3) above.

It is, therefore, the opinion of this office that the county judges of Jefferson County during the years 1933, 1934, did not under the law constitute a Board of Road Overseers, and therefore were not entitled to receive the salary of $1200.00 per year provided in Section 7892, R. S. Mo. 1929.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

TAXATION: Senate Bill 143 of the 58th General Assembly does not remit Court costs accrued on tax in suit.

5-22

May 20, 1935.

FILED
38

Hon. George Harrington
Collector of Revenue
Jackson County
Court House
Kansas City, Missouri

Dear Mr. Harrington:

This will acknowledge receipt of your recent request for an opinion of this office on the following matter:

> "On April 4, 1935, I received an opinion from your office pertaining to House Bill No. 124, in regard to penalties and interest on delinquent taxes which was submitted by Mr. Harry G. Waltner, Jr., Assistant Attorney General, and approved by you.
>
> On April 30, 1935, I received a communication from Mr. Forrest Smith, State Auditor, in relation to Senate Bill No. 143, regarding penalties and interest for the year 1934 and prior years.
>
> If you will kindly notify me as quickly as possible if your Opinion regarding House Bill No. 124 applies to Senate Bill No. 143, I will appreciate it very much."

In the opinion dated April 4, 1935, this office held that House Bill 124, page 166, Laws of Missouri 1933-34, Extra Session, did not remit the court costs which had accrued on taxes upon which suit had been instituted prior to the effective date of Senate Bill 94, page 425, Laws of Missouri 1933, to-wit, July 24, 1933. The conclusion of this opinion reads as follows:

> "It is therefore the opinion of this office that suits instituted prior to the effective date of Senate Bill 94, Laws of Missouri, 1933, page 425, may be prosecuted to final judgment and taxes collected by execution if necessary, and that the necessary court costs incident to such procedure including statutory attorneys fees, may be collected from the taxpayer."

That opinion was written construing House Bill 124, adopted by the 57th General Assembly in Extra Session, and reading as follows:

> "That all penalties and interest on personal and real estate taxes delinquent from the year 1932 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

On the 29th day of April, 1935, Governor Park approved Senate Bill 143, passed by the 58th General Assembly, which bill reads as follows:

> "Section 1. That all penalties and interest on personal and real estate taxes, delinquent for the year 1934 and prior years shall be computed after December 31st, 1934 on the same penalty and interest basis as the taxes delinquent for the year 1934 until paid.

> Section 2. As the expeditious collections of such taxes is necessary for the maintenance of the State Institutions and for the support of the Public Schools, an emergency exists within the meaning of Section 57, Article 4 of the Constitution of this State, and this act shall be in force and take effect immediately after its passage by the 58th General Assembly and approval by the Governor."

It is to be noted that this act carried no repealing clause and that therefore House Bill 124 of the 57th General Assembly in Extra Session, is not by express terms repealed. However, it is clear from a reading of these two acts that under one the penalties and interest are to be calculated upon one basis, and under the other act the penalties and interests are to be calculated upon a different basis. Although repeals by implication are not favored, State ex rel. McDowell vs. Smith, 67 S. W. (2d) 50, yet, when there is a total repugnancy between the two statutes it will be held that the later statute repealed by implication the earlier statute.

In the case of State ex rel. Wells vs. Walker, 34 S. W. (2d) 124, 129, it is stated:

> "However, repeals by implication occur when there is a total repugnancy between the later and the earlier statutes. Section 1136 was reenacted in 1927 (Acts of 1927, page 131). In order to leave no doubt of the legislative intention at the same session the other act of 1927 (page 129, 130), more comprehensive and more specific, was passed. These two acts, at the same session, without exception or qualification, showed conclusively what was in the legislative minds. The total repugnancy should be conclusive to repeal the objectionable sentences respecting 12426."

So with the enactment of Senate Bill 143, by the 58th General Assembly it is clear what was in the legislative mind in respect to House Bill 124 of the 57th General Assembly in Extra Session. It must be construed to have been repealed by the later enactment.

It is to be noted that the only changes made in House Bill 124 of the 58th General Assembly, Extra Session, and Senate Bill 143 of the 58th General Assembly is the change in the years 1932 and 1933 to 1934. As this had no effect other than including 1933 taxes within the penalty remission features of the law, there is no basis for changing the rule laid down to you in our opinion of April 4, 1935.

CONCLUSION.

It is therefore the opinion of this office that our opinion to you of April 5, 1935, regarding House Bill 124 of the 57th General Assembly in Extra Session, applies with equal force to Senate Bill 143 passed by the 58th General Assembly, and that therefore, court costs that accrued upon suits filed for delinquent real estate taxes before the operative date of Senate Bill 94, page 425, Laws of Missouri 1933, are not remitted or affected by said Senate Bill 143.

Respectfully submitted,

H. G. Waltner Jr.

HARRY G. WALTNER, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

OLD AGE PENSIONS: County Old Age Assistance Board may not employ clerks, investigators or deputies and pay them out of State funds.

June 27, 1935.

FILED
38

Hon. Charles M. Hay
City Counselor
The City of St. Louis
St. Louis, Missouri

Dear Mr. Hay:

This is to acknowledge your letter as follows:

"I have had referred to me by the Board of Estimate and Apportionment, a question relative to the power of the County Old Age Assistance Board, which the Board of Estimate, acting in the capacity of a County Court, has the power to appoint under Senate Bill No. 7, to engage assistants to make investigations necessary in the performance of their duties.

"I find nothing in the law, giving express authority to such a local board to employ investigators or other help, except in the case of formal hearings on applications for the pension.

"I do find, however, that in Section 3 there is this provision:

> 'The members of the County Board shall serve without compensation, except that the necessary expenses incurred while in the performance of their duties shall be paid to them.'

"In Section 7 it is made 'the duty of the County Board to appraise such property at its true value,' referring to property belonging to an applicant.

"In Section 10 it is provided that whenever an application is made for old age assistance, the County Board shall 'promptly made an investigation of the facts.'

"These provisions, as you will readily see, impose a very considerable burden upon the County Old Age Assistance Board, which is to serve without compensation. It seems to me that unless the language 'except that the necessary expenses incurred while in the performance of their duties shall be paid to them' be construed to authorize them to hire the necessary help in making such investigations, that the result will be well-nigh farcical. In my view of it, this language can, without doing violence to it, be construed to authorize the County Board to set up such an organization as is necessary properly to discharge the duties imposed upon this Board.

"Assuming that I am correct in this, then the next question presented is as to the source of the expense money. Is this to come from the Eleemosynary Board, or must local jurisdictions provide it?

"I assume that these questions have been presented to you already from other sources. I would be pleased to have your opinion before I give an opinion to the Board of Estimate."

Senate Bill No. 7 passed by the 58th General Assembly without an emergency clause, becomes effective on August 27, 1935. The Act contains 30 sections.

Section 1 defines certain terms used in the Act. Section 26 provides that in the City of St. Louis the Board of Estimate and Apportionment shall perform the same duties as the Act places upon the several county courts of the State

of Missouri. In other words, where the duty is placed upon the county courts of this state, such are deemed to be applicable to the Board of Estimate and Apportionment in the City of St. Louis.

Section 3 provides in part as follows:

> "In every county there shall be established a County Old Age Assistance Board, to consist of three persons domiciled in the county, each of whom shall have been a resident taxpaying citizen of the county for a period of five years prior to his or her appointment at least one of whom shall be a woman, who shall be appointed by the county court for a term of four years, * * * * *."

It is thus seen that in the City of St. Louis the Board of Estimate and Apportionment shall appoint a County Old Age Assistance Board. The members of the County Old Age Assistance Board are to serve without compensation, except that the necessary expenses incurred while in the performance of their duties shall be paid to them. Section 3.

The County Old Age Assistance Board have several duties to perform, namely: (1) Make an investigation into the facts when an application is presented to them for old age assistance. Section 10. (2) Make a recommendation of the amount of assistance to be allowed. Section 10. (3) The disapproval of the application. Section 10. (4) Direct a rehearing. Section 10. (5) Forward its decision to the State Old Age Assistance Commissioner. Section 10. (6) "For the purpose of ascertaining the true value of property of persons applying for a pension under this act, it shall be the duty of the County Board (County Old Age Assistance Board) to appraise such property at its true value." Section 7. (7) Issue to each applicant a certificate for one year stating the amount of each installment which shall be paid monthly. Sections 12 and 13. (8) Requiring of them to ascertain the qualification of all persons resident in their county, applying for benefits under the old age pension law.

It may safely be said that the members of the County Old Age Assistance Board are public officers and are to serve without compensation. Section 3.

Section 11 provides in part as follows:

> "For the purpose of any such investigation * * *, the county board (County Old Age Assistance Board) * * * shall have the power to compel, by subpoena, the attendance and testimony of witnesses and the production of books and papers. The costs of such hearing to be paid by the State Board out of funds appropriated to such Board. * * *."

Nowhere in the Act is it provided that the County Old Age Assistance Board may hire investigators or clerks to perform duties for them. Neither is it provided in the Act as to where "the necessary expenses incurred while in the performance of their (County Board) duties shall be paid" from, or by whom, except that it might be said that Section 11 provides for the payment of the costs of hearings to be paid by the State Board out of funds appropriated to such Board by the Legislature.

If it may by inference be said that the power to hire clerks or assistants to aid the County Old Age Assistance Board in the performance of its duties, is delegated to the Board, then, the Act must further be scrutinized and a statute pointed to in order to allow compensation to such clerks. We do not find any provision in the Act to which the clerks could point, if employed, which would allow them compensation. Hence, it follows that if such are employed no compensation could be paid to them out of state funds, except when the services could be taxed as costs by virtue of Section 11. What we are saying is that no clerk or assistant could be paid for services rendered on a monthly, weekly or yearly basis. Further, if the Board has a right to appoint clerks and assistants, then there is no limitation as to number or the compensation to be paid them. We clearly believe that the Legislature did not intend for the County Old Age Assistance Board to have the power to appoint and fix the compensation of clerks or assistants. And, if the Legislature intended them to have this power, it would and could have done so specifically and not have left it to inference.

In King v. Riverland Levee District., 279 S. W. 195, l. c. 196, the St. Louis Court of Appeals said the following:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creating of the law and then is incidental to the office. State ex rel. Evans v. Gordon, 245 Mo. 12, Loc. cit. 27, 149 S. W. 638; Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504. Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. State ex rel. Evans v. Gordon, supra."

It is our opinion that Senate Bill No. 7 does not authorize the County Old Age Assistance Board to employ clerks or assistants, as regular employes, to aid or assist in the discharge of duties imposed upon them by law.

It is our further opinion that the reimbursing of members of the "County Board" for personal expenses shall be paid by the "State Board" by virtue of Sections 11 and 28, and House Bill No. 541 (Appropriation Act).

We invite your attention to Section 2, in particular this part, namely, "The State Board shall administer the provisions of this Act and may appoint such clerical and office assistance, and such deputies as may be appropriated for by the General Assembly", with a view in mind of obtaining a clerk or deputy from the "State Board" if the "County Board" cannot discharge their duties without aid or assistance.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

TAXATION AND REVENUE:)
COUNTY COLLECTORS:)
COUNTY CLERKS:)

Fees of county clerks and county collectors Re: Delinquent land lists, back tax books; and fee of county collector for delinquent taxes.

June 28, 1935.

FILED
38

Hon. John C. Harlin
Collector of the Revenue
Ozark County
Gainesville, Missouri

Dear Mr. Harlin:

This is to acknowledge your letter as follows:

> "Will you kindly render your opinion on Sec. 9950 S. A. 1933, Page 427, and state in your opinion whether the county court in making a compromise with a taxpayer on delinquent taxes due and unpaid have the right to reduce the fees due the clerk for making the back tax book and the collectors fees and commission for making the delinquent tax list.
>
> "The fee of the former collector and clerk for making the back tax book is brought forward on the consolidated back tax book and collected as cost, and if the county court has any right to compromise the clerks and collectors fees for making the book I would like to know at once. This question is up at this time and I will appreciate your answer."

In State ex rel. Attorney-General v. Bair, 63 S. W. (2d) 64, l. c. 66, the Supreme Court of Missouri, en Banc, said:

> "The same rule necessarily applies to the other interveners, who as

> public officers have no contractual right as to their terms of office or their compensation or any vested right in either, the same being subject to legislative control. * * * * * The fees of the collector and his attorney and of the interveners are subordinate to the general legislative power to impose, increase, diminish, or remit penalties for tax delinquencies; and no vested right of any of them is impaired by the remission." (underscoring ours)

I.

COLLECTOR'S COMMISSION ON COMPROMISED BACK TAXES.

On February 12, 1935, this Department rendered an opinion to Honorable Forrest Smith, State Auditor, concerning the collector's commission on compromised back taxes, ruling as follows:

> "From the foregoing, it is our opinion that the collectors can only retain a commission on the amount of money actually collected, regardless of the face value of the tax bill."

We are enclosing herewith copy of that opinion.

II.

FEES OF COLLECTOR FOR MAKING DELINQUENT LAND LISTS AND FEES OF CLERK FOR MAKING BACK TAX BOOK AND COMPARING AND AUTHENTICATING SUCH.

Section 9945, Laws of Missouri, 1933, page 426, in part provides as follows:

> "* * * * *; all taxes hereafter becoming delinquent shall bear interest until paid as provided by section 9952, and shall also be subject to the same fees, commissions and charges as in this chapter provided for taxes now delinquent, except that for making and recording the delinquent land list, the collector who makes such book and the clerk or other officer who makes the 'back tax book' shall receive only ten cents per tract, city or town lot, and the clerk for comparing and authenticating such record of the delinquent list of land and lots as made by the collector shall receive five cents per tract, city or town lot."

We invite your attention to the underscored part.

It is our opinion that the collector is entitled to a fee of ten cents per tract, city or town lot, for making and recording the delinquent land list, regardless of the face amount of the tax or whether or not said tax is compromised by virtue of Section 9950, Laws of Missouri, 1933, page 427.

It is our further opinion that the clerk or other officer who makes the back tax book is entitled to receive a fee of only ten cents per tract, city or town lot, and in addition thereto for comparing and authenticating such record of the delinquent list of land an additional fee of five cents per tract, city or town lot, regardless of the face amount of the tax or whether or not said tax is compromised by virtue of Section 9950, supra.

III.

FEE OF COUNTY COLLECTOR FOR RECORDING THE LIST OF DELINQUENT LAND AND LOTS.

Section 9969, Laws of Missouri, 1933, page 429, in part provides as follows:

"* * * To the county collector, for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

It is our opinion that the county collector is entitled to a fee of twenty-five cents per tract for recording the list of delinquent land and lots, regardless of the face amount of the tax or whether or not said tax is compromised by Section 9950, supra.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG
Enc.

SCHOOLS AND SCHOOL DISTRICTS:) Money derived from sale of scho or easement goes into "building fund", and can be used for "building fund" purposes only.

9-19

September 18, 1935.

FILED 38

Honorable James Haw
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Mr. Haw:

This is to acknowledge receipt of your letter of September 4, 1935, including a statement of facts relative to the questions submitted therein. Your questions, which we glean from your letter, are:

(1) To what fund does the money received from the United States Government by the common school districts of Mississippi County, by reason of the condemnation of lands belonging to said school districts, or in the event of a friendly settlement with the government by certain school districts of your county, belong? (2) And for what purposes could said money be expended by the board of directors of said school districts? (3) Also, whether or not the money thus received is a trust fund to be held for purposes of repairing any prospective damages that might arise from the flooding of the school property by the Mississippi River.

From your letter we assume that the school districts in question are "common school districts" of that county.

Section 9312, R. S. Mo. 1929, provides for the division of the moneys coming to the school district into three separate funds, namely, "teachers' fund," "incidental fund" and "building fund." Said section provides in part as follows:

"* * * All money derived from taxation for building purposes, from the sale of school site, schoolhouse or school furniture, from insurance, from the sale of bonds, from sinking fund and interest, shall be placed to the credit of the "building fund;" * * *"

The money derived by reason of the condemnation suit or settlement with the government by the school districts for the easement which the government secures for the purpose of erecting certain set-back levees and a consequent flooding of the school property, would be construed to be a sale of a certain interest of the school site. Therefore, the money derived therefrom would, in our opinion, go into the "building fund."

Section 9311, R. S. Mo. 1929, provides that the board, in the payment of any obligations of the school district, shall order the warrants to be drawn in favor of any party to whom the district has become legally indebted, and should be drawn on the appropriate fund, namely, "teachers' fund," "incidental fund" or "building fund."

Our first premise, then, is that the money should go into the"building fund" and when said money is lodged in the "building fund" it is subject to all purposes for which said fund may be legally used by the board. The statutes only provide for three funds and we do not find that said funds may be further subdivided into other funds,as suggested in your letter; and when the board of directors legally issues a warrant on a particular fund for a legal purpose, the treasurer is bound to honor such warrant if he has money in that particular fund.

We do not think that this money becomes a trust fund in the hands of the treasurer for the purpose of repairing the school building only in the event of damage caused

by the flood waters of the Mississippi River, but may be used for any purpose for which "building fund money" may be used. We do not find that the district would be authorized under the law to use the money in question for the constructing of a Negro school building; neither do we think that said money may be used for paying back teachers' wages for the reason that there is no provision in the law for the transfer of money from the building fund into the teachers' fund.

It is, therefore, our opinion that the money received under the aforesaid circumstances from the government would go into the "building fund" and may be used by the board for any legal purpose authorized for which funds from the building fund may be used.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

CRH:EG

COUNTY BUDGET ACT: County court incurs no liability if warrants are issued in excess of estimate as contained in the budget.

9-20

September 20, 1935.

FILED
38

Honorable James Haw,
Prosecuting Attorney,
Mississippi County,
Charleston, Missouri.

Dear Sir:

This department is in receipt of your letter of September 13 making certain inquiries relative to the County Budget Act of 1933 as it may apply to a condition now existing in your county. The pertinent part of your letter is as follows:

> "Mississippi County is a county having less than 50,000 inhabitants. Counties of this population are governed by sections 1 to 8 inclusive of the County Budget Law found in the 1933 session acts at page 340 and following. In the spring of 1935 a budget was made up for this county as required by the budget law. A certain sum was set aside in that budget for the payment of criminal costs under Class two as defined under section 2 of this act. The sum set aside for the payment of criminal costs has been exhausted, though the total amount allotted to Class 2 is not exhausted, though nearly so. The budget of this county was fixed as high as possible to come within the total estimated revenue for the county.
>
> "The County Court is considering the refusal to write any more warrants for criminal costs during 1935, on the grounds that the members of the

> court and other officials having anything to do with the drawing of such warrants would be personally liable for the amount of the warrants issued in excess of the amount allocated to criminal costs in the budget. This position is based on the penalty provision in section 8 and a doubt on the part of some of the members of the court as to whether the penalty provided in section 20 could possibly be construed to apply to them.
>
> * * *
>
> There are no funds in Class 6 or anticipated funds in that class so that the provisions of Section 5 under Class 6 offer no solution."

Section 1 of the County Budget Act (Laws of Mo. 1933, p. 340) states that counties of a population of 50,000 inhabitants or less shall be governed exclusively by Sections 1 to 8 inclusive, of the Act. Section 9, of the Act, (Laws of Mo. 1933, p. 346) is as follows:

> "In all counties in this state, now or hereafter having a population of more than 50,000 inhabitants, according to the last federal decennial cenxus, the presiding judge of the county court shall be the budget officer of such county, or the county court in any such county may designate the county clerk as budget officer. The budget officer shall receive no extra compensation for his duties under this Act, and Sections 9 to 20 inclusive of this Act shall apply to such counties."

According to the terms of the above section, we are of the opinion that in counties of less than 50,000, the officers incur no liability for their acts under Section 20. The liability of officers in counties of less than 50,000 inhabitants is under Section 8 of the Act, which provides as follows:

> " * * * * any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

The purpose of the County Budget Act is to promote efficiency and economy in county government. Under Section 1 the county court shall classify proposed expenditures according to the classification provided in Section 2, and priority of payment must be adequately provided according to the classification, and the priority must be sacredly preserved.

From the facts as contained in your letter it appears that the county court has carried out its duties and so classified its expenditures, allotting Class 2 the amount which, in the court's judgment, it deemed necessary for the fiscal year, which included costs in criminal cases when properly chargeable to the county. When the court has carried out its duty in this respect and the priority of payment of various classes is preserved, then the court has done its duty and incurred no liability under the penalty section above quoted. Being human, the court cannot estimate in each of the classes the exact amount that will be needed or expended. Once an amount is decided on as an estimate, it is the duty of all the officers participating in the issuance of warrants to sacredly preserve the amount so set aside and estimated and to preserve the priority of payment; this, it appears from your letter, the county court has done.

The new County Budget Act did not undermine completely the former financial structure of the county. Under Section 22 of the Act only three sections were expressly repealed, i.e., Sections 9874, 9985 and 9986, R.S. Mo. 1929, and they are repealed only insofar as they conflict.

We assume that your county court hesitates to order the issuance of any warrants over and above the amount contained in the estimate for Class 2. This, we think the county court can do without incurring liability under Section 8. It is evident the Legislature was mindful that the estimates could not be made with an absolute degree of accuracy; hence, under Section 4, (Laws of Mo. 1933, p. 343) we find the following:

"Less outstanding warrants for preceding years as follows (list total by years)

"Less all known lawful obligations against the county December 31, last, and for which warrants were not drawn at that date * * * *:

"Total unpaid obligations of the county on January 1st of current year. (This shall include unpaid warrants and outstanding bills for which warrants may issue); * * * * *"

Merely as a suggestion, we remind you that funds at the close of the fiscal year may be transferred under Sections 12167 and 12168, R.S. Mo. 1929; therefore, you may make up the deficiency in Class 2 from a surplus in some of the other classes if any such surplus exists at the close of the year.

As a further suggestion (which should be followed with extreme caution), it is possible that if it can be determined with absolute certainty that a surplus now exists in some of the classes below Class 2, and will exist at the close of the year, then the county court may, at its own peril, use such funds. In no event, however, do we suggest that any of the funds in Class 1 be so used.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH

SCHOOLS - County Superintendents - Traveling expenses and clerical hire.

$3 per teacher limit repealed. 25% maximum applies only to travel expense. Sec 167.150, 167.190, 167.230 & 167.270 after July 1, 1965 - see 179.190

June 29, 1935.

FILED 39

Mr. V. R. Heavenhill,
County Superintendent
of Public Schools,
Stockton, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of June 6, 1935, such request being in the following terms:

"In a certain county the County Supt. of Schools budgeted his annual supervisory and clerical expense and estimated it at $337.50. This amount being $3.00 per teacher and not in excess of 1/4 his annual salary, which was $1350.50. Each month he billed the County Court for $28.12 1/2 as his monthly allowance for such expense. Some months his actual expense is double that amount and sometimes less than that amount. Is he entitled to this amount each month so long as the total amount is not in excess of 1/4 his annual salary? Please advise me in this particular matter."

R. S. Missouri, 1929, Section 9487, provides in part as follows:

changed

"That the county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for traveling expenses and necessary clerical assistance, provided such allowance shall not exceed three dollars ($3.00) annually for every teacher under his jurisdiction. The county court shall, upon presentation of his bill properly setting forth his actual expenditures for traveling expenses and clerical hire, draw a warrant upon the county treasury for the payment of same."

The underlined phrases of such section clearly show that only actual out-of-pocket expenses can be billed by the County Superintendent of Schools to the County, and, therefore, if at the end of the month less than one-twelfth of the annual maximum for these expenses had been spent, such County Superintendent of Schools would have no right to bill the County for one-twelfth of such annual maximum.

Where an amount is spent in one month which is greater than one-twelfth of the annual maximum allowed, there is no prohibition in the statute against the County Superintendent of Schools billing the County for the amount so spent, so long as the total of such expenses for that year does not exceed one-fourth of his annual salary, or if the $3.00 for every teacher under his jurisdiction is less than the one-fourth of his annual salary, then the less amount. There is nothing in the statute which says that the total for these expenses, which are expressly put on an annual basis, shall be divided, either as to incurring and paying such expenses or as to reimbursement thereof, equally between the twelve months of the year. To give the statute such a construction would be impractical, for it would not be reasonable and probably not possible to spend each month exactly one-twelfth of the annual maximum, and under such a construction, whenever less than one-twelfth of the annual maximum was spent in any one month, this would reduce the annual maximum.

In conclusion, it is our opinion that a County Superintendent of Schools, under R. S. Missouri, 1929, Section 9467, is entitled to be reimbursed for actual expenditures for traveling expenses and clerical hire, in an amount not to exceed, in any one year of the term of his office, either 25% of his annual salary or $3.00 for every teacher under his jurisdiction (as the case may be), and that so long as he keeps within this maximum he is entitled

to be reimbursed for his actual expenses for these purposes, even though they exceed for any one month one-twelfth of such maximum amount.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

CONTRACTS--COUNTY COURT: County Court cannot legally contract with a corporation in which members of a county court are corporation officers.

10-10

October 10, 1935.

FILED
34

Honorable Ted M. Henson
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Sir:

We acknowledge your request for an opinion dated September 19, 1935, which reads:

> "The presiding Judge of the County Court of Butler County is the President of the Ruth Lumber Company, a corporation, which is engaged in selling lumber and ties in Butler County, Missouri. The County Court has been buying lumber from the above corporation.
>
> I would like to have your opinion as to the legality of a Judge of the County Court purchasing materials from a corporation in which he is interested."

Section 4092 R. S. Missouri 1929, makes certain acts of County Judges a misdemeanor and provides:

> "No judge or justice of any county court in this state shall, either directly or indirectly, become a party to any contract to which such county is a party, or act as any road or

> bridge commissioner, either general or special, or as keeper of any poor person, or as director in any railroad company in which such county or any township, part of township, city or incorporated town therein is a stockholder, or act as agent for the subscription of any stock voted to any railroad by any county or subdivision thereof; any such judge or justice who shall violate any of the provisions of this section shall be adjudged guilty of a misdemeanor."

13 Corpus Juris, page 434, Section 371, paragraph 3, provides:

> "The rule prohibiting a public officer from being personally interested in a contract under his supervision or control has been extended so as to prevent him from letting such a contract to a corporation of which he was an officer or a stockholder."

In the case of State v. Boyd, 196 Mo. 52 l. c. 66; 94 S. W. 532, our Supreme Court said:

> "This provision of the Constitution clearly contemplated that the General Assembly had provided for the imposition of penalties upon officers for violation or neglect of duty, and with equal clearness indicated the conception of the framers of that provision as to the essential elements of such wrongful acts and neglect of the officials which subjected them to the imposition of such penalties, that is, 'wilful, corrupt or fraudulent violation or neglect of official duty.'"

46 Corpus Juris, page 1037, Section 308, provides:

> "A public office is a public trust and the holder thereof cannot use it directly or indirectly for a personal profit; and

> officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. Thus public officers are denied the right to make contracts in their official capacity with themselves, or to become interested in contracts thus made, or to take contracts which it is their official business to see faithfully performed; and a board cannot make a legal contract with one of its own members in respect of the trust reposed in it."

15 Corpus Juris, page 553, Section 249, provides:

> "A contract with a county is void and unenforceable not only when it is without the authority of the county or the officers making it, but also when it is induced by, or tainted with, fraud, or when it, or some of its stipulations, are opposed to public policy, or come within positive constitutional or statutory prohibitions."

In the case of People v. Schenectady County, 151 N. Y.S. 830, l. c. 831, that Court held that a contract made by a Board of Supervisors for the necessary purchase of mazda lamps at a fair market value, with a corporation of which a member of the board was a stockholder, officer and director, being illegal under a penal law making it a misdemeanor for a public officer to participate in his official capacity in making a contract in which he is individually interested was unenforceable. In that case the Court said:

> "The contract is unenforceable, not because a public officer has failed in his duty, but because he has some interest in conflict with his duty. The interest referred to is not necessarily a money interest, nor is it an interest sufficiently large to induce a man generally honest to disregard his duty. It may be indirect. It is such an interest as is covered by the moral rule; No man can serve two masters whose interests conflict."

CONCLUSION.

We are of the opinion that the County Court of Butler County has no legal power under the Statutes of Missouri to contract for the purchase of supplies from the Ruth Lumber Company, of which the presiding judge is president, and no doubt is a stockholder. Any such contract is against public policy and even if the Statutes were silent, such contract would be void, and county warrants issued pursuant thereto are also void. The reasoning of the New York case, supra, is equally applicable in Butler County.

We do not say that it necessarily follows that a misdemeanor has been committed by the presiding Judge of the County Court. Before a crime has been committed we believe that under our Constitution the criminal charge must be predicated upon a willful, corrupt or fraudulent violation of such duty, and such is the holding in the Boyd case, supra.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

WOS:H

COUNTY CLERK--COUNTY HEALTH OFFICER--COUNTY COURT: County is not legally liable for salary of county health officer not legally appointed and County Clerk is personally liable for certification of illegal expenditure to health officer.

2-22

March 21, 1935.

FILED
40

Mr. J. B. Hicks
Clerk of the County Court
Taney County
Forsyth, Missouri

Dear Sir:

I hereby acknowledge your request for an opinion dated March 6th, 1935. Your request is as follows:

> "I have a rather pecular question to ask and probably you wont feel like answering it but if you will it will sure be appreciated by me as I think under the Budget law it may cost me something if I make a mistake in signing warrants that I am not wholly satisfied that is legal. Now this is the proposition, The last record that our County Court shows regarding the Appointment of a Deputy County Health officer was March 4th, 1929 and that appointment was made for four years, which would have been to March 4th, 1933. The Physician has been doing work all the time and drawing his little salary and the 1933 laws made it mandatory to only appoint for one year and that to be made at the Regular February Term of the Co. Court. The Court seems to think the appointment was made February 1934, but no record of it and the Dr. has never qualified so far as the Records shows, which may not be required. He puts in his account for December 1934, January and February 1935 for his salary, Would I be

justified to sign the warrant and not be personally liable under the present Budget law for the amount if the office was really vacant. In your opinion does he have to qualify or be commissioned by the Court? The law says nothing on that line and I take it from that he possibly does not have to qualify. I certainly would appreciate a reply to this at your earliest convenience."

Section 9025 R. S. Mo. 1929, provides as follows:

"At the first regular February term of the county court in each county of the state after this article becomes effective and at the regular February term of said county court every third year thereafter said court shall appoint a reputable physician as a deputy state commissioner of health for that county for a term of three years. In case of a vacancy in the office of the deputy state commissioner of health of a county, the county court shall at its next regular term of court appoint a reputable physician for the unexpired term. If the county court fails to appoint a deputy state commissioner of health as above provided at the February term of said court or at the next term following a vacancy, the state board of health shall appoint a reputable physician as deputy state commissioner of health for that county who shall serve until the county court of such county makes such appointment. The county court of any county upon appointing a physician as deputy health commissioner shall confer with such physician and agree with him as to his compensation and expenses for the performance of his duties as deputy state health commissioner of that county and such compensation

> and expenses shall be paid to him out of the county treasury of that county. If it becomes necessary for the state board of health to appoint a deputy state health commissioner, as above provided, said state board of health shall fix a reasonable compensation for such deputy state health commissioner and shall designate what shall be his reasonable expenses, all of which shall be paid out of the county treasury of the county of which he is deputy state health commissioner."

Section 9025, Laws of 1933, page 271, after repealing the above law, provides as follows:

> "At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said county court every year thereafter, said court may appoint a reputable physician, as a Deputy State commissioner of health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

In the case of Sanders v. Kansas City, 162 S. W. 663, l. c. 665; 175 Mo. App. 367, the Appellate Court stated the law thus:

> "In this State our courts always have recognized and applied the doctrine supported by the great weight of authority in America that no one can acquire a vested right in an office established by the legislative department of a State or municipality. All offices are created for the public good and the rights of their incumbents are subordinate and inferior to that prime object. The power to create, unless restrained by law, includes the power to abolish and an officer elected or appointed even for a definite term, take office with the implied understanding that the power which created the office may abolish it before the expiration of his term, in which event he will find himself out of office."

In an early case of State v. Gordon, 139 S. W. 403, l. c. 407, 236 Mo. 142, our Supreme Court said:

> "There is no doubt of the power of the Legislature to refuse to make an appropriation for the payment of the salary and expenses of any public officer holding office under the Constitution or laws of this State. Neither is there any doubt as to its power to abolish any office not provided for by the Constitution."

Again the Supreme Court said in State ex rel. v. Davis, 44 Mo. 129, l. c. 131:

> "A mere legislative office is al-

> ways subject to be controlled, modified, or repealed by the body creating it."

Budget laws of 1933, page 345, Section 8, provides in part as follows:

> "Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

Budget laws of 1933, page 350, Section 19, provide in part as follows:

> "No contract or order imposing any financial obligation on the county shall be binding on the county unless it be in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in thetreasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred and unless such contract or order bear the certification of the accounting officer so stating,"

Budget laws 1933, page 351, Section 20, provide in part as follows:

> "The accounting officer shall be personally liable and liable on his bond for the amount of any obligation incurred by his erron-

eous certification* * * * or for the payment of any amount not legally owing by the county."

CONCLUSION.

Thus we see that the old law authorized the appointment of a health commissioner every third year after the original appointment which you say was on March 4, 1929. Under the old law the Statute did not authorize the four year appointment, which you say was made, but even under theold law the original office would have expired March 4, 1932, and not March 4, 1933, as suggested in your letter. The county courts appointment, in so far as the court exceeded their authority to appoint, is void and the appointment expired on the statutory limitation. It is the opinion of this office that on the statutory limitation there was a vacancy in office if there was no new appointment.

Assuming that a new appointment was made as provided in the then existing law, it is still our opinion that the new act of 1933, repealing the old act appearing in the Statutes of 1929, legislated out of office any person holding office by virtue of the old law.

Any person who holds over and continues to perform the duties of said non-existing office is at best but a de facto officer. On the other hand said hold over is not entitled to the emoluments of the office which was created by the new law, unless he received his appointment under the provisions of the new law.

A county court speaks only through and legally obligates the county only by its record and its orders made in writing. Under the new law, the Legislature did not make it compulsory for a county court to emplpy a deputy State Health Commissioner. In counties where the County Court deems such an officer necessary it is up to the provisions of the new act, otherwise an allowable office under the law is vacant for want of an officer. Where a county court follows the provisions

of the new act and appoints a county health officer, such a contract being for service imposing a financial obligation on the county must be in writing in order to comply with the budget law. You say the court "seems to think the appoint was made February 4, 1934." What they"seem to think" does not bind the county in a legal obligation. If no written contract was entered into there was not a compliance with the budget law.

You note that in the budget law you are the "accounting officer" and as such you and your bondsmen are personally liable for your erroneous certification or payment of any amount not legally owing by the county. It is our opinion that under the circumstances outlined in your request for an opinion you would not be justified in signing said county warrant.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

COUNTY BUDGET ACT: Rock crusher and tractor not included in proposed expenditures for year cannot be purchased from funds in Class 6.

6-14

June 14, 1935.

FILED
40

Hon. A. D. Hewitt,
Prosecuting Attorney,
DeKalb County,
Maysville, Missouri.

Dear Sir:

This department is in receipt of your letter of May 25 requesting an opinion on the following question which has arisen in your county:

> "Our County Court and a few of our citizens are anxious to buy a rock crusher to be used in the construction of roads in our county. The crusher and tractor will cost between $6500 and $7000.
>
> "The County Court in making up their budget for the present year did not take into consideration the purchase of this crusher and tractor, and did not make any allowance for this amount in any of the classes in their budget.
>
> "Under Class Six we feel sure that there will not be any cash balance to make this purchase. Under class five there will not be any balance left, or perhaps a very small balance of the one-fifth anticipated revenue. Under classes one, two, three and four, we believe that this purchase of the tractor and crusher could not be made under any one of these latter classes.
>
> "The County Court,however, would like to have your opinion on this matter, and so would the writer. * * * *"

Under the terms of Sec. 1 of the County Budget Act (Laws of Mo. 1933, page 341) it is the duty of the county court at the regular February Term thereof to prepare and enter of record and file with the county treasurer and state Auditor a budget of estimated receipts and expenditures for the year beginning January 1 and ending December 31.

Section 2 of the Act classifies the expenditures into six separate classes; the first four of said classes are definite in their terms and may be at once eliminated in the matter of the possibility of buying the proposed crusher and tractor from the funds therein. Class 5 provides:

> "The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

Under Section 5 of the Act denominated "Classes of Expenditures", Class 5 is as follows:

> "Contingent and emergency expense, not to exceed one-fifth of the total estimated revenue to be received. Purposes for which the court proposes the funds in this class shall be used shall be shown."

This class, being general in its terms, it is readily noted that while the section states that the purposes for which the funds are to be expended shall be shown, the amount of each purpose or each itemized expenditure cannot be definitely determined. However, you state in your letter that the proposed cost of the crusher and tractor, to-wit, between $6500 and $7,000, was not included in the list of proposed expenditures. You also state that in all probability no balance will remain in Class 5.

It was the intention of the Legislature in passing the County Budget Act to promote efficiency and economy in county government. The county court may alter or change the budget

before filing, but after same is filed and approved, there is no provision for any change or alteration therein; hence, under Sec. 1 of the County Budget Act it is the duty of the county court to classify the expenditures and to sacredly preserve the priority of payment of the classes.

CONCLUSION

It is the opinion of this department that the rock crusher and tractor costing between $6500 and $7,000 cannot be purchased from the funds in Class 5 for the reason (1) that said item was not included in the list of proposed expenditures presented to the county court at the regular February Term for that year; and (2) that the proposed expenditures, being large, if the funds of Class 5 were permitted to be used therefor, might jeopardize the priority of payments as contained in the four preceding classes.

Class 6 contains the provision "after having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose". This appears to be the only class from which it might be possible to use funds to purchase the crusher and tractor in question; however, the funds in this class could be used only in the event that said payment would not jeopardize the priority of payment of the other five classes and there be no outstanding warrants constituting legal obligations.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

CHILDREN: A child committed to the Missouri Training School for Boys is subject to any order or further orders made by Court making commitment.

6-27

June 27, 1935.

FILED
40

Mr. J. M. Highfill
Chief Clerk
Missouri Training School for Boys
Boonville, Missouri

Dear Sir:

This will acknowledge your letter requesting an opinion from this department which reads as follows:

> "Enclosed is Commitment paper of Jack B. Collison from the Juvenile Court of Jackson County.
>
> "Collison was born November 24, 1920.
>
> "Would appreciate an opinion as to how long we can keep this boy. Please return the commitment paper as it is our authority for holding him."

We direct your attention to Section 14151, R. S. Mo. 1929, which provides in part:

> "In the case of a delinquent child, the court may suspend the sentence or execution thereof from time to time, and may in the meantime commit the child to the care and control of a probation officer duly appointed by the court, and may allow such child to remain in its home subject to the visitation and control of the probation officer, such child to report to the probation of-

> ficer as often as may be required, and to be subject to be returned to the court for further proceedings whenever such action may appear to the court to be necessary; or the court may authorize the child to be placed in a suitable family home, subject to the friendly supervision of a probation officer and the further order of the court, or it may authorize the child to be boarded out in some suitable family home, in case provision is made by voluntary contribution or otherwise for payment of the board of such child, until suitable provision may be made for the child in a home without such payment; or the court may commit the child, if a boy, to the Missouri training school for boys, ****.

From a reading of the above section, you will note that it is within the discretion of the Juvenile Court as to what may be done regarding a delinquent child; and that such a child, if a boy, may be committed to the Missouri Training School for Boys.

Your attention is further directed to Section 14152, R. S. Mo. 1929, which provides in part:

> "In any case where the court shall commit a child to the care of any association or individual in accordance with the provisions of this article, the child shall, unless otherwise ordered, be subject to the control of the association or individual to whose care it is committed, but subject to the order of the court in committing such child and to any further order made by the court. ****"

It is evident from a reading of the above section of the statutes that the Court having committed a child to the care of any association or individual does not lose jurisdiction over said child.

CONCLUSION.

In light of the foregoing, it is the opinion of this department that Jack B. Collison is still subject to the control of the Juvenile Court of Jackson County, Missouri. We conclude that you may only keep the aforementioned boy until such time as the Court may decree otherwise.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

Enclosed committment.papers.

RECORDER: Under laws of 1935 Recorder is to charge no fee for discharging a chattel mortgage from the record.

8-28

August 28, 1935.

FILED
40

Honorable Elmer Hicklin
Recorder of Deeds
Kennett, Missouri

Dear Sir:

We acknowledge your request for an opinion dated August 22, 1935, which reads as follows:

> "You will pardon me for annoying you at this time, but I am in possession of the Session Acts of 1935 and note on page 209 of Section No. 3099 which is in lieu of Section 3099 of the Revised Statutes of Missouri, 1929, regarding the filing fee of chattel mortgages. I note the section provides for a fee of 20¢ for filing which in turn the Recorder shall note thereon the time of filing such instrument or copy. In this county in a number of cases we are presented with an original and a copy and they desire that the copy or original be filed and one to be stamped and returned to the mortgagee or cestui que trust. I am just wondering if I am entitled in such cases to charge as the old way of 20¢ per copy and too if at this time I should make the change by charging 20¢ instead of the old fee of 10¢ per copy.
>
> "Trusting that you can enlighten me on the above and assuring you if you are a candidate for Governor or what not, I am for you."

Laws of 1935, page 209, Sections 1 and 3099 repeal Section 3099 R. S. Mo. 1929, and provided in lieu thereof as follows:

"Section 1. That Section 3099 of the Revised Statutes of Missouri, 1929, be and the same is hereby repealed, and a new section, to be known by the same number and pertaining to the same subject, is hereby enacted in lieu thereof, to read as follows:

"Section 3099. Such recorder shall enter in a book, to be provided by him for such purpose, the names of all the parties to such instrument, arranging the names of such mortgagors or grantors alphabetically, and shall note thereon the time of filing such instrument or copy, for which such recorder shall receive a fee of twenty cents. Said fee shall also include and cover all costs for discharging said mortgage or deed of trust according to the methods hereinafter provided. Such mortgage or deed of trust, when satisfied, shall be discharged by any of the following mthods:

"1. By the mortgagee, cestui que trust, his agent or assigns, on the margin of such index, which shall be attested by the recorder.

"2. Upon the presentation by the mortgagor or grantor of the original mortgage or deed of trust, and upon such mortgagor or grantor making affidavit before such recorder that the instrument presented by him is the original of the copy on file, and that such mortgage or deed of trust has been fully paid and satisfied.

"3. Upon presentation or receipt of an order in writing, signed by the mortgagee or cestui que trust thereof, attested by a justice of the peace, or any notary public, stating that such instrument has been paid and satisfied.

> "When any of these provisions have been complied with, it shall be the duty of the recorder to enter in a column for that purpose the word 'satisfied,' giving date. When a chattel mortgage shall be satisfied as above provided, the recorder may deliver said mortgage to the holder of the note secured thereby, or, if the holder of said note refuse to receive the same the recorder may destroy said mortgage; Provided, that the recorder may deliver to the parties entitled thereto, or destroy all such mortgages now remaining on file in his office and which have been entered satisfied on the chattel mortgage register."

CONCLUSION.

The old law went out of existence and the new law came into effect ninety days after adjournment of the Legislature, that is to say, ninety days after May 29, 1935, which would be on August 27, 1935.

The new law, by its very terms, repeals the old law in toto. Fees once chargeable for recording or discharging a chattel mortgage under the old law are not chargeable under the present law, unless the exaction of such fees be provided for in the new law. Under the present law, set out supra, no provision is made for charging a fee for discharging a chattel mortgage, hence no fee for discharging a chattel mortgage can be legally charged, even though there be prescribed a statutory duty to and method of discharge. The only fee chargeable under the new law is the twenty cent fee for filing the original or copy of the chattel mortgage.

Chattel mortgages filed previous to the date the new law went into effect must be discharged exactly as they were discharged under the old law, but without fee. There is no change in the method of discharge. In such cases the Legislature has required of the Recorder a duty to perform a gratuitous service.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS.
Assistant Attorney General.

JOHN W. HOFFMAN JR.
(Acting) Attorney General.

OFFICER: OFFICES: One person may hold both the office of Public Administrator and Justice of the Peace.

January 8, 1935

FILED 44

434

Mr. O. L. Holmes
Maryville
Missouri

Dear Sir:

This is to acknowledge receipt of your letter dated November 26, 1934, which reads as follows:

> "Could a Justice of the peace hold the office of Public Administrator. At the same time. The two offices don't pay enough to justify a good officer and they are sadly neglected.
>
> There is a possibility that the Public Administrator may retire and if so if lawful would be pleased to combine them. "

Article IX Section 18 of the Constitution of Missouri provides as follows:

> "In cities or counties having more than two hundred thousand inhabitants no person shall at the same time be a state officer and an officer of any county, city or other municipality, and no person shall at the same time fill two municipal offices, either in the same or different municipalities; But this section shall not apply to notaries public, justices of the peace or officers of the militia."

In the case of Nickelson v. City of Hardin 221 S.W. 358, l. c. 360, the court in construing the above constitutional provision, said:

> "The question is not free from difficulty but we are of the opinion that the proper construction of the section is that it applies only in counties and cities having more than two hundred thousand inhabitants."

We must therefore look to the common law to determine the question of whether one person can hold two public offices. Corpus Juris, Volume 46, page 941,942,reads:

> "At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time,provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent,or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

On the question of whether or not the duties of offices are incompatible, we quote the Supreme Court en banc, in State ex rel. v. Bus 135 Mo. l. c. 338:

> "The remaining inquiry is whether the duties of the office of deputy sheriff and those of school directors are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the

> only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other,is required to deal with, control, or assist him. It was said by Judge Folger in People ex rel. v. Green,58 N. Y. l.c. 304: 'Where one office is not subordinate to the other,nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares the acceptance of the one is the vacation of the other. The force of the word,in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another,though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.' "

The Supreme Court has held that the duties of the offices of county and circuit clerk are not incompatible and may be performed by one person. State ex rel. Moore v. Lusk 48 Mo. 242. Also the offices of

deputy sheriff and school director in the City of St. Louis are not incompatible. State ex rel. Walker v. Bus 135 Mo. 338. They have held that the offices of treasurer and collector are incompatible. State ex rel. McAllister v. Dunn 277 Mo. 38.

In order to determine whether or not the offices of justice of the peace and public administrator are incompatible, it is necessary to examine their duties.

Section 299 Revised Statutes Missouri 1929, reads as follows:

> "It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons, and the person and estates of all minors, and the estates or person and estate of all insane persons in his county, in the following cases: First, when a stranger dies intestate in the county without relations, or dies leaving a will, and the executor named is absent, or fails to qualify; second, when persons die intestate without any known heirs; third, when persons unknown die or are found dead in the county; fourth, when money, property, papers or other estates are left in a situation exposed to loss or damage, and no other person administers on the same; fifth, when any estate of any person who dies intestate therein, or elsewhere, is left in the county liable to be injured, wasted or lost, when said intestate does not leave a known husband, widow or heirs in this state; sixth, the persons of all minors under the age of fourteen years, whose parents are dead, and who have no legal guardian; seventh, the estates of all minors whose parents are dead, or, if living, refuse or neglect to qualify as curator, or, having qualified, have been removed, or are, from any cause, incompetent to act as such curator, and who have no one authorized by law to take care of and manage their estate; eighth, the estates or person and estate of all insane persons

in his county who have no legal guardian, and no one competent to take charge of such estate, or to act as such guardian,can be found,or is known to the court having jurisdiction,who will qualify; ninth, where from any other good cause,said court shall order him to take possession of any estate to prevent its being injured, wasted,purloined or lost."

Section 300 Revised Statutes Missouri 1929,provides:

"In addition to the provisions of this article, he and his securities shall have the same powers as are conferred upon, and be subject to the same duties,penalties,provisions and proceedings as are enjoined upon or authorized against executors and administrators,guardians and curators, by articles 1 to 13,inclusive, of this chapter,so far as the same may be applicable. He shall have power to administer oaths and affirmations in all matters relating or belonging to the exercise of his office."

Section 2153 Revised Statutes Missouri 1929,provides as follows:

"Justices of the peace shall have power and jurisdiction throughout their respective counties as follows: First,jointly and severally to cause to be kept all laws made for the preservation of the peace; second,to cause to come before them, or any of them, persons who break the peace,and commit them to jail or bail them, as the case may require; third, to arrest and cause to come before them persons who attempt to break the peace or who are not of good fame, and compel them to give security for their good behavior, or to keep the peace,or both."

Section 2166 Revised Statutes Missouri 1929,reads:

"Except as otherwise provided by law, justices of the peace shall have original jurisdiction of all civil actions and proceedings for the recovery of money,whether such action be founded upon contract or tort,or upon a bond or undertaking given in pursuance of law in any civil action or proceeding,or for a penalty or forfeiture given by any statute of this state,when the sum demanded,exclusive of interest and costs,does not exceed two hundred and fifty dollars, and of all actions against any railroad company in this state,to recover damages for the killing or injuring horses,mules,cattle or other animals,within their respective townships, without regard to the value of such animals,or the amount claimed for killing or injuring the same."

Section 2168 Revised Statutes Missouri 1929,provides:

"No justice of the peace shall have jurisdiction to hear or try any action against any executor or administrator, nor of any action of slander,libel, malicious prosecution or false imprisonment,nor of any action where the title to any lands or tenements shall come in question and be in issue,nor of any strictly equitable proceedings."

A careful study of the statutes fails to show that the duties of justice of the peace and public administrator are inconsistent, incompatible or repugnant to each other.

We are therefore of the opinion that one person may hold at the same time the office of justice of the

peace and that of public administrator.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

TAXATION AND REVENUE - If county court levies the maximum of 40¢ and then attempt to proceed under Sec. 9868 R.S. 1929 to levy an additional 10¢, same would be in violation of Sec. 11, Art. X of Constitution.

February 6, 1935.

FILED
41

Hon. Lewis B. Hoff,
Prosecuting Attorney,
Cedar County,
Stockton, Missouri.

Dear Sir:

This department acknowledges receipt of your letter, presented in person February 4, in which you make the following inquiry:

> "Does Section 9868, Revised Statutes of Missouri for 1929 authorize a judge of the circuit court to order a county court to levy a special or additional tax for the payment of outstanding warrants, when that levy would exceed the constitutional limits?
>
> In Section 9867 the legislature seems to have taken the position that 'county purposes' as was used in the language of the constitution means the funded or bonded debt of the county and the tax for current county expenses. If this be true, then a levy under section 9868 even in excess of the constitutional limits would be valid.
>
> Cedar County has an assessed valuation of between six and ten million dollars (estimated eight million) that it has lived well within its means is shown by the fact that there is at present $12,189.34 in outstanding and unpaid warrants as against delinquent taxes amounting to $21,669.22. The estimated expense of the county for the year 1935 is $50,000 and the estimated receipts from all sources are $45,619.09 less 10 per centum or $41,471.90.
>
> An extra levy of 10 cents on the $100, would in the opinion of the county court, provide ample

> funds for the payment of all outstanding warrants if used with the probable savings in the current expense.
>
> The only other alternative would be to raise the valuation and this would work an extreme hardship on the taxpayer for the reason that an increased valuation would carry with it larger road, school and state taxes, the former two of which are not needed in this county."

As this involves Section 11, Article X of the Constitution of Missouri, we quote the pertinent part:

> "Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation."

Section 9867, R.S. Mo. 1929, mentioned in your letter, designates the taxes which shall be assessed, levied and collected, and is as follows:

> "The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz.: The state tax and the tax necessary to pay the funded or bonded debt of the state, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages, and for schools."

Sec. 9868, R.S. Mo. 1929 was enacted a number of years later and we interpret the same to be a special section enacted in aid of Section 9867, supra. The pertinent part of Section 9868 is as follows:

> "No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz.: The prosecuting attorney or county attorney of any county, upon the request of the county court of such county--which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section--shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise. ****"

Referring to the statement in your letter, as to whether or not an extra levy of 10¢ on the $100.00 valuation to take care of the outstanding warrants would be in excess of the constitutional limitation for the reason that Sec. 9867, supra, only includes county purposes and bonded indebtedness, we respectfully call your attention to the decision in the case of State ex rel. v. Wabash Railway Co., 169 Mo. 563, in which the Supreme Court said (l.c. 573-575):

> "The vital question to be considered in this case is with respect to the validity of the levy in question. Ray county having more than six million

dollars and less than ten million dollars valuation, was limited to a levy (which was made) of forty cents on the one hundred dollars, by the express terms of section 11, article 10, of the Constitution of the State, and, unless the special levy of twenty cents in addition thereto was authorized by section 12 of the same article of the Constitution, or by section 7654, Revised Statutes 1889, it must be held invalid.

In Lamar Water Company v. City of Lamar, 128 Mo. l.c. 221, it was ruled that under section 11, supra, no higher rate of taxation than therein prescribed was permissible, but that a rate might be imposed under the conditions and restrictions of section 12, supra, even though in excess of the rates stated in section 11. The court said, 'The tax expressly authorized in the last lines of section 12, may be imposed in excess of the rates named in section 11, if the other limitations in section 12 are observed,' which are, the assent of two-thirds of the voters of the county voting at an election to be held for that purpose, and, that with such assent any county may be allowed to become indebted to a larger amount for the erection of a courthouse or jail.

It is not pretended, in the case at bar, that the requirements of section 12, supra, as indicated were complied with.

In Aurora Water Company v. City of Aurora, 129 Mo. 540, the ruling in the Lamar case upon the question now under consideration was approved.

The case of the Lamar Water & Electric Light Company v. City of Lamar was before this court on a second appeal (140 Mo. 145) and the rulings on the constitutional questions which were passed upon on the former appeal were adhered to by a majority of the court in banc, without further discussion of them.

> Again in the recent case of State ex rel. Miller v. M., K. & T. Ry. Co., 164 Mo. 208, the same rule announced in the cases before referred to was adhered to but by a divided court.
>
> The leading case in this State upon the power of a county court under the present Constitution to contract a debt for any purpose in excess of its revenue for the current year, is Book v. Earl, 87 Mo. 246, in which it was said: 'The evident purpose of the framers of the Constitution and of the people who adopted it, was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it."

The answer to the question involved was stated by the court in the same case (l.c. 576-577) wherein the Court said:

> "But plaintiff contends that as it is shown by the agreed statement of facts that the warrants were issued within the limit of the revenues receivable for the years of their issue respectively; that is to say, that had all the taxes assessed and levied for those years been collected, the amount of such taxes, together with the other revenue and income actually paid into the county treasury for the benefit of the contingent fund, would have exceeded the amount of warrants issued for said years, but that the full amount of said taxes were not so collected, but a portion each year returned delinquent to such an extent that there remained at the end of each of the above fiscal

years a surplus of unpaid and outstanding warrants, and that, therefore, the warrants are valid. That the warrants were valid may be conceded, but as to whether or not they can be paid otherwise than from the surplus after the revenues for any one year have been applied to payment of the current expenses of the county for that year, is another and entirely different question. Plaintiff, however, contends that this may be done, as in this case, by proceeding under section 7654, Revised Statutes 1889. That this section of the statute is not in conflict with the Constitution of the State is admitted, but its position is, that it does not, except as provided by section 12, supra, authorize the levy of a tax upon property exceedingforty cents on the one hundred dollars for any purpose.

It was held in the cases relied upon by plaintiff, viz., State ex rel. Brown v. Mo. Pac. Ry. Co., 92 Mo. 137; State ex rel. Givens v. Wabash St. L. P. Ry. Co., 97 Mo. 296; State ex rel. Hamilton v. H. & St. Joe Ry. Co., 113 Mo.297; State ex rel. v. St. L. K. & N.W. Ry. Co., 130 Mo. 243; State ex rel. v. Bridge Co., 134 Mo. 339, and Andrew County ex rel. v. Schell, 135 Mo. 38, that a proceeding in conformity with section 7654, supra, was the proper course to pursue in order to require a county court to make a special levy for the purpose of paying outstanding and unpaid warrants, but it was not held in any of those cases that such a levy in excess of the constitutional limit would be valid, but it seems to have been taken for granted that it would be. Now, if under such circumstances, the county court had the power to make a special levy of twenty cents on the hundred dollars valuation of property in the county in addition to the levy of forty cents, the constitutional limit, it could of course upon the same theory and by the same authority levy fifty or one hundred per cent and thus ignore those wholesome provisions of our Constitution which were intended to protect the property rights of the people, and to prevent its confiscation by an evasion of that instrument. That no such purpose was contemplated by the statute is indisputable, but what was meant thereby

> was that a special levy in addition to a general levy, when the latter does not come up to the constitutional limit, may be made for the purpose of paying past indebtedness of the county, provided it, including the general levy, or the levy for general purposes, does not exceed the constitutional limit."

We believe the question is further answered by the decision in the case of State ex rel. Philpott v. Railway Co., 296 Mo., l.c. 524-525, in the following language:

> "The foregoing provisions, except the amendment of 1921, were originally enacted in 1879. (Laws 1879, pp. 185 and 193). Ever since their enactment the levy authorized by Section 12860 has been regarded as a special tax for county indebtedness in addition to the general levy for county purposes. In State ex rel. v. Wabash Ry. Co., 169 Mo. 563, it was held (syl. 6):
>
> 'A proceeding in conformity with Section 7654, Revised Statutes 1889' (now Sec. 12860, R.S. 1919), 'is the proper course to pursue in order to require a county court to make a special levy for the purpose of paying outstanding and unpaid warrants, but a proceeding under that section does not make valid a levy in excess of the constitutional limit. What is meant by that section is that a special levy in addition to a general levy, when the latter does not come up to the constitutional limit, may be made for the purpose of paying past indebtedness.'
>
> See State ex rel. v. Ry. Co., 130 Mo. 243, 248; State ex rel. v. Miss. River Bridge Co., 134 Mo. 321, 338.
>
> The revenue collected to pay past indebtedness must be applied to that purpose and may not be apportioned under Section 12866 for current county expenditures. (State ex rel. v. Hortsman, 149 Mo. 290, 297). Current county expenditures mean expenditures for the year for which the taxes were levied. (State ex rel. v. Payne, 151 Mo. 663,673.) The only tax that a county court may levy on its own initiative is that for the payment of county current expendi-

tures as authorized by Section 12859, R.S. 1919. No other tax for any purpose shall be assessed, levied or collected except as authorized by Section 12860. In this case the additional ten-cent levy was made by the order of the circuit judge in vacation."

CONCLUSION

In view of the above decisions, it is the opinion of this department that if the county court levies the maximum 40 cents on the $100 valuation, as contained in Section 11, Article X heretofore quoted, and should then attempt to proceed under the provisions of Section 9868, thereby levying an additional 10 cents, the same would be in violation of Section 11, Article X of the Constitution of Missouri for the reason that it would not be within the limits prescribed by said section, and it would therefore be invalid.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

INSANE PERSONS: Proper county to assume charge of county
PAUPERS: patient - Residence.

5-22

May 18, 1935.

FILED
41

Dr. E. F. Hoctor,
Supt., State Hospital No. 4,
Farmington, Missouri.

Dear Sir:

We wish to acknowledge your letter of May 7th, 1935, which is as follows:

"Mrs. Minnie Hill of East Prairie, Mo. was admitted as a patient to State Hospital No. 4, Farmington, Mo. 10-3-1917 on order of the County Court of Mississippi County. She remained as a patient in this hospital until April 27, 1922 when she was released to the custody of her daughter. She had not recovered her mental health at the time that she was released from the Institution. It is reported that since leaving Farmington State Hospital, for 17 months she made her home with her daughter in West Frankford, Ill. and from there was admitted as a patient to the Anna Ill. State Hospital. She remained confined in the Anna State Hospital until March 1935 when she was removed from the hospital by the Illinois Deportation Agent and took to Maries County, Mo. where her daughter lives and "dumped" there. March 18, 1935 she was brought to the Farmington State Hospital by the Presiding Judge of Maries County who stated that he felt she should be still considered as a charge of Mississippi County. At the present time she has no relatives in Mississippi County, as far as I know. I do not know that she owns any property there.

"May I have your opinion as to which County is liable for her support? Thanking you."

Section 8663, R. S. Mo. 1929, provides:

> "No person shall be entitled to the benefit of the provisions of this article as a county patient, except persons whose insanity has occurred during the time such person may have resided in the state, and except the insane poor under sentence as criminals, as provided in sections 8655 to 8659, inclusive, of this article. Every patient in a state hospital shall be deemed to be the county patient of the county first sending him till one year after his regular discharge from the hospital."

The above section specifies that no one is entitled to the benefits of this act as a county patient except persons whose insanity occurred during the time such person may have resided in this State, which is evidenced by the statement of facts made in your above letter, "This patient was admitted as a patient to State Hospital No. 4, Farmington, Mo. 10-3-1917 on order of the County Court of Mississippi County and remained as a patient until April 27, 1922."

Section 8636, R. S. Mo. 1929, provides in part:

> "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. * * * "

In reading the statutes you will note that the county courts of the 114 counties take care of their indigent insane people and such are committed to the State hospitals at the direction and expense of the county.

In the case of Thomas v. Macon County, 175 Mo. Sup. 68, l. c. 73, the court in writing his opinion held the following:

> " * * * Plaintiff next points to section 4867 (8636 R. S. Mo. 1929) which provides that: 'The several county courts shall have power to send to the asylum such of their insane poor as may be entitled to

> admission thereto.' And it specifies that the county shall pay for the support and maintenance of such insane poor persons as the county court may send to the asylum.
>
> "Under that section, however, even the county court is not authorized by its arbitrary will or unlimited discretion to send any insane poor person it may select to the asylum at the expense of the county, but the court must hold due proceedings upon a petition filed showing that the insane poor person is 'a citizen residing in the county' and other essential facts as prescribed by the statute, and there must be a trial of the facts and a judgment of the court thereupon. (Statutes cited) The county court has no authority under those statutes to send a person to the asylum or maintain one there at the expense of the county who is not a resident thereof. * * * "

It is the opinion of this Department that such patient is still a resident of Mississippi County, that a resident becoming insane is not mentally capable of making a change of residence.

In State ex rel. v. Wurdeman, 129 Mo. App. 263, the court said:

> "In disposing of the petition, Lord Elden said the old settled law was not to grant a commission of lunacy to be executed at any other place than the residence of the supposed lunatic; that if a resident of London were conveyed into Essex, he still would be a resident of the city, and no man could be said to reside in a place where he had been carried while he had not mind enough to make a change of residence." (Italics ours)

We furthermore believe this patient has never officially been discharged, and if this is the case, such patient remains a charge on the county originally sending her to the hospital, as stated in Section 8663 in part:

> "Every patient in a state hospital shall be deemed to be the county patient of the county first sending him till one year after his regular discharge."

By paroling such patient, as stated in your letter, to the custody of her daughter, such patient not having recovered at the time of making such custody, it is our opinion this patient has never been discharged.

Section 8629, R. S. Mo. 1929, provides:

> "Persons afflicted with any form of insanity shall be admitted into the hospital for the care and treatment of the insane, and any patient may be discharged by the superintendent whenever, in his opinion, the reason of such person is fully restored: Provided, that nothing herein shall be so construed to prevent any superintendent from paroling any patient whenever he deems it best for such person confined in the hospital; and provided further, that county courts are hereby prohibited from removing from the hospital any indigent insane persons, except as herein provided."

The above section provides the method of discharging a patient, which is "only when, in the superintendent's opinion, the reason of such person is fully restored". However, it qualifies this by another provision, as follows: "Provided, that nothing herein shall be so construed to prevent any superintendent from paroling any patient whenever he deems it best for such person confined in the hospital". This last proviso automatically gave the superintendent the

authority to parole this patient to the custody of her daughter in 1922. However, in construing together the above section relative to discharging a patient, and Section 8663, R. S. Mo. 1929, holding that every patient shall be deemed to be the county patient of the county first sending such patient till one year after his regular discharge, it is the opinion of this Department that the maintenance incurred in caring for the patient should be assumed by Mississippi County.

Respectfully submitted,

James L. HornBostel,
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK,
Attorney-General.

ARH:HR

ROADS AND BRIDGES: Construction of Section 44a, Missouri Constitution as it relates to traffic relief roads chargeable against State Road Fund.

June 26, 1935.

FILED
41

Honorable Maurice Hoffman
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We acknowledge your request for an opinion dated May 29, 1935, which is as follows:

> "As advisor to the County Court of Buchanan County I want to get your opinion as to the construction to be placed on section 44-A of article 4 of the State Constitution, particularly the construction to be placed upon the clause near the end of paragraph 4 of said section 44-A, which is in these words, 'to construct and maintain other state highways and bridges and to widen or otherwise improve existing state highways and bridges in the congested areas adjacent to the cities of St. Louis and Kansas City'.
>
> "The people of this city, and the County Court as their representatives, are interested in establishing a traffic relief road between Savannah and St. Joseph. The contention of the Court is that the words of this clause 'to construct and maintain other State Highways and bridges' authorize the building of such a road out of this city as a traffic relief road and it is their contention that the words in that clause following the language just quoted does not limit the authority to construct such roads to areas adjacent to the cities mentioned, St. Louis and Kansas City.

> "I would appreciate very much an opinion on the construction to be placed on this clause at your earliest convenience."

Article IV, Section 44a, paragraph 4 of the Missouri Constitution provides more fully than that portion quoted in your request, and your problem should be determined with an understanding of the whole amendment, particularly the 4th and 9th paragraphs of said amendment. The 4th paragraph of the amendment reads as follows:

> "The said bonds and the interest that will accrue thereon shall be paid out of a fund to be provided by the levy and collection of a direct annual tax upon all taxable property in the State. All state motor vehicle registration fees, license taxes or taxes authorized by law on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicle and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation shall, after the issuance of any of said bonds and so long as any of said bonds herein authorized remain unpaid, be and stand appropriated without legislative action, to the payment of the principal and interest of the said bonds and for that purpose shall be credited to the State Road Bond Interest and Sinking Fund provided by law. <u>If in any year there should be any balance in the State Road Bond Interest and Sinking Fund beyond the requirements of the next</u>

succeeding calendar year for interest and sinking fund of the said bonds, such balance shall be transferred and credited to the State Road Fund to be administered and expended under the direction and supervision of the State Highway Commission for the following purposes: to complete and widen or otherwise improve, and maintain the state system of primary and secondary highways as designated and laid out under existing law; to reimburse the various counties and political or civil subdivisions (including road districts) of the State for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the State as permanent parts of the state highway system to the extent of the value to the State of such roads and bridges at the time taken over, not exceeding in any case the amount expended by such counties or subdivisions in the construction or acquisition of such roads and bridges; to construct and maintain other state highways and bridges, and to widen or otherwise improve existing state highways and bridges in the congested traffic areas adjacent to the cities of St. Louis and Kansas City; to locate, establish, acquire, construct, and maintain, as hereinafter provided, supplementary state highways and bridges in each county of the State, in addition to those state highways and bridges designated and laid out under existing law, and to acquire materials therefor, and for such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the State Highway Commission may deem proper."

The 9th paragraph of the amendment reads as follows:

> "In order to connect state highways as designated and laid out under existing law with other such highways or with highways in adjoining states, and also in order to facilitate and expedite the movement of through traffic, the State Highway Commission is hereby authorized and empowered to locate, construct, and maintain from the funds herein provided for construction of primary and secondary highways and from the State Road Fund, highways and bridges not exceeding in the aggregate three hundred (300) miles as a part of and to be added to the said state highway system, and from such funds the State Highway Commission is hereby also authorized and empowered to locate, construct, and maintain highways and bridges in state parks, now or hereafter established, and connect the same with the primary or secondary highways of the State."

Article IV, Section 44a of the Missouri Constitution, which we refer to as "the Amendment," was submitted to the people by initiative petition and adopted at the General Election held November 6, 1928. Said Amendment repeals the preexisting Section 44a. It enacts in lieu thereof a new section which authorizes the General Assembly to issue $135,000,000.00 worth of State Bonds, which is $75,000,000.00 in addition to the $60,000,000.00 authorized to be issued under the repealed preexisting Constitutional Amendment.

We have not quoted the whole Amendment, as it exists today, but we do state that after the people, by their vote authorized the issuance of said bonds, for the purpose of "locating, establishing, acquiring, constructing, widening and improving hard surfaced public highways in the State" for the purpose of "locating and constructing bridges across the rivers and waters of the State, and of the participation in the constructing of toll free interstate bridges" the people then proceeded to authorize the sale of the said $75,000,000.00 additional bonds, the proceeds to be expended under the direction and supervision of the

State Highway Commission for the purposes underscored in the Constitution above appearing in paragraph 4. Lastly, the people by said paragraph proceeded to authorize the retirement of said bonds from the proceeds received from license tags, etc., to be placed in a sacred fund to be known as a State Road Bond Interest and Sinking Fund.

As we understand your request you want to know whether or not any balance in the State Road Bond Interest and Sinking Fund, beyond the requirement of the next succeeding calendar year, for interest and sinking fund of the said bonds, which has been duly transferred and credited to the State Road Fund to be expended under the direction of the State Highway Commission can legally be used in establishing a "traffic relief road between Savannah and St. Joseph" by virtue of the provisions of the 4th paragraph of Section 44a of the Constitution which authorizes the use of money in the State Road Fund "to connect and maintain other state highways and bridges, and to widen or otherwise improve existing state highways and bridges in the congested traffic areas adjacent to the cities of St. Louis and Kansas City;".

In the case of State ex rel. Russell v. State Highway Commission, 42 S. W. (2d) 196; 328 Mo. 942, the Supreme Court had under consideration an original proceeding in mandamus wherein Russell wished to compel the Highway Commission to consider a petition presented to the Commission for widening of U. S. Highway No. 40 within the corporate limits of Kansas City, at the expense of the State from State funds credited to the State Road Fund. The Court took occasion to construe all of Section 44a, Article IV of the Missouri Constitution, and to apply its construction to the problem before them. On page 952 of the Missouri Report the Court said:

> "The fourth paragraph names the sources of revenue from which the principal and interest due on the bonds shall be paid, including certain fees, licenses and taxes less the expense of collection and the cost of maintaining the State Highway Department and State Highway Commission, etc. This net revenue above the annual requirements for interest and sinking fund for the bonds

> is to be credited to the State Road Fund 'to be administered and expended under the direction and supervision of the State Highway Commission for the following purposes: * * * * it seems the proceeds from the bond issue are to be used only for construction and improvement work, and to reimburse counties, etc., for highways taken over, whereas moneys derived from the specified revenue sources above the requirements for paying off the bond issue may be used for those purposes and for maintenance as well. See Sections 8144-8148, Revised Statutes 1929."

On page 953 the Court said:

> "The ninth paragraph figures large in this controversy. It is as follows: 'in order to connect state highways as designated and laid out under existing law with other such highways or with highways in adjoining states, and also in order to facilitate and expedite the movement of through traffic, the State Highway Commission is hereby authorized and empowered to locate, construct, and maintain from the funds herein provided for construction of primary and secondary highways and from the State Road Fund, highways and bridges not exceeding in the aggregate three hundred (300) miles as a part of and to be added to the said state highway system, and from such funds the State Highway Commission is hereby also authorized and empowered to locate, construct, and maintain highways and bridges in state parks, now or hereafter established, and connect the same with the primary or secondary highways of the State.' "

On page 954 the Court, after summarizing the words of the amendment, said:

"As the foregoing summary shows, the road construction authorized by the constitutional amendment falls into five classes:

(1) The completion and widening or other improvements of the state system of primary and secondary highways as designated and laid out under existing law.

(2) The construction of other (new) state highways and bridges and the widening or other improvements of existing state highways and bridges in the congested traffic areas adjacent to the cities of St. Louis and Kansas City.

(3) The location, establishment, acquisition and construction of 'supplementary' state highways and bridges in each county of the State, exclusive of St. Louis and Kansas City, in addito those state highways and bridges designated and laid out under existing law, these being what are generally called 'farm-to-market' roads.

(4) The location and construction of not exceeding three hundred miles of highways and bridges to be addéd to the state highway system 'in order to connect state highways as designated and laid out under existing law with other such highways or with highways in adjoining states, and also in order to facilitate and expedite the movement of through traffic.' "

On page 962 the Court said:

"In providing for 'traffic relief' roads in congested areas the amendment definitely locates these areas as being 'adjacent' to St. Louis and Kansas City. In dealing with the supplementary state highways the two cities are expressly excluded. Indeed,

in referring to the state highway system it is carefully described as the system 'designated and laid out under existing law.'

"On the other hand, when it comes to the 300-mile addition to the system there is no such limitation. The sole condition imposed is that these roads shall be built in order to connect highways in the state system with other such highways or with highways in adjoining states, and also in order to facilitate and expedite the movement of through traffic. As to the latter objective it must have been in contemplation that one of the greatest obstructions to the movement of through traffic is congestion; and that this condition would be encountered in and entering these two cities. Indeed, the amendment takes notice of it by providing for traffic relief roads in the 'congested' areas adjacent thereto. And yet, as we say, there is no word of restriction in this paragraph against building such roads inside the corporate limits of Kansas City and St. Louis, notwithstanding the framers of the section were meticulous in that regard in the other clauses. The language of the '300-mile' paragraph being without exception and for a paramount and definitely stated purpose which we know may be served by road construction within these municipal areas, it would do violence to the amendment to read into it a proviso excluding them, or to say the omission of such limitation was through oversight.

"Respondent insists that if it had been the intention to facilitate the movement of through traffic inside the two cities by relieving against congestion, that concept would have been covered in the 'traffic relief'

> clauses instead of limiting the latter to areas 'adjacent' to the cities. That might have been done, but the traffic relief provisions allow both new construction and the improvement of existing roads, and they contain no express limitation as to mileage, whereas the paragraph under consideration authorizes only new construction and holds it to a maximum of 300 miles for the whole State. These limitations may have been in mind. It may be suggested further that if it was the intention to speed up through traffic by relieving congestion, why did the 300-mile clause provide only for building new roads instead of allowing also the widening and improving of existing roads, as was done in the 'traffic relief clause? ' We do not know; it may have been intended to construct a few separate roads for through traffic."

On page 963 the Court said of the 9th paragraph of the Amendment:

> "We find it unnecessary to decide the question further than to say we think the paragraph states two separate purposes, (1) to connect highways and (2) to facilitate the movement of through traffic."

On page 965 the Court said:

> "But while, as is held in the foregoing part of this opinion, there is nothing in the '300 mile' provision of the constitutional amendment forbidding the building of highways into the corporate limits of St. Louis and Kansas City for the special purposes mentioned in that clause,* * * *. So, also, with the 300 miles of roads, the Commission may 'locate (and) construct' them as an addition to the designated system. In our opinion this clearly

contemplates only the building of new roads adding mileage to the state system, and not the widening of existing roads."

CONCLUSION.

We are of the opinion that a traffic relief road between Savannah and St. Joseph does not come within the provisions of the 4th paragraph of the Constitutional Amendment, supra, suggested by you, namely, "to construct and maintain other highways and bridges,". As said quotation must be construed with the whole amendment and when so construed, said quotation, as it relates to road construction, merely authorizes the construction of other (new) State highways and bridges, and the widening or otherwise improving existing State highways and bridges in the congested traffic areas adjacent to the cities of St. Louis and Kansas City. State ex rel. Russell v. State Highway Commission, supra, page 952.

Our conclusion, hereinabove set out, was predicated on the premises contained in your letter, which only concerned Paragraph 4 of the Constitutional Amendment, supra. However, we do not wish to be understood as holding that a traffic relief road may not be constructed between Savannah and St. Joseph. However, if such is done, it must be by virtue of Paragraph 9 of said Amendment, provided, of course, the three hundred miles of such additional traffic relief roads have not already been included in the State Highway system.

We suggest this to you so that inquiry may be conducted to determine if the road may be obtained by virtue of the 9th Paragraph.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

COUNTY CLERKS: COUNTY DEPUTIES: Salaries of County Clerks and his deputy in Counties having a population of 7,500 and less than 10,000 persons.

February 2, 1935.

FILED 43

Hon. W. R. J. Hughes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

This department is in receipt of your letter wherein you state in part as follows:

> "The County Court of Iron County asks me to secure the opinion of your office as to the meaning of Section 11811, Laws of 1933, page 370 wherein is found the following:
>
> "'In counties having a population of 7,500 and less than 10,000 persons, the clerks shall be allowed to retain $1100.00 for themselves, and shall be allowed to pay for deputies and assistants $900.00'
>
> "The question is whether the County Court, which by Section 11680, 1929, Statutes must approve the deputy, is empowered to fix the salary of said deputy or deputies at anything less than $900.00 per annum. In other words has the County Court as much control over the deputies and their salaries in its own court as Laws of 1933 give it in regard to Circuit Clerk's deputies?
>
> "I note that Section 11810, 1929, says:
>
> "'The county court shall at each regular session examine such statement, and may

examine any person as to the truth of same and allow all necessary clerk or deputy hire, not to exceed the amount allowed in the next succeeding section of this chapter for deputies or assistants, etc.'

"This section would indicate to me that the county court does control the purse strings of the county even so far as deputies to the county clerk are concerned. From the standpoint of reason it would seem that the county court which is responsible for the proper expenditure of the revenue of the county should have as much discretion in the matter of salary for a deputy in its own court where it can judge the necessity for extra help with some degree of accuracy as it is permitted in the matter of a deputy for the circuit court with whose work it is more or less unfamiliar.

"Ours is a very poor county and just now we are having a fight for our existence. The question of how much must be spent for deputy county clerk hire becomes therefore an important one. If we can reduce such salary it will mean much to our welfare as a county this year."

We believe you will find your question fully answered by a ruling of this department directed to Honorable F. M. Brady, Prosecuting Attorney, Benton County, Warsaw, Missouri, dated January 23, 1935, and signed by Roy McKittrick, Attorney General, and Wm. Orr Sawyers, Assistant Attorney General, a copy of which is herewith enclosed.

You will note that although the opinion above referred to deals with the salaries of County Clerks and their deputies in counties having more than eleven thousand five hundred (11,500) persons and less than twelve thousand five hundred (12,500) persons, yet the language therein contained, aside from the numbers and amounts referred to is the same as that part of the section which provides for the salary of County Clerks and their deputies in counties having a population of seven thousand five hundred (7,500) and less than ten thousand (10,000) persons.

The language is identical in the following form:

> "*** the clerks shall be allowed to retain *** for themselves, and shall be allowed to pay for deputies and assistants ***."

You call our attention to Section 11810, R. S. Mo. 1929, which provides in part as follows:

> "***** The county court shall at each regular session examine such statement, and may examine any person as to the truth of the same, and allow all necessary clerk or deputy hire, not exceeding the amount allowed in the next succeeding section of this chapter for deputies or assistants, ****."

The county court is responsible for the proper expenditure of the revenue of the county, but we are of the opinion that the above set out section is designed merely to prevent the County Clerk from exceeding the amount allowed him to be retained for deputy hire under Section 11811, R. S. Mo. 1929.

Respectfully submitted,

James L. HornBostel
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

MW/JLH:afj

CIRCUIT CLERK: Circuit Clerk not entitled to retain change of venue fees prior to first Monday in January, 1935.

Circuit Clerk is allowed to retain change of venue fees, in addition to other fees allowed him under Section 11786 Laws of 1933.

4-3

April 1, 1935

FILED 43

Mr. Charles S. Huckstep
Deputy Circuit Clerk
Lincoln County
Troy, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date requesting an opinion from this office, which reads as follows:

"I am writing you relative to fees in the Circuit Clerk's office, those made from the change of venue cases, clerk's fees. When I came into this office in 1927, I wrote to the attorney general of the State as to fees accruing from C. of V. cases, and asked him if the clerk's had a right to the clerk's fees or not. He advised me that the several clerks of the State had a right to take the fees as it was extra work, and of course having his statement of this, I used them feeling I was doing right. Then again when the new Attorney General came in, Mr. Gentry, I also asked his advice regarding these fees and he said he deemed them due the several clerks on account of the extra work, and from his statement also I keep the change of venue fees of the Clerk. Now since the auditors have been here they inform me that you have ruled they have no right to keep them. I would just like to ask you this, where am I now regarding these fees. If I had not been advised it was all right and they

> were due me, I would have turned them into the County Treasurer, but feeling I was doing the right thing, I kept them. Now what am I to do. I have had so much bad luck in the past two years and losing my wife last October, sure has hit me hard, and now to go back and dig this amount up for the past 8 years, sure will be a hard blow on me. Advise me if you please what I can do, and who can I depend upon to have things right from now on for Mr. Hardesty, who is the Clerk now, and I am his deputy. I shall await your advice. I will add that the attorneys advised that these fees were due me too, and that all the clerks ahead of me kept the C. of V. fees. With best wishes to you, I am."

This office, in an opinion given to Honorable Forrest Smith, State Auditor, Jefferson City, Missouri, under date of February 28, 1933, ruled that a circuit clerk, prior to the first Monday in January 1935, was not entitled to retain, in addition to the salary allowed him under the provisions of Section 11786 R. S. Mo. 1929, fees earned in cases of change of venue from other counties. Said opinion was signed by Carl C. Abington, Assistant Attorney General and approved by Attorney General Roy McKittrick. A copy of said opinion is inclosed for your information.

Prior to the first Monday in January, the circuit clerk was paid a salary for his services, under the provisions of Sections 11786 and 11813, R. S. Mo. 1929. Said sections have been repealed and superseded by Section 11786 Laws of Missouri 1933, which reads in part as follows:

> "The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out; * * * * * * * * * * * * * * * provided, further, that clerks of the Circuit Court shall be allowed to retain

> in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; provided, further, that,until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

The above section is plain and unambiguous and provides that a circuit clerk is allowed to retain, as compensation for one year's service, the fees earned by him during said year, not to exceed the amount specified in said section. In addition thereto, he is allowed to retain all fees earned by him in cases of change of venue from other counties. In view of the above it is the opinion of this office that a circuit clerk is allowed to retain, for one year's services, the fees earned by him during said year, not to exceed the amount specified in Section 11786 Laws of Missouri 1933, and, in addition thereto, he is allowed to retain all fees earned by him in cases of change of venue from other counties.

You mention in your letter how hard it would be for you to pay back the change of venue fees retained by you for the past eight years. For your information we call your attention to the statute of limitations applicable to your case, same being Section 863 R. S. Mo. 1929, which reads as follows:

> "Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money, collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is

given to the party aggrieved, or to such party and the state."

In view of the above, it is the opinion of this office that an action to recover change of venue fees retained by you more than three years before the commencement of an action to recover same, would be barred by the above statute of limitations.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JLH/JET:LC

PENITENTIARY:) Money deposited in fund for convicts cannot
CONVICTS' FUND:) be diverted to any other use without consent
of convict or by court action.

5-9

May 6, 1935.

FILED
43

Hon. S. B. Hunter
Chairman
Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Hunter:

This is to acknowledge your letter as follows:

"On the night of April 17, 1933, a trusty at the Missouri Training School, Boonville, burglarized the commissary there, stole about $46.00 and some clothing, and then escaped. When apprehended, he was tried in the Circuit Court of Cooper County and sentenced to the Penitentiary.

At the time this inmate escaped from the Training School, he had $10.01 on deposit in his account. Now he is asking that the $10.01 be forwarded to him at the Penitentiary, where he is confined.

The Penal Board would like to be advised as to whether or not the deposit of $10.01 may be retained by the Training School and applied as a partial replacement of the money stolen from the commissary."

From the facts stated in your letter we understand that an inmate at the Boonville Training School deposited $10.01 with some official of the Training School, such

money being held in trust and for the use of the inmate; and owing to the fact that the inmate stole some money and escaped it is sought to apply the money he had on deposit to the payment of money stolen.

In our opinion the $10.01 belongs to the inmate and cannot be taken from him except by due process of law. "Due process of law" means by consent of the convict, or, second, by court action, namely, obtaining judgment and execution. If the $10.01 is arbitrarily taken from the inmate, it will be in violation to the Constitution of Missouri, particularly Section 30, Article II, which provides:

> "That no person shall be deprived of life, liberty or property without due process of law."

Therefore, since this money is the property of the convict, the holder of such is merely acting in the capacity as trustee for the benefit of the cestui que trust (convict) and such trustee is held liable for the safe-keeping of said money. It follows that the money is subject to the wishes and disposal of the convict unless it is taken from him by due process of law.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

The election and number of Justices of the Peace should be governed by Sections 12268 and 12269, and Section 2136 R. S. Mo. 1929 does not apply to the election of Justices of the Peace in counties having township organization.

5-13

May 10, 1935

FILED
43

Honorable Glen W. Huddleston
Prosecuting Attorney
Carrollton, Missouri

Dear Sir:

This Department is in receipt of your letter of April 12 requesting an opinion based on the following facts:

> " You will find inclosed sample ballots of the township election held in Carroll County, Missouri March 26th,1935,the ballots were printed on separate pieces of paper just like the samples that are inclosed.
>
> As you no doubt know Carroll County is under Township organization, and therefore, I do not think section 2136, R. S. Mo. 1929 would have anything to do with the number of Justices to be elected in Carrollton township. If you need any additional information, please, let me know at once and I will be glad to send to you as I am anxious to get your opinion on this question as soon as possible."

Carroll County being under township organization, the election of township officers is authorized under Section 12268, which is as follows:

> "There shall be chosen at the biennial election in each township one trustee, who shall be ex officio treasurer of the township, one township collector,and one township clerk, who shall be ex officio township assessor, one constable, two members of the board, and two justices of the peace: Provided, the same persons may be elected members of the board and justices of the peace, at the same election, and hold both offices; also the same person may be elected constable and collector at the same election and hold both offices at the same time, by taking the proper oath of each office and giving the bond required by law."

The following section, 12269, provides for an additional Justice and is as follows:

> "In all townships having a population of over two thousand inhabitants, it shall be lawful for the qualified voters thereof to elect an additional justice of the peace for every two thousand inhabitants until the population reaches six thousand, after which the number of justices shall not be increased. Said additional justices shall be elected and commissioned and shall have the same powers and perform like duties as other justices of the peace have and perform by law."

You do not state in your letter the population of the township. By the terms of Section 12268 every township should elect two justices of the peace. If the township in question contains more than two thousand inhabitants then an additional justice may be elected until the population reaches six thousand.

Section 2136 Revised Statutes Missouri 1929, mentioned in your letter, is under Chapter 9 of Article VII, the title of the Chapter being " Courts not of Record - Justice Courts - Organization and Procedure."

In the case of State ex rel. v. Powles 136 Mo. 376, which related to the appointment of an additional justice of the peace in Howell County, the court said:

> "An additional justice of the peace to which a town or city of over two thousand inhabitants may be entitled, under Revised Statutes, 1889, section 6090, is a township officer governed by the general law relating to justices of the peace."

The legislature has passed special laws and chapters relating to elections and the government in counties under township organization. In conducting the election, Section 12270 states,

> "Said township election shall in all things conform to the general law concerning elections for state and county officers, so far as the same is consistent with the provisions of this chapter."

CONCLUSION

We are of the opinion that the manner of choosing justices of the peace should be governed according to the terms of Section 12268 and Section 12269, in Carroll County, and that Section 2136 has no applicability to the election of the justices and does not apply to the number of the justices of the peace. As to whether or not the township in question is entitled to three justices, as stated

before, we can not answer this question for the reason that you failed to state the population of the township in question.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

RECORDER OF DEEDS: Not entitled to any fee for recording figures in a deed; entitled to ten cents for every hundred words for recording acknowledgments.

5-15

May 11, 1935.

FILED
43

Hon. Duffy J. Hudnall
Clerk of the Circuit Court
Scotland County
Memphis, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office which reads as follows:

> "Would like to know whether to count figures in counting the number of words when charging for copying deeds or certified copies. Does each figure count as a word?
>
> "What should be charged for extra acknowledgments attached to a deed when it is recorded. Some of our attorneys say extra acknowledgments are 25¢ each and some say it is 10¢ per hundred words."

Section 11804, R. S. Mo. 1929, provides what fees the recorder is allowed for his service and reads as follows:

> "Recorders shall be allowed fees for their services as follows:
>
> " For recording every deed of (or) instrument, for every hundred words..... $.10
>
> In addition to the above fee for recording deeds, they shall be allowed for recording every such instrument relating to real estate, a fee of ten cents, as a compensation for making and preserving direct

> and inverted indexes to every book containing deeds affecting real estate.
>
> For every certificate and seal..... .50
>
> * * * * * * * * * * * * * * * **

Section 11547, R. S. Mo. 1929, provides the manner of recording deeds and makes it the duty of the Recorder to record the acknowledgments, written on or under the same. Said section is in part as follows:

> "The recorder shall record, without delay, every deed, mortgage, conveyance, deed of trust, bond, commission or other writing delivered to him for record, with the acknowledgment, **** written on or under the same, ****, in the order of time when the same shall have been delivered for record, by writing them word for word, in a fair hand, ****."

Section 3101, R. S. Mo. 1929, provides that a Recorder is entitled to ten cents for every hundred words for furnishing a certified copy of a chattel mortgage filed in his office. Said section reads:

> "Every such recorder of deeds shall be entitled to receive for certified copies of such instruments so filed as aforesaid, when requested to furnish the same, for every one hundred words, ten cents; and in every case where a copy of the instrument shall have been filed at the request of the mortgagee or assigns holding the original, such recorder shall certify on the back of such original that a true copy thereof has been filed, giving date, for which service such recorder shall be entitled to a fee of ten cents."

I.

If we understand your first question clearly, you desire to know what fees you are entitled to for recording deeds and for furnishing certified copies of said deeds.

Under the provisions of Section 11804, supra, a recorder of deeds is allowed for recording every deed or instrument, for every hundred words, ten cents. It will be noted that the statute does not specifically allow any fee for recording figures. Many statutes allow a fee for copying both words and figures. For instance, Section 3248, R. S. Mo. 1929, allows a recorder for transcribing the records, when ordered by the county court to do so, to such compensation as may be allowed by the county court not to exceed eight cents for every hundred words and figures. Section 11563, R. S. Mo. 1929, allows a recorder ten cents for every hundred words and figures for copying a new abstract and index of the record, when ordered by the court to do so. Since the Legislature allows a fee for copying figures as well as words under Sections 3248 and 11563, supra, but fails to allow any fee for recording figures under Section 11804, it is evident that they did not intend that a recorder should receive a fee for recording figures.

The right of a public officer to fees is derived from the statutes. He is entitled to no fees for services unless the statute gives it and when the statute fails to provide a fee for services, he is required to perform as a public officer, he has no claim on the State for compensation therefor. Gammon v. Lafayette County, 76 Mo. 675; Williams v. Chariton County, 85 Mo. 645.

Under the provisions of Section 3101, supra, a recorder is allowed a fee of ten cents for every hundred words for furnishing a certified copy of a chattel mortgage filed in his office.

Under the provisions of Section 11804, supra, a recorder is entitled to a fee of fifty cents for every certificate and seal. We find no statute requiring him to copy a deed that is to be certified by him or allow him any fee for doing so. He, of course, is entitled to a fee of fifty cents for certifying and affixing his seal to said deed.

In view of the above, it is the opinion of this department that a recorder of deeds is entitled, for recording every deed or instrument, to a fee of ten cents for every hundred words but is not entitled to any fee for recording figures; that a recorder is entitled to fifty cents for certifying to and affixing his seal to any instrument, but that the statute does not make it his duty to copy the instrument to be certified or allow him any fee therefor except in the case of a certified copy of a chattel mortgage for which he is entitled to a fee of ten cents for every hundred words.

II.

Section 11547, R. S. Mo. 1929, makes it the duty of the recorder to record without delay every deed, mortgage, conveyance, deed of trust, bond, commission, or other writing delivered to him for recording with the acknowledgments written on or under the same.

Section 11804, R. S. Mo. 1929, allows him, as compensation for recording every deed, a fee of ten cents for every hundred words although the statute makes it his duty to record the acknowledgment as well as the deed, no extra compensation is allowed therefor, except for the additional words contained in the acknowledgments.

We are therefore of the opinion that a recorder is only entitled to ten cents for every hundred words for recording all acknowledgments contained in any deed.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/afj

ASSESSORS - Compensation for attending meetings called by State Tax Commission.

6-13

June 11, 1935

FILED
43

Honorable M. J. Huffman
Prosecuting Attorney
Wright County
Hartville, Missouri

Dear Sir:

We have your request of May 23, 1935 for an opinion, which request is as follows:

> "I would appreciate it very much if you will send me your interpretation of paragraph 14 of Section 9854, Revised Statutes, 1929.
>
> "The County Court of this county take the position that the township assessors are only entitled to their necessary expenses when called to the county seat to meet with the official of the State Tax Commission as they did in this county some few days ago. However, the assessors claim mileage and per diem of $5.00 for the time spent."

Since your opinion calls for a construction of Subdivision 14 of Section 9854, R. S. Mo. 1929, and since that section deals with two classes of officers, namely, "county assessors" and "township assessors", each will be considered separately.

I.

COUNTY ASSESSORS.

The applicable portion of the statute to county assessors reads as follows:

> "The commission is empowered to call a group meeting of two or more assessors at such time and place as it may designate, due notice of which shall be given by the commission: * * For attending such meetings assessors shall be allowed a per diem of five dollars for the time actually spent, including coming to and returning from such meeting, and their railroad fare necessarily spent in going to and returning from said annual meeting. * * "

The term "assessor" is defined in Section 9976, R. S. Mo. 1929 as follows:

> "The term 'assessor' or 'assessors,' wherever used in this chapter, shall be held to mean and refer to county, township, city, town or district assessors, as the case may require."

It is, therefore, the opinion of this office that county assessors, under the above and foregoing statute, are entitled to a per diem of $5.00 per day for attending such meetings when called by the State Tax Commission, together with railroad transportation both ways.

II.

TOWNSHIP ASSESSORS.

The applicable portion of the statute to township assessors reads as follows:

> " * * PROVIDED, in counties under township organization the commission shall call a meeting of the township assessors at the county seat of said county at which meeting

> a representative of the commission shall be present; and provided further, the township assessors shall receive no compensation other than their necessary expenses in attending said meeting. * * "

Statutory terms with reference to compensation are to be strictly construed, and the following excerpt from State ex rel. v. Patterson, 152 Mo. App. 264, l.c. 268 is a terse statement of the rule:

> "The rule is well settled that a public officer cannot demand any compensation for his services not specifically allowed by statute, and that statutes providing such compensation must be strictly construed."

Furthermore, an officer in Missouri is presumed to render his services gratuitously unless some specific statutory authorization is found for the payment of such services. King v. Riverland Levy District, 279 S. W. 195, l.c. 196 (1926).

It is, therefore, the opinion of this office that township assessors are not entitled to a per diem for attending group meetings at the county seat called by the State Tax Commission.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
Acting Attorney General.

FER:PE

ATION OF MERCHANTS: Poultry company buying from farmers, fattening them and shipping in car lots is a merchant within the meaning of Sec. 10099 R.S. 1929; likewise grain elevators operating in same manner.

8-27

August 7, 1935.

FILED
43

Hon. Glen W. Huddleston,
Prosecuting Attorney,
Carroll County,
Carrollton, Mo.

Dear Sir:

This department is in receipt of your letter of August 2 wherein you make the following request for an opinion:

> "Please send me an opinion as to whether or not the following firms are subject to assessment on their property for merchant's tax.
>
> "The Stamper Poultry Co. buys poultry from the farmers and poultry dealers here in Carroll County and fattens them, and then ships this poultry, in car load lots, to market. The company contends that as it does not sell any of this poultry at retail here in Carroll County, it is not a merchant within the meaning and definition of the Mo. statutes of 1929, and therefore, should not be assessed for merchant's tax on this poultry.
>
> "I would, also, like to have an opinion as to whether or not grain elevators are subject to assessment for merchant's tax on the grain which they buy in small quantities and ship to market in car load lots. It is their contention that they are wholesalers in regard to this grain that is shipped in car load lots,

> and therefore, are not subject to assessment on it for the merchant's tax."

The question of whether or not the Stamper Poultry Co. and the grain merchants of Carroll County are merchants within the meaning of the law may be treated together, as they appear to be in the same position insofar as the merchant's tax may apply.

Sec. 10075, R.S. Mo. 1929 declares certain persons to be merchants, as follows:

> "Every person, corporation or copartnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant."

In the case of State of Missouri v. Whittaker, 33 Mo. 457, it was held that one who manufactures and sells is a merchant.

In the case of Kansas City v. Brewing Co., 98 Mo. App. 590, it was held that it is a mixed question of law and fact as to whether or not a manufacturer is a merchant.

Section 10099, R.S. Mo. 1929 construes the term "merchant" as follows:

> "The term 'merchant', as used in this article, shall be construed to include all merchants, commission merchants, grocers, manufacturer and dealers in drugs and medicines, except physicians for medicines used in their practice whether trading as wholesale or retail dealers."

In the case of Campbell Baking Co. v. City of Harrisonville, 50 F. (2d) l.c. 675 Sections 10075 and 10099, supra, and numerous definitions of "merchants" are discussed. The Court said:

"'Merchants of all kinds' is a broad designation. There is a statutory definition of merchant (Rev. St. Mo. 1929, Sec. 10075 and section 10099), which is as follows:

* * *

"This definition is in a taxing statute, but it is part of a statute having to do with an ad valorem property tax on the amount of 'all goods, wares and merchandise which they may have in their possession or under their control' (section 10077), and the license required is purely to aid in procuring the property tax--the fee therefor is nominal, being but 50 cents (section 10086). A necessity for an ad valorem tax of this character would be the location within the state of the goods taxed. This is not necessarily a definition of 'merchants of all kinds', as used in section 7046, which relates only to license or privilege taxes. As applied to privilege taxes, the term is defined as 'one making a business of buying and selling commodities; a trafficker; a trader.' Secondary meaning: 'One who carries on a retail business' (Viquesney v. Kansas City, 305 Mo. 488, 498, 266 S.W. 700, 703), and by this court as 'persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade'. (Union County Nat. Bank v. Ozan Lumber Co. (C.C.A.) 179 F. 710, 715.) Appellant sells bread within the City of Harrisonville and would therefore seem to be a merchant, because it is 'one making a business of * * * selling commodities' (bread) and one 'engaged in the business of * * * selling merchandise or other personal property in the usual course of trade.' Also see City of Kansas v. Vindquest, 36 Mo. App. 584. Appellant contends it is simply a manufacturer. But a manufacturer may, as to the articles made by him become a merchant when he sells them."

Further definitions, and the construction of said sections, are contained in the same decision in a dissenting opinion by Judge Van Valkenburgh in the following language (l.c. 676):

> "In the first opinion of this court, the expression 'merchants of all kinds' contained in Section 7046, Rev. St. Mo. 1929, granting power to cities of the fourth class to levy license taxes, was held to be a designation sufficient to include appellant, and to satisfy the requirements of section 7287, Rev. St. Mo. 1919. On rehearing, counsel for appellee, while seeking to sustain this classification on the theory of ejusdem generis (rejected, as the majority opinion correctly holds, by controlling decisions of the Missouri Supreme Court) in brief and argument placed greater dependence upon the contention that appellee was a peddler as specially designated in section 7046, Rev. St. Mo. The majority opinion holds that appellant is a merchant, as named in the statute, and comes within the express terms of the ordinance. In that opinion, which expressly holds that the Campbell Baking Company is not a peddler, appellant is nevertheless apparently viewed as an itinerant vender as defined in Singer Sewing Machine Co. v. Brickell, 233 U.S. 304, 34 S. Ct. 493, 58 L. Ed. 974. The decision of the majority depends upon the conception that appellant is a merchant within the statutory designation, and that its sales take place in Harrisonville. The definition of 'merchant' contained in Rev. St. Mo. 1929 (sections 10075 and 10099), which would exclude appellant, is rejected upon the rather fine distinction drawn between different kinds of taxing statutes. The general definition of a merchant contained in the Standard Dictionary is 'a person who buys and sells

commodities as a business and for profit; especially one who has a place of sale and stock of goods; a trader, a buyer, a shopkeeper; a storekeeper.' This does not differ materially from those definitions as applied to privilege taxes, used by the Supreme Court of Missouri (Viquesney v. Kansas City, 305 Mo. 488, 266 S.W. 700), and by this court (Union County National Bank v. Ozan Lumber Co., 179 F. 710, 715). But none of these definitions apply to the business of appellant as disclosed beyond dispute by this record. Appellant is essentially a manufacturer. It does not buy and sell. It maintains no stock of goods. It manufacturers upon orders of its regular customers, and delivers those orders by its own vehicles throughout its trade territory."

CONCLUSION

We assume, and in fact you state in your letter, that these dealers maintain that they are wholesale merchants due to the fact that they do no local retail business; therefore, in view of the above decision and the plain wording of Section 10099, supra, wherein the statute used the phrase "whether trading as wholesale or retail dealers", we are of the opinion that the firms mentioned in your letter are merchants within the meaning of the law relating to taxation of merchants, Chapter 59, Article 17, R.S. Mo.1929.

You have used the words "merchant's tax"; we assume that you refer to the above mentioned chapter and not to a merchant's license.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

FEES: Circuit clerk entitled to charge for certified copies of naturalization papers and marriage licenses.

10-10

October 8, 1935.

FILED 43

Mr. Virgil B. Hunt,
Clerk, Circuit Court,
Livingston County,
Chillicothe, Missouri.

Dear Sir:

This will acknowledge receipt of your letter which is as follows:

> "I have so many requests for copies of marriage license and certified copies of naturalization papers to be used by persons applying for old age pensions and would like to know if I am permitted to charge for these copies."

Section 11785, R. S. 1929, provides that

> "The clerks of the several circuit courts of this state * * * shall receive in all civil proceedings the following fees for their services:
> * * *
> For copies of records and papers, for every hundred words ..... $ .10
> * * *
> For certificate and seal ..... .50"

Section 11804, R. S. 1929, provides that

> "Recorders shall be allowed fees for their services as follows:
> * * *
> For recording every deed of instrument, for every hundred words .... $ .10
> * * *
> For every certificate and seal ..... .50"

The naturalization laws of the Federal Government found at page 3813, R. S. 1929, provide that the clerk in naturalization cases shall charge, collect, and account for certain fees, as follows:

> "(1) For receiving and filing a declaration of intention and issuing a duplicate thereof, $5:
>
> "(2) For making, filing and docketing a petition for citizenship, and issuing a certificate of citizenship if the issuance of such certificate is authorized by the court, and for the final hearing on the petition, $10."

The same naturalization laws found at page 3817, R. S. 1929, state:

> "It shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings, to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys herein specified; and a violation of any of the provisions of this section or any part thereof is declared to be a misdemeanor * * *."

Section 2979, R. S. 1929, provides:

> "The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return thereon * * *."

Section 1705, R. S. 1929, provides:

> "The record books of marriages to be kept by the respective recorders, in pursuance of the provisions of law, and copies thereof, certified by the recorder under his official seal, shall be evidence in all courts."

In the case of State ex rel. v. Board of Police Commissioners, 108 Mo. App. 98, l. c. 104, it is stated:

> "As contended by the appellant, an officer of the court claiming fees for services must be able to put his finger on some statute expressly allowing the fee he claims, and if he is unable to do so he is not entitled to the fees. (Citing cases.) And it is also true that statutes regulating costs should be strictly construed. But it is equally true that the Legislature has provided compensation in the way of fees to the clerks of the circuit courts for services which the law requires them to render and when it appears they have rendered such services they ought not to be deprived of the fees allowed for like services because the extraordinary and particular procedure in which the services were rendered is not specifically named in the statute."

It will be noted that the Federal statutes having to do with the fees that the clerk of the court may charge in naturalization proceedings limit and fix the amount of fees that may be charged for services therein, but that is quite a different question or subject-matter from your inquiry, which we construe to be, are you as circuit clerk and ex-officio recorder of deeds entitled to charge a fee for furnishing to another at his request a certified copy of naturalization papers or records on file in your office? The Federal statute does not pretend to regulate the fees that you in your official capacity may charge for furnishing certified copies of records of your office. It merely defines the amount of fees that may be charged by the clerk of the court in which the naturalization proceedings take place for the services performed by that clerk in the process of the naturalization of the alien.

Section 11785, R. S. 1929, by its terms defines the fees that the clerk of the circuit court shall charge "in all civil proceedings."

From an examination of the statutes, we have not found a statute in terms requiring the circuit clerk, as a part of the performance of his official duties, to furnish certified copies of naturalization papers, nor requiring the recorder or

circuit clerk and ex-officio recorder to furnish certified copies of marriage licenses. It would seem that the law contemplates that they are the logical parties to furnish certified copies if and when the same are furnished because they have charge of the records thereof, but it appears to us as unreasonable that they should be required under the present statutory law to furnish certified copies of either naturalization papers or marriage licenses without compensation therefor. If they were so required to furnish them, then their time might be entirely taken up by some person or persons who ordered from or asked them to furnish such certified copies. There would be nothing to prevent one person from going into the clerk's office and ordering a certified copy of each of those papers on file in the office. It appears to be the logical view that such an officer in furnishing certified copies of marriage licenses or naturalization papers acts in his individual capacity and is entitled to a reasonable compensation for the services he performs in so furnishing such certified copies. The statute above quoted which prescribes the rate of compensation that the official shall receive for the performance of the duties set forth by said statute would seem to be a reasonable measure of the fair value and worth of the compensation that such a clerk would be entitled to for furnishing certified copies of naturalization papers or marriage certificates.

CONCLUSION

It is our opinion that the section above quoted in the naturalization laws does not apply with reference to fixing or affecting the fees that may be charged by the circuit clerk in furnishing certified copies of naturalization papers, and further that the clerk in furnishing such certified copies of naturalization papers or in furnishing certified copies of marriage certificates is entitled to charge therefor at the rate of 10¢ per one hundred words thereof plus 50¢ for affixing his certificate thereto.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

ALIENS: Right to hold and dispose of real estate in Missouri.

Alien Siamese subjects may own real estate in Missouri.

October 9, 1935.

FILED
43

Honorable Cordell Hull
Secretary of State
Washington, D. C.

Le 892.5211/23

Sir:

Your letter of September 19th, 1935, addressed to the Governor of Missouri, relative to the rights of Siamese subjects - who are ineligible to American citizenship - to own land in Missouri, has been referred to this department for attention.

In your letter you request us to furnish excerpts from the laws of Missouri, which determine whether Siamese subjects may own or lease land in the State of Missouri, together with any supplemental information which may be pertinent to the inquiry. Accordingly, we set forth herewith excerpts from the Missouri laws, which are applicable to the question, namely:

Section 313, Revised Statutes of Missouri, 1929:

> "In making title by descent, it shall be no bar to a demandant that any ancestor through whom he derives his descent from the intestate is or has been an alien."

Chapter 121, Revised Statutes of Missouri, 1929:

> "Sec. 14011.--Aliens shall be capable of acquiring, by devise or descent, real estate in this state, and of holding, devising

or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States and residents of this state.

15-9

"Sec. 14012.--Any female born in the United States, owning real estate or any interest therein in this state, who shall marry an alien and reside in a foreign country, may, at any time, notwithstanding such marriage or residence, convey such real estate, or any interest therein, by deed, or may at any time devise the same by last will: Provided, the same be done in either case in conformity with the general laws of this state concerning the conveyance of real estate by deed and the making of wills.

15-30

"Sec. 14013.--It shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some state or territory of the United States, to hereafter acquire, hold or own real estate so hereafter acquired, or any interest therein, in this state, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts: Provided, that the prohibition of this section shall not apply to cases in

which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries; which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer.

15-31

"Sec. 14014.--No corporation or association, more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in this state: Provided, that nothing contained in this chapter shall be construed to forbid any person or corporation from acquiring an interest in any real estate in this state as cestui que trust or mortgagee in any deed of trust or mortgage taken in good faith to secure the repayment of any money lent upon such real estate and interest thereon, nor as assignee of such cestui que trust or mortgagee, nor to forbid the person or corporation lending such money or becoming such assignee from purchasing such real estate at its sale upon foreclosure of said deed of trust or mortgage, when the amount for which such property is sold at said sale does not exceed the amount due under said deed of trust or mortgage at the time of such sale and the costs of such foreclosure: Provided, however, that

all right, title or interest acquired by such person or corporation at such sale or foreclosure shall be forfeited to the state of Missouri unless such person or corporation shall in good faith sell all of such right, title and interest to a citizen of the United States, within six years after the person or corporation so purchasing at such sale or foreclosure shall have held the possession of such real estate according to the interest purchased or acquired by him or it at such sale or foreclosure.

"Sec. 14015.--All property acquired, held or owned in violation of the provisions of this chapter shall be forfeited to the state of Missouri, and it shall be the duty of the attorney-general, or circuit or prosecuting attorney of the proper city or county, to enforce every such forfeiture by bill in equity or other proper process. And in any suit or proceeding that may be commenced to enforce the provisions of this chapter, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights, either of the state or of the parties concerned, in any such proceeding arising out of the matters in this chapter mentioned."

What is now Section 14011 became the law of Missouri in 1872, and in 1895 Section 14013 was enacted restricting the right of aliens to own lands in Missouri.

The Supreme Court of Missouri in the case of Pembroke v. Huston, 180 Mo. 627, l. c. 639, had this to say relative to these sections:

> "The right of an alien to acquire and hold real estate has been the subject of legislation in this State, from time to time, from an early date, the earlier statutes conferring qualified rights in that respect upon him.
>
> "In 1872 our General Assembly enacted that: 'Aliens shall be capable of acquiring, by purchase, devise or descent, real estate in this State, and of holding, devising or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States and residents of this State.' That statute passed into the revision of 1879 as section 325 and into that of 1889 as section 342, and was the law when the plaintiff acquired title to the Nodaway county land, and was the law until 1895, when the act which is now sections 4764-5-6, above quoted, was enacted and which was the law when the transactions in question occurred.
>
> "The act of 1872 repealed those features of the common law which imposed disabilities on an alien in respect of his capacity to acquire and hold real estate. While that statute was in force an alien had as much capacity to acquire and hold real estate as a citizen had. But after an experience of more than twenty years

under the operation of that statute our General Assembly concluded to change the policy of the State in that particular.

"As the act of 1872 had repealed the common law on that point, it was at least doubtful, under section 4177, Revised Statutes 1899, if a mere repeal of that act would restore the common law, even if the Legislature had intended to restore it in its original form and effect; it was, therefore, doubtless deemed necessary in order to accomplish its purpose that the Legislature should by affirmative act withdraw from the alien the right that had been conferred on him by the act of 1872. When the Legislature in the act of 1895 said it shall be unlawful for an alien to acquire land by purchase, it did not mean that an alien in taking a deed to land was to be regarded as a lawbreaker or one guilty of an offense, but it only meant that the right that had been conferred on him by the act of 1872 was withdrawn, and that the disabilities that the common law had formerly imposed were now to be imposed by statute, except as in the statute itself otherwise provided. Some of the words of the statute give plausibility to the contention that title can not pass to the alien at all, the words being that it shall be unlawful for the alien 'to hereafter acquire,' etc., but when those words are taken with the immediate context that idea disappears. The language is that

> it shall be unlawful for the alien 'to hereafter acquire, hold or own real estate so hereafter acquired.' The sense is awkardly expressed; there could be 'no real estate so hereafter acquired' if we give literal meaning to that part of the sentence which says that it shall be unlawful 'to hereafter acquire' such property. This meaning is further shown by the language in the beginning of Section 4766: 'All property acquired, held or owned in violation of the provisions of this chapter shall be forfeited to the State of Missouri,' etc.
>
> "That is an express recognition that real estate might be acquired by an alien after the passage of the act, but that whenever the State called for it the alien should surrender it. That is just what the common law was on that subject.
>
> "The act of 1895 was intended to reinstate the common law on the subject of the acquiring by purchase of real estate by an alien; under that statute an alien can take by purchase a defeasible title and hold it subject to the same conditions that the common law imposed."

From the above and foregoing statutes and the above case construing same, it is our conclusion that alien Siamese subjects - who are ineligible to American citizenship - may own and lease lands in Missouri.

Section 14015, R. S. Mo., 1929, quoted above, imposes the same conditions on the alien in the ownership of lands as was imposed by the common law, that is, he has

a defeasible estate subject to forfeiture only by the attorney-general, or circuit or prosecuting attorney of the proper city or county, to enforce such forfeiture. The proviso in Section 14013, R. S. Mo., 1929, recognizes and reaffirms the supreme treaty-making powers of the United States government, securing to aliens the right to hold or dispose of lands in the United States as such treaty so provides.

It is our opinion, therefore, that Siamese subjects, although they are ineligible to American citizenship, yet have the right to hold and dispose of lands in Missouri, subject to forfeiture by the State, and subject to the treaty-making powers of the United States government.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

SCHOOLS: County Superintendent must pay for clerical hire under Sec. 9467 from his own funds. County Court pays for necessary printing.

11-6

November 1, 1935.

FILED
43

Honorable Glen W. Huddleston,
Prosecuting Attorney,
Carrollton, Missouri.

Dear Sir:

We are in receipt of your inquiry of October 8, 1935, which is as follows:

> "Some years ago the question arose as how greater economy could be effected in the office of the County Superintendent in the printing of materials necessary for the conduct of the office. At this time, the printing work was sent to a public stenographer for mimeographing and a part of it was sent to the local printing companies.
>
> "In order to effect a saving, the County Court purchased a mimeograph machine and allowed the County Superintendent the privilege of securing some one to come to the office and do the work there at a flat rate of so much per month. By this plan a savings was effected amounting to from 50% to 75% of the cost of the work which was sent out.
>
> "When the audit of Carroll County was made several months ago, the auditor stated: 'It is claimed that this $30.00 per month is allowed for multigraph work and the amount is paid as a salary and in many instances as is shown on the warrant register as "clerk hire" and it

is noted that this employee does clerical work including the writing of letters, answering the telephone, and otherwise performing the duties of a general clerk in the office. This salary..... was approved and ordered paid by the County Court in violation of Section 9467. It is recommended that the expense of this office be so arranged that the amount paid will not exceed the amount allowed under Section 9467 R. S. Missouri 1929.'

"In consequence of the auditors interpretation the entire four years of pay for such mimeographic service is charged personally to the County Superintendent even though the warrants are written directly to the girl doing the work and the bills as sent in for this service by the County Superintendent in all cases stated that the services were for 'mimeographic service.'

"Since the entire sum of the money paid to the girl for these mimeographic services during the past four years has been charged against the County Superintendent he is planning to abandon the policy of keeping a girl in the office to do this work and will send the work out as provided in Section 9456 R. S. 1929, which will incur a much greater expense to the county; since we have on hands the necessary mimeographic equipment for doing such printing we regret to change back to the old plan of sending all necessary printing matter outside to have it done.

"Will you kindly advise whether or not an arrangement of doing the mimeographic work in the office of the County Superintendent is illegal as indicated by the auditor in his report?"

Section 9456, R. S. Mo. 1929, in part, speaking of the duty of the county court with reference to supplying printing to the county superintendent, states the following:

> " * * * and said county court shall supply the superintendent with all necessary record books, stationery and postage stamps for properly conducting the business of his office, and shall allow all necessary printing of notices and circulars of information, the same to be paid for by warrant drawn upon the county treasurer."

Section 9467, R. S. Mo. 1929, in part, states the following:

> "That the county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for traveling expenses and necessary clerical assistance, provided such allowance shall not exceed three dollars ($3.00) annually for every teacher under his jurisdiction. The county court shall, upon presentation of his bill properly setting forth his actual expenditures for traveling expenses and clerical hire, draw a warrant upon the county treasury for the payment of same."

The statute appears to contemplate that the county superintendent of schools may employ such clerical help as he desires, within the limitations of Section 9467, supra, the same to be presented to the county court, and the bill shall set forth the clerical hire, and thereupon the county court shall draw a warrant upon the county treasury for its payment.

We do not find any other section of the law authorizing the county superintendent of public schools to employ clerks than the one above referred to.

Section 9456, supra, appears to authorize the county superintendent to have printed all necessary notices and

circulars of information of his office, and directs that the same shall be paid for by a warrant drawn on the county treasurer.

CONCLUSION

Our opinion is that mimeograph work is printing, and if the work which was paid for as inquired about by you was necessary printing of notices or circulars of information, and was required in the proper administration of said office of county superintendent of schools, then it should be paid by the county in the manner hereabove set forth. If the payments complained of in the auditor's report are for clerical hire, then they must be paid out under the provisions of Section 9467, supra, and if otherwise paid out they are unlawfully so paid.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

TAXATION: Assessor only entitled to change his assessment list of ownership to the extent that the "land list" kept by the recorder shows the change. He may not substitute other names, although they be owners, if the same are not shown on the recorder's "land list".

41-13

November 9, 1935.

FILED
43

Honorable B. L. Huston,
County Assessor,
Saline County,
Marshall, Missouri.

Dear Sir:

We are in receipt of your inquiry which is as follows:

"I would appreciate your opinion in regard to a matter of importance to my office which is as follows:

"Is it illegal for me to change the name of a real-estate transfer from one person to the present owner after the first named person has turned in an assessment list which bears all property owned the first day of June and including said property in question on his list?

"If I can legally make a change on the real estate book after I am certain that the ownership of this property has changed, by writing in the name of the present owner on said real estate book over the past owners name, then my books will be more correct and will facilitate the work for all offices so concerned.

"As you probably know, we assess this year for next years tax collections and therefore the real-estate changes that will happen in the meantime will be several and if I can legally change my

> real-estate book to conform to said changes as they transpire, it will keep my tax records up to date and of course more nearly correct."

Section 9780, R. S. Mo. 1929, in part provides:

> " * * * and all lands that can be described by numerical order, shall be placed in the 'land list', with the owner's name, if known, and if not, then the name of the original patentee, grantee or purchaser from the federal government, the state or county, as the case may be, opposite thereto."

Section 9782, in part, provides:

> "The 'real estate book' shall contain all lands subject to assessment. It shall be in tabular form, with suitable captions and separate columns. The first column shall contain the name of the owner or owners, if known; if not, the name of the party who paid the last tax; if no tax has ever been paid, then the name of the original patentee, grantee or purchaser from the federal government, the state or county, as the case may be, opposite thereto; the second column shall contain the residence of the owner;" the third column shall contain a description of the land, and the fourth column shall contain the actual cash valuation.

Said section further provides that when any person shall be the owner or original purchaser of land, the same shall be assessed as one tract, and that

> "The assessor shall arrange, collect and list all lands owned by one person in the county, under his name and on the same page, if there be room to contain it, and if not, on the next and following leaf,"

and also provides that the assessor shall consolidate all lands owned by one person in a square or block into one tract, lot, or call, and provides that

> "At the close of each of the owners' lists, the assessor shall place all the lands that appear to belong to the said owner, which cannot be properly described by numerical order, as contemplated in this section, which shall be otherwise properly described, indicating the quantity and location thereof. It shall be the further duty of the assessor, each year, in compiling the book provided for above, to procure the descriptions of the land and the names of the owners from the book known as and denominated 'the land list,' kept by the recorder as provided for in this chapter, carefully noting and accurately entering in their proper places all changes that may have occurred, either in the names of owners or descriptions of land since the last 'real estate book' was compiled. This shall be done each time the 'real estate book' is compiled."

Section 9784, providing that the "land list" be kept by the county recorder, among other things, provides:

> "The recorder shall, whenever any deed conveying the title to real estate in the county is left with him for record, before recording the same, enter in the blank space in the 'land list,' opposite and next to the description of the land so conveyed, the name of the purchaser and date of purchase, and if there be any change in the description of the land from that already entered in the 'land list', he shall also note that variance by stating what part or parcel of the original has been so conveyed."

This section also provides that for failure to comply with its requirements in so doing, the recorder shall be liable on his bond for not less than $25.00 or more than $100.00 for each neglect to enter said transfers, and provides that if, in making up the "real estate book", the assessor finds that the recorder has failed to do the things above set forth, he shall at once notify the county attorney, who shall forthwith commence suit against the recorder and his bondsmen.

Section 9791 provides that

> "No assessment of property or charges for taxes thereon shall be considered illegal on account of any informality in making the assessment, or in the tax lists * * *."

Section 9793 provides that

> "Each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed. The assessment of land or lots in numerical order, or by plats and a 'land list' in alphabetical order, as provided by sections 9780 and 9781, shall be deemed and taken in all courts and places to impart notice to the owner or owners thereof, whoever or whatever they may be, that it is assessed and liable to be sold for taxes, interest and costs chargeable thereon; and no error or omission in regard to the name of any person, with reference to any tract of land or lot, shall in anywise impair the validity of the assessment thereof for taxes."

In the case of State ex rel. McKee v. Clements, 281 Mo. 195, discussing the question of assessments, the Supreme Court of this state said, l. c. 200:

> "Read and construed together the three sections seem to mean, that land shall be assessed in the name of the owner, if known; if not, in the name of the party who paid the last

tax; if no tax has ever been paid, then in the name of the original patentee, etc., but each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed, and no error or omission in regard to the name of any person, with reference to any tract or lot, shall in anywise impair the validity of the assessment thereof for taxes. It is said that a tax is assessed against the owner, that he and not his property pays the tax, and that the property is resorted to merely for the purpose of ascertaining the amount of the tax. (Gitchell v. Kreidler, 84 Mo. 472; State ex rel. v. Snyder, 139 Mo. 549.) Yet such tax so far as it is assessed against him on account of his ownership of real estate cannot be recovered as and for a debt owing from him in an action at law. (Carondelet v. Picot, 38 Mo. 125.) Under our system there are but two methods of collecting a real-estate tax. One is a distraint of the owner's personal property, and the other is the enforcement of a lien on the real estate on account of which the tax is assessed. It may be conceded that such a tax could not be collected by distraint of the owner's personal property, unless it was assessed against him, that is, unless the land was assessed in the owner's name, but, so far as the creation of a lien on the land is concerned, it is immaterial in whose name it is assessed. By said Section 11385 each tract of land is chargeable with its own taxes no matter who the owner is or in whose name assessed. The assessment of land or lots in numerical order, or by plats and a 'land list' in alphabetical order, as provided by preceding sections, imparts notice to the owner that it is assessed and liable to be sold for the taxes chargeable thereon. This and related

> sections make the taxes a charge on the land under all circumstances, regardless of who the owner or prior lienors may be, regardless of the name or names in which it is assessed, and regardless of any error or omission in that respect."

And at page 201 the court said:

> "There is no question here of the failure of the assessor to use diligence to ascertain the name of the owner at the time he made the assessment; the validity of the assessment is not dependent upon that. Whose, if any one's, dereliction caused the error or omission is wholly immaterial. The statutory corrective for the failure of the assessor to discharge his duty in carefully entering the names of the owners in the 'real estate book' is an action on his bond. * * * Defendant knew that taxes had been assessed against her lots, that they had not been paid, and that the amount thereof was easily ascertainable. She was in no respect prejudiced because they were assessed in the name of another."

It will be noted that Section 9782 places the duty upon the assessor, "each year, in compiling the book provided for above, to procure the descriptions of the land and the names of the owners from the book known as and denominated 'the land list', kept by the recorder as provided for in this chapter."

By the express statutes, as well as under the decisions of the courts, the tax on real estate becomes a lien upon that real estate regardless of whether it is assessed in the name of the record owner or some other person.

The statutes appear to contemplate that the assessor shall have charge of and make up his assessment book during the time the statutory law prescribes to the assessor for compiling his assessment book and records. The office of assessor is prescribed by the State Constitution. He has the right to place what he deems to be a fair value upon the property. He has the duty placed upon him by Section 9782 of placing in the first column on his "real estate book" the name of the owner, if known; and if not known, then the name of the party who paid the last tax, etc., as therein further provided, but the law-

making body marked his course as to what alterations could properly be made after conveyances had been executed and recorded in the recorder's office, and that duty is to "procure the descriptions of the land and the names of the owners" from the book kept by the recorder and denominated "the land list". The Legislature in so providing has definitely outlined and marked the limit of authority of the assessor in this respect.

For the purpose of liability for the payment of real estate taxes, it is of no consequence that the first named person whom you speak of in your inquiry has turned in an assessment list which includes certain real estate owned by him at the time he turned in his assessment list, or on the first day of June, and later sold to another. If the grantee therein has had his deed recorded, then it became the duty of the recorder of the county to show that transfer in his "land list" as required by Section 9784. If he failed to do that, it would appear that he is liable on his bond for the failure, but that does not invalidate the tax, as is held in the case of State ex rel. McKee v. Clements, supra, but the assessor is not permitted to go to any other source than such "land list" so compiled and kept by the recorder in order to procure the correct name of the record owner of the real estate.

CONCLUSION

It is our opinion that you, as county assessor of Saline County, Missouri, have the right to substitute the name of the more recent owner of real estate, as shown by the "land list" kept by the recorder, in lieu of the name of some other person that you have theretofore indicated on your book to be the owner thereof, but that you are not permitted to go outside of or beyond said "land list" so kept by the recorder in order to change the name of the owner of real estate assessed by you.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

OFFICERS: Right to be both Judge of Probate and Justice of the Peace.

2-17

February 8, 1935.

FILED
44

Hon. David E. Impey,
Prosecuting Attorney,
Houston, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of January 16, 1935, such request being in the following terms:

> "The Prosecuting Attorney for Texas County requests the opinion of the Attorney General upon the following question:
>
> (1). May one, being a justice of the peace, who has been elected and qualified and serving as Judge of Probate of his county, continue lawfully to act as justice of the peace?
>
> (2). May one, being Judge of Probate of his county, run for and, if elected, serve as justice of the peace of the township of his residence?"

"At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

It was said by Judge Folger in People ex rel. v. Green, 58 N. Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility

> 'from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.' " State ex rel. Walker v. Bus, 135 Mo. 325, 338, 36 S. W. 636.

An examination of the statutes relating to probate judges and justices of the peace has revealed nothing which would make it incompatible or improper for the same person to hold both offices. The Constitution of Missouri, Article IX, Section 18, which prohibits in certain instances the holding of two offices by the same person, expressly excepts justices of the peace from its provisions, thus indicating that a justice of the peace is contemplated as not being necessarily confined to holding only that office. As to probate judges, R. S. Mo. 1929, Section 2053, provides that "the judge of probate, if otherwise qualified, may practice as an attorney and counselor at law in any of the courts of this state, except his own; * * *", thus indicating that a probate judge is not required to give all of his time to the duties of his office, but is entitled to function in other capacities.

In conclusion, it is our opinion that a justice of the peace who has been elected and qualified as judge of probate, could lawfully continue to act as justice of the peace, or, while holding the office of judge of probate, could be a candidate for the office of justice of the peace, and if elected, could legally serve as justice of the peace, while continuing to hold the office of judge of probate.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TAXATION AND REVENUE - BANK STOCK: Right to deduct interest from tax free bonds in computing value of shares under R. S. Missouri, 1929, Section 9765.

February 28, 1935.

FILED
44

Hon. David E. Impey,
Prosecuting Attorney,
Texas County,
Houston, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of January 16, 1935, such request being in the following terms:

> "Is a bank, incorporated under the laws of Missouri, in making out the statement of value of the shares of stock therein in compliance with Section 9765, entitled to deduct from the reserve funds, undivided profits, premiums and earnings of the bank such amount thereof as has been received as interest on Liberty Bonds and/or other tax free securities?"

I

CONSTRUCTION OF THE MISSOURI STATUTE

R. S. Missouri, 1929, Section 9765, provides in part as follows:

> "Persons owning shares of stock in banks, or in joint stock institutions or associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, company, institution or association; and such shares,

> reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock."

R. S. Missouri, 1929, Section 9766, provides as follows:

> "The taxes assessed on shares of stock embraced in such list shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares, respectively, and shall be paid before a transfer thereof can be made."

These two statutes make it clear that in assessing the value of the shares of stock in banks, all the assets of the corporation are to be considered except the real estate, for if the terms of Section 9755, "all reserved funds, undivided profits, premiums or earnings", do not cover all such assets, then surely the following phrase in such section, which is "and all other values", is sufficiently comprehensive. Furthermore, the express deduction of real estate from total assets would impliedly exclude other unnamed deductions. Therefore, money received as interest on Liberty Bonds or other tax free securities would not be deductible by the terms of the statute.

II

CONSTITUTIONALITY OF THE MISSOURI STATUTE

The Supreme Court of the United States has held that a state statute could assess to the stockholders shares of stock in a bank, and measure the value of such shares by assets exempt from state taxation. In the case of DesMoines National Bank v. Fairweather, 263 U. S. 103 (1923) the court in discussing a statute of the State of Iowa, which was substantially the same as the Missouri statute in question, said:

> "The next contention-that the statute subjects securities of the United States to taxation contrary to exempting laws of the United States in that it requires that the assessment be based on the aggregate of the capital, surplus and undivided

> earnings without any deduction or allowance on account of the investment in such securities-confuses the shares, which are the property of the stockholders, with the corporate assets, which are the property of the bank. It is quite true that the States may not tax such securities, but equally true that they may tax the shares in a corporation to their owners, the stockholders, although the corporate assets consist largely of such securities, and that in assessing the shares it is not necessary to deduct what is invested in the securities. The difference turns on the distinction between the corporate assets and the shares,-the one belonging to the corporation as an artificial entity and the other to the stockholders." (263 U.S. 112)

Long before the above decision the Supreme Court of the United States had upheld the predecessor of the present Missouri statute which is in question, in the case of Lionberger v. Rouse, 9 Wall. 468 (1870) which arose on a writ of error to the Supreme Court of Missouri (43 Mo. 67) in which the Supreme Court of the United States said:

> "It is no longer an open question in this court, since the decision in the case of Van Allen v. The Assessors, that the shareholders in a National bank are subject to State taxation, although the entire capital of the bank be invested in the bonds of the United States, which cannot be taxed by State authority."

See also Home Savings Bank v. DesMoines, 205 U. S. 503 (1907). That the Supreme Court of Missouri agrees with this construction is evident from its opinion in State ex rel Campbell et al. v. Brinkop, 238 Mo. 255, 143 S.W. 444 (1911). See also State ex rel v. Gehner, 319 Mo. 1048, 5 S.W. (2d) 40 (1928) in which a bank had claimed a deduction under the statute in question for United States bonds which was disallowed by the Board of Equalization, and the right to make such deduction was not even argued in the Supreme Court of Missouri, the argument and opinion of the court being confined to a consideration of other phases of the ruling of the Board of Equalization.

If United States bonds are not deductible under Section 9765, then a fortiori money received as interest thereon would not be deductible in the hands of the bank.

In conclusion it is our opinion that for the assessment of shares of bank stock under R. S. Missouri, 1929, Section 9765, no deduction can be made for money held by such bank which has been received as interest on United States bonds or other tax exempt securities, in computing the valuation of such shares of stock.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

DELINQUENT AND BACK TAXES - Section 9952, Laws of Mo. 1933, p. 429 repeals by implication Sec. 9948, R.S. Mo. 1929.

43

March 19, 1935.

FILED
44

Hon. David E. Impey,
Prosecuting Attorney,
Texas County,
Houston, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion based on the following facts contained in your letter:

> "****Under Sec. 9948, R.S. 1929, provision is made for the making of a consolidated back tax book in the odd numbered years by the county clerk.
>
> Under the act of 1933, Laws 1933, page 425, the foregoing Sec. 9948 (and nowhere else so far as I have found) is not directly Sec. 9952, R.S. 1929 is repealed and a new Sec. 9952 enacted in lieu thereof, and by said section as it now exists provision is made for the making by the collector of a book containing a statement of delinquent taxes, naming the years delinquent, etc., which record of the list of delinquent taxes in the collector's office is declared to be such 'back tax book', wherever that those words are found in laws pertaining to the collection of taxes on delinquent lands.
>
> In Texas County, having township organization, the county treasurer is collector. Will you therefore advise: (1) Is a 'consolidated back tax book' to be made? and (2) if so, by whom?"

In its last analysis the question contained in your letter relates to Sections 9948, R.S. Mo. 1929 and 9952, Laws of Mo. 1933, page 429 and we have before us these questions: (1) Does the new section, 9952, repeal by implication the old section? (2) Are they in pari materia? (3) Does Section 9952 repeal by implication parts of Section 9948?

Section 9948, R.S. Mo. 1929 provides as follows:

> "Within thirty days after the settlement of the collector, in the odd numbered years, the several county clerks in each county in this state, and in such cities, the register, city clerk or other proper officer, shall make, in a book to be called the 'back tax book', a correct list, in numerical order, of all tracts of land and town lots on which back taxes shall be due in such county or city, setting forth opposite each tract of land or town lot the name of the owner, if known, and if the owner thereof be not known, then to whom the same was last assessed, the description thereof, the year or years for which such tract of land or town lot is delinquent or forfeited, and the amount of the original tax due each fund on said real estate (and the interest due on the whole of said tax at the time of making said back tax book, together with the clerk's fees then due), in appropriate columns arranged therefor, and the aggregate amount of taxes, interest and clerk's fees charged against each tract of land or town lot for all the years for which the same is delinquent or forfeited; said back tax book, when completed, shall be delivered by said clerk or other proper officer to the proper collector of the county or such city, for which he shall take duplicate receipts, one of which he shall file in his office and the other with the state auditor, and the clerk or other proper officer shall charge such collector with the aggregate amount of taxes, interest and clerk's fees contained in said 'back tax book'. In all such cities the said 'back tax book' shall be made out, in alphabetical order,

> in the name of the owner, if known; and if the owner be not known, then in the name of the person to whom such tract or lot was last assessed. All taxes, interest and clerk's fees hereafter contained in the 'back tax book' herein described shall bear interest from the time of the making out of said 'back tax book' at the rate of ten per cent. per annum until paid. In computing interest under this article, a fraction of a month shall be counted as a whole month."

We shall first deal with the question of whether or not Section 9952, infra, is in pari materia with Section 9948, supra. In the case of McVey v. McVey, 51 Mo. 406, it was decided that "the settled rule of construction is, that if by any fair interpretation, all the sections of the law bearing on a given topic can stand together, then there is no repeal by implication."

In the case of State ex rel. v. Spencer, 164 Mo. 48, the Court said (l.c. 53-54):

> "****Repeals by implication are not favored. This is now axiomatic in the law in this state. **** A later statute will not repeal a prior one unless there is such repugnancy between them that the two cannot stand together or be consistently reconciled. **** If two statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be read together and effect given to both."

In the case of Decker v. Diemer, 129 S.W. 936, the Court said:

> "Repeals by implication are not favored and both statutes will be permitted to stand if it can be done on any reasonable construction."

The Legislature, in repealing Section 9952, R.S. Mo. 1929 and enacting the new section, 9952, Laws of Mo. 1933, page 429, appears to have abandoned the entire content of the original section and changed completely the substance. The old section was entitled "Enforcement of payment of taxes by suit, etc.", while the new section is styled "Shall record delinquent tax property." Section 9948 states, among other things that

"within thirty days after the settlement of the collector, in the odd numbered years ****", while Section 9952 contains the provision "between the first of January and the first of July in the year 1934 and annually thereafter". Section 9948 states that "the county clerk shall make in a book to be called the 'back tax book'", while Section 9952 states "such 'back tax book' and the recording of same by the collector and certification by the county clerk as herein provided, shall be construed as a making of such 'back tax book' of delinquent real estate, lands and lots."

While Section 9952 in enumerating the duties of the county collector with reference to the recording of delinquent tax property, in many instances is similar to the duties devolving upon the county clerk in Section 9948, yet we are of the opinion that in addition to the apparent conflicts and repugnancies as heretofore set forth, along with many others which might be mentioned, the statutes cannot be read in pari materia or the provisions and life of both cannot be preserved.

We shall next consider whether or not Section 9952, Laws of Mo. 1933, page 429 repeals Section 9948, R.S. Mo. 1929 by implication. We agree with you that in no instance has the Legislature referred to a direct, specific or express repeal of Section 9948.

In the case of Boone Co. Home Mutual Insurance Co. v. Anthony, 68 Mo. 424, the Court said (l.c. 428):

> "There are three ways in which a statute may be repealed: First, by a repealing clause; second, by such repugnance that the two laws may not, in reason, both stand; third, by a revision of the whole subject matter of the former law, which is evidently intended as a substitute for it."

In the case of State ex rel. Matacia v. Buckner, 300 Mo. 359, the Court said (l.c. 367):

> "Repeals by implication are not dependent upon the presence in titles or acts under them of express mention of the matter so repealed. Repeal by implication is a result of repugnancy between an earlier and a later act. If the later act is passed under a title which, independently considered, is sufficient when tested by Section 28,

> Article IV of the Constitution, it repeals every other part of act which is so repugnant to it that the two cannot stand together."

In the case of State ex rel. Vastine v. McDonald, 38 Mo. 529, the Court said (l.c. 531-532):

> "A subsequent statute which is clearly repugnant to a prior one necessarily repeals the former statute, although it does not do so in terms."

Under the provisions of the enactment of 1933 known as the Jones-Munger Law, an entirely new system is established for the collection of delinquent real estate taxes. It should be noted that this new delinquent tax law applies only to the collection of delinquent real estate taxes and does not purport to affect the method of collecting personal taxes, railroad taxes, or levee and drainage district assessments.

Section 9948, R.S. Mo. 1929 provides for a consolidated tax book in the odd numbered years. This section was an integral part of the procedure for collecting delinquent taxes under the old system and it is to be noted that this section confines itself entirely to "all tracts of land and town lots on which back taxes shall be due." Under the old system this consolidated back tax book was made each two years. However, Section 9952, Laws of Mo. 1933, page 429 provides as follows:

> "Between the first of January and the first of July in the year 1934 and annually thereafter, and immediately upon the effective date of this act, the county collector shall make out and record, in a book to be provided for that purpose, a list of lands and lots, returned and remaining delinquent for taxes, including therein the delinquent taxes of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state returned delinquent

to the county collector, separately stated, describing such lands or lots as the same are described in the tax books and said delinquent returns, as corrected under sections 9938 and 9942, and charging them with the amount of delinquent tax and naming the years delinquent, separately stated, and in addition thereto a penalty of ten per centum on such tax delinquent for the preceding year and an additional annual ten per centum on taxes for each year prior to the preceding year, and shall certify to the correctness thereof, with the date when the same was recorded, and sign the same by himself, or deputy, officially; provided, however, if taxes are paid on land or lots delinquent for the preceding year at any time prior to sale thereof as in this act provided, the per centum of penalty added shall not exceed one per centum per month or fractionaly part thereof or ten per centum annually. It shall be the duty of the county clerk and county collector to compare the collector's record of such list of delinquent lands and lots as corrected with the corrected "delinquent land list" made pursuant to sections 9938 and 9942, and the county clerk shall certify in the 'delinquent land list' on file in his office that same has been properly recorded in the collector's office and shall attach a certificate at the end of the record of such list of delinquent lands and lots in the collector's office that such record contains a true copy of the 'delinquent land list' on file in his office. And where the words 'back tax book' are now used in laws pertaining to the collection of taxes on delinquent lands, real estate and/or lots, the record of the list of delinquent lands and lots in the collector's office under the provisions of this act shall be held to be (where applicable and except as to city or town 'back tax book')

> such 'back tax book', and the recording of same by the collector and certification by the county clerk as herein provided shall be construed as a making of such 'back tax book' of delinquent real estate, lands and lots. Said collector shall be charged with the taxes, penalty and interest shown on such record of the list of delinquent lands and lots."

It is clear that under the new system a delinquent list of lands and lots is made for each year, which list is all inclusive and contains memoranda on all years' taxes which are delinquent. Under this new system each delinquent list of lands and lots is a consolidated list and contains all information. Itis to be noted that Section 9948 of the 1929 Revision provides for the clerk of the county court to prepare and make this consolidated tax book.

Section 9945, Laws of Mo. 1933, page 426 provides:

> "Hereafter as often as any delinquent tax list or tax bills shall be received by the county court or other proper tribunal or officer from collectors at their annual settlements, the same, except as to the list of delinquent lands, shall be made by the county clerk, and as to the delinquent lands the same shall be entered of record in the county collector's office by the collector, if in counties, and if in cities containing a population of five thousand or more inhabitants, by the proper officer, into a 'back tax book', containing the same facts and in the same form as provided in sections 9948 and 9952, as to lands, city and town lots now delinquent; except that in counties where an alphabetical arrangement of the 'land list' in the assessor's book shall have been required by an order of the county court, such collector's record of the delinquent land list shall be made out in alphabetical order, in the name of the owner, if known,

> and if the owner be not known, then in the name of the person to whom the tract or lot was last assessed; the collector shall proceed to collect the taxes due thereon as provided in this chapter in reference to taxes now delinquent; all taxes hereafter becoming delinquent shall bear interest uhtil paid as provided by section 9952, and shall also be subject to the same fees, commissions and charges as in this chapter provided for taxes now delinquent, except that for making and recording the delinquent land list, the collector who makes such book and the clerk or other officer who makes the 'back tax book' shall receive only ten cents per tract, city or town lot, and the clerk for comparing and authenticating such record of the delinquent list of land and lots as made by the collector shall receive five cents per tract, city or town lot."

By virtue of this section, it is now the duty of the county collector to enter of record the list of delinquent lands. The county clerk no longer prepares this list of delinquent lands and under the new law no compensation is allowed the county clerk for making any such record. Under the provisions of Section 9946, supra, and 9969, page 429, Laws of Mo. 1933 the county collector now receives the sums per tract for making the list of delinquent lands and lots that the county clerk heretofore received for making the back tax book.

The provisions of the 1933 law for a list of delinquent lands and lots which each year consolidates all delinquent taxes against any one tract, leaves Section 9948 of the 1929 revision without any force or vitality in respect to the collection of state and county taxes.

CONCLUSION

As hereinbefore stated, Section 9948, R.S. Mo. 1929 is not expressly repealed by Section 9952, Laws of Mo. 1933, page 429, but the two sections appear to be clearly in conflict and repugnant to each other. The new section, 9952, is the later

or subsequent section; hence it will take precedence and by implication repeal Section 9948 insofar as state and county real estate taxes are concerned.

It is further the opinion of this department that Section 9948, R.S. Mo. 1929 prescribes a procedure unnecessary and foreign to the system of delinquent tax collection set up by the Jones-Munger Act, and as the latter act is a complete system and a later enactment, it should take precedence over the former law.

This conclusion is fortified by the fact that the making of the delinquent land list is transferred from the county clerk's office to the county collector's office and that under the new law no compensation is provided for the county clerk as compensation for performing the services required by Section 9948, R.S. Mo. 1929. The consolidated back tax book contemplated by Section 9948 is not now required to be made insofar as state and county real estate taxes are concerned.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

TAXES--STATE LIABILITY: Legislature has no constitutional power to authorize State debts in form of special municipal assessments on real estate of the State.

April 22, 1935.

FILED
44

Mr. Truman L. Ingle, Superintendent
Missouri School for the Deaf
Fulton, Missouri

Dear Sir:

Your request for an opinion, dated April 12, 1935, is as follows:

> "We have received from the City of Fulton, a city of the third class, a Tax Bill for the amount of $360.00 for the improvement (paving) of one of the streets passing our school campus.
>
> "There is a doubt in my mind as to whether or not we are liable for this assessment.
>
> "Will you please let me know whether or not the state can be taxed for street improvement made by the city, on streets on which state property fronts."

Article XI, Section 16 of the Missouri Constitution of 1865 exempted from taxation property belonging to the United States, the State, counties, municipal corporations, and public school property. In the Constitution of 1820 there was no limitation placed upon the Legislature in their power to grant exemptions to taxation and that condition continued until the Constitution of 1865. In 1875 our present Constitution became the law, and Article X, Section 6 provides:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any

> such city or town, to the extent of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Article X, Section 7 of the Missouri Constitution provides:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void.

Thus we see that under our present Constitution, property "of the State" is exempt from taxation. We also see the tendency of the Constitution of 1875 was to take from the Legislature some of their common law prerogative of exemption from taxation, which prerogative had been freely exercised in prior years.

We see also, that exemptions from taxation other than enumerated in Article X, Section 6 are void.

Section 9688 R. S. Mo. 1929, provides:

> "The 'Missouri school for the blind' at St. Louis, and the 'Missouri school for the deaf' at Fulton shall be regarded, classed and conducted wholly as educational institutions of the state."

Section 9689 R. S. Mo. 1929, provides:

> "The government of each of these schools shall be vested in a board of managers, composed of five mem-

> bers, appointed by the governor with the consent of the senate. The members of said board shall be appointed on or before the first day of February, in the odd numbered years, by twos and threes, as may be required for each of said boards, and they shall hold their office, respectively, for the term of four years, and until their successors are appointed and qualified. After such appointments have been made and have been approved by the senate, the secretary of state shall notify such persons of their appointment."

Section 9705 R. S. Mo. 1929, provides how the real estate of the Missouri School for the Deaf shall be controlled, and reads as follows:

> "The board of managers of each school shall have the care and control of all the property, real and personal, owned by such school, and the title to all real estate or personal property now owned by such school, or by the state for its use, or that may hereafter be purchased by or donated to such school shall be vested in such board of managers of the respective schools, for the use and benefit of the said school. The board of managers of either school shall not sell or in any manner dispose of any real estate belonging to the school without an act of the general assembly authorizing such sale or disposal of such real estate. The boards of managers shall provide their respective schools with an official seal."

We see that under the present law the Missouri School for the Deaf is a body corporate, and that the control of its property is under the Board of Managers ap-

pointed by the Governor, and that the title to all property connected with said school is, by legislative act, vested in the Board of Managers for the use and benefit of said school.

This question presents itself in your request: In the face of the Constitution exempting State property from taxation, can the City of Fulton legally run a special assessment against property belonging to the Board of Managers of the Missouri School for the Deaf in which the Board holds legal title for the use and benefit of said school?

The section of law which vests the title in the Board for certain uses admits that before the passage of said act certain properties were held by a legal title in the ownership of the State of Missouri to the use of said school. Said section of law, transferring title from the State of Missouri to the Board of Managers, first appeared in Laws of 1921, page 649, and prior to that time the State had legal title to said property in its own name.

Does this legislative transfer of legal title in 1921 change the title to the extent that now this property is not "the property of the State" which under the constitution is exempt from taxation? All depends on what the people in thier Constitution intended when they used the phrase "of the State", when exempting property from taxation.

The preposition "of" has been defined by Noah Webster to mean in its general sense, the following:

> "Proceeding from; belonging to; connected with; concerning."

We have been unable to find the phrase "property of the State", used in any Constitution judicially defined, but under a Statute in Kansas which provides that judgments shall be a lien on "real estate of the debtor" in the case of Burke v. Johnson 15 Pac. 204 l. c. 207; 37 Kan. 337, that Court said:

> " 'Real estate of the debtor,' means that which is in fact of or belonging to the debtor."

We do find the word "State" as used in the Federal Constitution judicially defined in Karem v. United States 121 Fed. 250, l. c. 256; 61 L. R. A. 437, when that Court said:

> "When the constitution speaks of a state, and inhibits the doing of certain things, it sometimes includes under the term 'state' every instrumentality or agency of the state which presumes to act by authority of the state,* * * *"

Where a State Board was authorized to take and hold State property for State purposes, the Supreme Court of Wisconsin holds that the property is State property, and in Milwaukee v. McGregor, 121 N. W. 642, l. c. 642; 140 Wis. 35, that Court said:

> "The fact that the Board is made a state agency to take and hold title to property for state purposes does not cut any figure in the matter. The building is not designated to be, in any proper sense, the property of the board, except as representing the state.
>
> "So the question comes down to whether the ordinary charter and ordinance regulations of a city requiring submission to local supervision, as regards the manner of constructing, altering and repairing buildings, have any application to state buildings. That must be answered in the negative. It is plainly so ruled by the familiar principal that statutes, in general terms, do not apply to acts of the state. Moreover, express authority to a state agency doing a particular thing in a particular way supersedes any local or general regulation conflicting therewith."

Special assessments for local improvements, although levied by virtue of the taxing power, have been

held in many cases by our Supreme Court not to be taxes within the meaning of this constitutional section exempting "property of the State" from taxation.

In the late case of Corrigan v. Kansas City, 211 Mo. 608, l. c. 627; 111 S. W. 215, Judge Valliant said:

> "Section 3, article 10, of the State Constitution requiring taxes to be uniform, and sections 6 and 7 of the same article, the one exempting properties of certain kinds and the other forbidding any other exemptions, refer only to general taxes; those sections neither exempt nor forbid the exemption of properties from special assessments for local improvement."

FIRST CONCLUSION.

We come now to our first conclusion. It is the opinion of this office that the constitutional exemption of State property from taxation exempts not only the State property where the legal title to same is in the name of the State, but exempts also that property, both personal and real, which is used as an instrumentality and agency of the State even though the legal title to said property be not in the State's name.

The Missouri School for the Deaf is a corporate body created by the Legislature as an instrumentality of this State. The Board of Managers vested with legal title to all the institution's property are creatures of the Legislature holding said title to the use of said state instrumentality. They hold but a bare legal title where the power of sale can only be exercised by Legislative authorization. The entire use of equitable interest in said property is vested in Missouri School for the Deaf, and it is only to said uses that they can legally exercise any control over said property. The property of the Missouri School for the Deaf falls within that constitutional provision exempting the "property of the State", from taxation, for the preposition "of" as used

in said constitutional provision includes all property which is in fact of and belonging to the State. "Of" as used in said constitutional provision has the meaning of its general sense as defined by Noah Webster, supra.

We are further of the opinion that this constitutional exemption of State property from taxation, according to the cases decided thereunder, refers only to general taxes, and by its terms neither exempts nor forbids the Legislature exempting properties from special assessment for local improvements. If the State of Missouri be not liable on this special tax bill, it is for reasons other than the constitutional provision exempting State property from taxation, for the exemption of this constitutional provision was not intended to exempt State property from special assessments.

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Having come this far with our conclusion, we must next determine the nature of this tax bill of the City of Fulton, whether it be a tax bill for a general tax or a tax bill based upon a special assessment for local improvements creating a constitutional liability on the part of the State.

Fulton is a city of the third class, and the Statutes providing for local improvements in cities of the third class would be in point. Improvements of streets in cities of third class are either by authority of Sections 6814 or 6841 R. S. Mo. 1929.

Section 6814 R. S. Mo. 1929, provides as follows:

> "The city council shall have power within the city, by ordinance, in all cases where the cost does not exceed sixty cents per front foot per annum upon the property abutting upon any street, avenue, alley or public place to be improved as in this section hereinafter provided,

to cause the streets, avenues, alleys and public places of the city, or any part thereof, to be sprinkled, oiled, repaired, surfaced and resurfaced, and the cost thereof to be provided for and defrayed by a special tax to be assessed in favor of the city or contractor on the adjoining property fronting or bordering on the streets, avenues, alleys and public places where such sprinkling, oiling, repairing, surfacing and resurfacing is proposed to be done, in proportion that the linear feet of each lot fronting or bordering on the street, avenue, alley and public place so to be sprinkled, oiled, repaired, surfaced and resurfaced bears to the total number of linear feet of all the property chargeable with the special tax aforesaid in the territory embraced by the contract under which said sprinkling, oiling, repairing, surfacing and resurfacing is to be done. The above work may be done by said city and an accurate account of the cost thereof kept by said city or may be contracted for annually by the city council at such time and under such terms as shall be provided by ordinance, and the city shall be divided into convenient sprinkling, oiling, repairing, surfacing and resurfacing districts for the above purpose, and each district shall be let separately. The special tax bill spoken of shall be and become a lien on the property charged therewith from and after the commencing of such pprinkling, oiling, repairing, surfacing and resurfacing of such streets, avenues, alleys or public places under the provisions of an ordinance providing therefor, and

shall be prima facie evidence of the liability of the property charged therewith to the extent and amount therein specified, and may be collected of and from the owner of the land in the name of and by the city or contractor as any other claim in any court of competent jurisdiction with interest at the rate of eight per cent per annum, and they shall be issued and collected in the manner hereafter provided by ordinance: Provided, that in no case shall the provisions of this section apply where the cost of any such improvement shall exceed the sixty cents per front foot per annum upon the property abutting upon any street, avenue, alley or public place.

Section 6841 R. S. Mo. 1929, provides in part as follows:

"Any city of the third class shall have full power and authority, under the following conditions, to do the following things: To levy and collect taxes, for general revenue purposes, on all property within the limits of such city, taxable according to the laws of this state. To grade, pave (the word pave as herein used meaning to improve with all kinds of street paving, including macadamizing), gutter, curb and otherwise improve streets and alleys, and parts of same, and to reconstruct and repair any paving, grading, guttering and curbing, and to make and repair sidewalks, bridges, culverts and crosswalks, and to condemn and destroy any sidewalk deemed unfit for use, and to replace the same wihh a new one of the same or different material, and to exercise control

over streets and alleys, and establish and re-establish grades thereon. * * * * The cost of paving, guttering and otherwise improving any alley and the roadway part of any street, that is the part between curb lines, including street intersections, shall be charged against the lots and ttracts of land fronting or abutting on the street or alley so improved along the distance improved, in proportion to the number of fronting or abutting feet. When the paving or guttering on any street or alley is only repaired (repaired as here used shall not include any improvement where the entire surface of a paving is renewed, but such renewal shall be considered as paving), the cost of such repairing shall be charged in the following manner, namely: The street or alley shall be divided into sections, a section being the distance from the center line of one cross or intersecting street to the center line of the next cross or intersecting street, and the cost of repairing each section shall be charged against the lots and tracts of land fronting or abutting on that section in proportion to the number of fronting or abutting feet. All lands owned by any county or other political or municipal subdivisions, cemeteries and railroad rights of way, fronting or abutting on any of said improvements shall be liable for their proportionate part of the cost of such improvement, and tax bills shall be issued against such property as against other property, and any county, city or other political or municipal subdivision that shall own any such property shall out of the general revenue funds or other funds pay any such tax bill, and in any case where any county, city

> or other political or municipal subdivision, cemetery company or owners or railroad company, shall fail to pay any such tax bill, the owner or holder of same may sue such county, city or other political or municipal subdivision, cemetery company or owners or railroad company on such tax bill, and be entitled to recover a general judgment against such county, city or other political or municipal subdivision, cemetery company or owners or railroad company. Any of said street improvements may be paid for in whole or part by such city out of general revenue funds, or other funds which the city may have for such purposes if the council so desires, but all such improvements shall be paid for with special tax bills, unless the proceedings of the city for same specify that payment will be made out of the general revenue funds or other funds in whole or part. The charges made against lands for all of said improvements shall be known as special assessments or taxes, for improvments, and shall be charged and assessed by issuing special tax bills against the lands chargeable with the cost of the improvements; each special tax bill so issued shall be a special lien on the land against which it is issued.* * * *."

Both of the above Sections authorize the city of Fulton to issue special tax bills against abutting property owners for local improvements. Where a street is surfaced or resurfaced by paving one must look to one or the other of these two sections in determining by what authority the City of Fulton acted in issuing tax bills against the State as an abutting property owner.

this tax is not levied and collected as other city tax is levied and collected. Both Sections authorize the issuance of a special tax bill against abutting property owners for local improvements which local improvements include the surfacing and paving of streets. In Section 6841 the Legislature specified particularly their intention to allow the city to issue special tax bills against abutting "lands owned by any county or other political or municipal subdivisions, cemeteries and railroad rights of way", and the Statute expressly specified their intention to make the owners of said lands liable for their proportionate part of the cost of improvement. In this grant of power when they undertook to mention specifically land owned by all the political subdivisions of the State, the Legislature did not name the State as a land owner chargeable with this special assessment, and if the State as a land owner is chargeable, it is because the power to specifically assess all abutting property owners by the general terms of the Statute if of itself a grant of power to specifically assess the State when the State happens to be one of the abutting property owners. It is indeed peculiar that while the Legislature was clearly expressing their intentions to include all political subdivisions of the State as a proper subject of a special assessment, they did not include specifically the State if they intended such a grant of power to cities of the third class.

The Legislature has the right to authorize cities of the third class to incur indebtedness on themselves or on the part of the State for purposes and in amounts not prohibited by the Constitution, but where the Constitution imposes limitations upon which valid State debts can be incurred by legislative act, then no debt can be incurred except for the purposes and in the manner prescribed by said Constitution. Let us look to the purported indebtedness of the State authorized by the general terms of this Statute and see if constitutional limitations preclude this tax bill from being a valid legal obligation of the State.

Article IV, Section 44 of the Missouri Constitution provides how far the Legislature can go in authorizing a State debt as follows:

> "The General Assembly shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the State, or to issue bonds or other evidences of indebtedness thereof, except in the following cases:"

Thereafter the above constitutional provision sets out in four separate paragraphs emergencies in which the Legislature has power by Statute to authorize the contracting of a debt or liability on behalf of the State. Not one of those enumerated emergencies, by word or by implication, gives power to the Legislature to authorize the incurring of debts on the part of the State to fund or refund cities of the third class or contractors for improvements made in road abutting property of the State. These general Statutes authorizing special tax bills in cities of the third class should be interpreted in the light of this constitutional provision and the purposes for which State debts can be authorized by legislative act. If the effect of these general Statutes is to authorize special tax bills (liability on behalf of the State), contrary to the power of the Legislatureto authorize indebtedness against the State, then these tax bills are void and of no force and effect insofar as they create any legal demand against the State.

59 Corpus Juris, page 214, Section 351, states the law thus:

> "Where the constitutions impose limitations, no valid debt can be created except for the purposes and in the manner prescribed. Neither the legislature nor the officers and agents of the state, nor all combined, may create a debt for or on behalf of the state, except in the manner provided for by the constitution; accordingly, where the constitution preseribes the only way in which a debt of the state can be contracted, any attempt by the legislature to create one in any other way is futle, although its purpose may be to reduce and not to increase the debt of the state.

Although Corpus Juris does not cite any Missouri cases, we believe it states the law applicable in Missouri.

SECOND CONCLUSION.

We are of the opinion that the tax bill in question is for a special assessment for local municipal improvements in the City of Fulton, a city of the third class, and not a tax bill representing a general assessment on State property for taxation.

We are further of the opinion that there is no constitutional provision in Missouri exempting State property for special assessments for local improvements, but that constitutional provision which provides the only purposes for which the Legislature can pass a Statute creating a legal liability against the State, although not exempting State property from special assessments for local municipal improvements, precludes the passage of a legislative act authorizing any indebtedness on the part of the State intended to fund or refund the City of Fulton or individual contractors for improvements made in roads abutting on property of the State.

We are further of the opinion that the special tax bill in question based upon general statutes for its validity, is not a legal claim against the State or the State Board in control of this property. To say that said tax bill is a legal claim would necessitate reading into those general statutes an invitation on the part of the Legislature to include the State as one of those body politics which we believe the Legislature intentionally omitted mentioning when expressly naming other body politics and the subdivisions of the State as land proprietors subject to this special assessment. To say that said tax bill is a legal claim against the State is to nullify that constitutional provision limiting the Legislature in authorizing debts and liabilities against the State for any particular purposes. The Constitution is too plain for any forced construction.

We do not think the Statute authorizing special tax bills against abutting property owners in cities of the third class is unconstitutional. It is our opinion that the Legislature, by the general terms of said Statute, did not intend to make a provision of law imposing liability on the State as an abutting property owner because they happened to pass a general municipal regulatory Statute.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

SCHOOL FOR DEAF: Board of Managers can lease real estate for C. C. C. location.

5-15

May 14, 1935.

FILED
44

Hon. Truman L. Ingle
Superintendent, Missouri
School for the Deaf.
Fulton, Missouri

Dear Sir:

Your request of May 14, 1935, for an opinion is as follows:

> "The matter of leasing a portion of our pasture land to the Federal Government and the State of Missouri has been brought up by army officers in charge of the C. C. C. Camp Placement.
>
> "These officers desire to place a C. C. C. Camp on a portion of our pasture land. The Board of Managers of the school have approved the leasing of this land to the Federal Government and the State of Missouri for a term of one year, with the privilege of extending the lease, provided in the opinion of the Attorney General's office they may do so, under the law.
>
> "Will you, therefore, give me an opinion as to whether or not it is legal for us to sign a lease for this purpose."

Section 9689 R. S. Mo. 1929, provides that the government of the Missouri School for the Deaf at Fulton, Missouri, shall be in a Board of Managers, and reads:

> "The government of each of these schools shall be vested in a board of managers, composed of five members, appointed by the governor with the consent of the senate.

> The members of said board shall be appointed on or before the first day of February, in the odd numbered years, by twos and threes, as may be required for each of said boards, and they shall hold their office, respectively, for the term of four years, and until their successors are appointed and qualified. After such appointments have been made and have been approved by the senate, the secretary of state shall notify such persons of their appointment."

Section 9705 R. S. Mo. 1929, provides how all property of the Missouri School for the Deaf shall be controlled, and reads as follows:

> "The board of managers of each school shall have the care and control of all the property, real and personal, owned by such school, and the title to all real estate or personal property now owned by such school, or by the state for its use, or that may hereafter be purchased by or donated to such school shall be vested in such board of managers of the respective schools, for the use and benefit of the said school. The board of managers of either shcool shall not sell or in any manner dispose of any real estate belonging to the school without an act of the general assembly authorizing such sale or disposal of such real estate. The boards of managers shall provide their respective schools with an official seal."

The statutory limitations in the above Statutes must be judicially construed before we can determine the power of the Board of Managers to execute the lease in question.

The word "sell" as used in the Statute has a very definite meaning in the Statute as it is used in the sense of passing title by a deed of sale for a consider-

ation. The phrase "sell or in any manner dispose of" or more particular the phrase "dispose of" as used in the Statute may confuse one in determining the fight of the Board of Managers to execute the lease in question.

In the case of Speckman v. Meyer 220 S. W. 529, l. c. 530; 187 Ky. 687, the Supreme Court of Ky. construed the phrase "sell or dispose of" as used in a will and said:

> "Passing the question as to the validity of the restraint, and conceding that the prohibition against his power to 'sell or dispose' deprived him of the right to convey by deed or other like instrument any part of this estate during the 15 years, it is contended, and was so held by the lower court, that although William Speckman could not sell or convey during the 15 years by deed or other like instrument, he could dispose of it within that time by a last will.
>
> "Whether he could or not turns on the meaning and effect that should be given to the words 'sell or dispose' in the will of F. H. Speckman. In arriving at the meaning of these words, we should and will be controlled by their common usage, because they have no technical meaning, are in general use in the everyday affairs of life, and are to be found in many instruments dealing with the sale and disposition of property, both real and personal. If the testator had simply prohibited the sale of the property during the 15 years by William Speckman, there would be little trouble in determining that he merely meant to deny him the right to part with the title by selling it, but not the right to dispose of it by will.

> "But the testator did not stop with prohibiting the sale; he also forbid the disposal of it by him, and the word 'dispose,' although often used as synonymous with the word 'sell,' has in some cases been given a larger meaning, although we have not found any authority that has construed it in the connection here used as forbidding a disposition by will. The sense, however, in which it is employed is usually to be gathered from the context and the purpose of its use. Its meaning may be restricted or enlarged to carry out the intention of the parties. Accordingly a prohibition upon the power to 'sell or dispose' of might mean that the property should not be sold or mortgaged, or exchanged, or incumbered in any way, while a grant of the right to 'sell or dispose' of might confer authority not only to sell, but to trade, exchange, or mortgage."

CONCLUSION.

We are of the opinion that the government and control of the real estate of the Missouri School for the Deaf at Fulton is vested in the Board of Managers appointed by the Governor, and that said Board has it within its power to lease that portion of the pasture land belonging to the Missouri School for the Deaf to the Federal Government, and the State of Missouri, for the placement of a C. C. C. Camp.

The power to lease is vested in said Board under its general statutory power to govern and control. The Statute prescribing that "The Board of Managers* * * * shall not sell or in any manner dispose of any real estate belonging to the school without an act of the General Assembly authorizing such sale or disposal of such real estate" is not a limitation upon the Board precluding it from executing a valid binding lease in the present case.

From the context of the Statute we are of the opinion that the phrase "dispose of" has a synonymous meaning with the word "sell" as used in the Statute. While the word "sell" means that the Board cannot pass title by a deed of sale for a consideration, the phrase "dispose of" means that the Board cannot pass title by exchange or other methods of passing title other than the common method of sale by deed for a consideration.

The limitations of this Statute were to prevent the Board from passing legal title to the property without legislative authorization, but the Legislature did not intend to restrain the Board from executing a lease and at the same time give them power to govern and control the property.

We are of the opinion that the execution of the lease in question is neither a "sale" or a "disposition of" the property coming within the limitations of Section 9705, supra.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

SCHOOLS: A grade school pupil must attend district in which he lives with certain exceptions.

6-18

June 17, 1935.

FILED
44

Mr. Frank J. Iffrig
Member, House of Representatives
St. Charles County
St. Peters, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "I would very much appreciate your opinion on the following in regard to the school law. Can the department of education give state aid to a grade school district for paying tuition of pupils living in another district?
>
> "If this can be done in case the pupil lives nearer to a school in a district than the one, in which the student lives, can money be paid out of the state school fund for a pupil who lives nearer or has to pass the school in his or her own district and wants to attend a school in another school district?
>
> "What I would like to know is if a school district has to accept pupils from other school district free of charge or whether the other district in which the pupil lives has to pay a tuition or if the state will pay this tuition regardless of how much nearer this pupil lives to the school in his or her own school district."

Section 9207, R. S. Mo. 1929, gives the board of a school district the right to make rules and regulations in regard to the admission of non-resident pupils and prescribe the tuition fee to be paid by same. Said section reads in part:

> "***** They shall have the power **, and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same: Provided, that the following children, if they be unable to pay tuition, shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support: Provided, further, that any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax."

Section 13, page 340, Laws of Missouri, 1931, requires the board of directors of each and every school district in this state to maintain the public school or schools of such district for a period of at least eight months in each school year, and it provides that when any district has legally levied for school purposes a tax of not less than twenty cents on each one hundred dollars of the assessed valuation of the property therein, such district shall be allotted out of public school funds of the State an equalization quota in order that such districts may have the funds necessary to maintain the school or schools thereof for such minimum term.

In view of the above sections, it is clear the Legislature intended that a pupil, unless he comes within one of the exceptions enumerated in Section 9207, supra, should attend the district in which he lives unless he is admitted to another district according to their rules and regulations and pays the prescribed tuition fee. The only exceptions to the above rule permitting a grade school pupil to attend

school in a district other than the one in which he lives at the expense of the district in which said student lives or providing any state aid therefor, are Sections 18 and 20, Laws of Missouri, 1931, pages 344 and 346 respectively.

Section 20 is only applicable to districts having an average daily attendance of less than fifteen. Said section provides that the State Superintendent of Schools, if he deems it to the best interest of all concerned, shall, in lieu of such State aid, require the board to provide for the transportation of pupils to other public schools provided that the total expense including transportation and tuition paid by the State shall not exceed the amount the State would have otherwise paid to such district.

Section 18 gives the county superintendent of schools the power and makes it his duty to assign pupils living in one district to an adjoining district when an adjoining school is more accessible for said pupil. Said section reads as follows:

> "Whenever any pupil is so located that an adjoining school is more accessible, the county superintendent shall have the power and it shall be his duty to assign such pupil to such adjoining district: Provided, if a school district shall be divided by a county line, or it is deemed advisable to assign pupils to a district in an adjoining county, then the county superintendent of the county wherein the pupil resides shall make the assignment, subject to the state superintendent by any county superintendent whose county is affected, and the decisions of the state superintendent shall be final: Provided, the attendance of such assigned pupil shall be credited for the purpose of apportionment of state funds to the district in which the student lives, and the board of directors of the district in which said student lives shall pay the tuition of such pupil or pupils so assigned: Provided, such tuition shall not exceed the pro rata cost of instruction."

The above section gives the county superintendent of schools the power and makes it his duty, when a pupil is so

located that an adjoining school is more accessible, to assign such pupil to such adjoining district. The county superintendent is not given the power to assign a pupil to any district other than an adjoining district and then only when the adjoining school is more accessible to the pupil. Said section plainly requires that the board of directors of the district in which said pupil lives shall pay the tuition of the pupil so assigned. The section provides, however, that the attendante of such assigned pupil shall be credited for the purpose of apportionment of State funds to the district in which the student lives.

CONCLUSION.

In view of the above, it is the opinion of this department that a grade school pupil must attend school in the district in which he lives unless he is admitted to another district according to such district's rules and regulations, in which event he must pay the prescribed tuition fee unless he comes within one of the exceptions specified in Section 9207, supra; or unless said pupil lives in a district having an average daily attendance of less than fifteen pupils, and the State superintendent of schools has required the board to transport said pupils to another school or schools, in which event the expense paid by the State shall not exceed the amount that the State would have otherwise paid to such district; or unless the pupil is so located that an adjoining school is more accessible and the county superintendent of schools has assigned such pupil to such adjoining district, in which event the board of directors of the district in which the pupil lives shall pay the tuition of the pupil so assigned. The attendance of such assigned pupil, however, shall be credited for the purpose of apportionment of state funds to the district in which the pupil lives.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

JOHN.W. HOFFMAN, Jr.
(Acting) Attorney-General.

JET/afj

OLD AGE PENSIONS: (1) Inmate of county infirmary may make application for pension before being discharged from institution, but immediately upon receipt of pension must be discharged. (2) Inmate of county infirmary cannot use old age pension to support himself in the infirmary and occupy quarters as a paying patient.

August 17, 1935.

8-20

FILED
44

Honorable David E. Impey,
Prosecuting Attorney,
Texas County,
Houston, Missouri.

Dear Sir:

This department is in receipt of your letter of August 12 wherein you make the following inquiries:

I

"May an inmate of a county poor farm make application for and receive old age pension without prior discharge from the farm?"

We are enclosing herewith copy of an opinion recently rendered by this department to the Honorable W. Ed Jameson with reference to county inmates making application and receiving old age assistance; this opinion bears indirectly on your question; however, your question involves the receiving of the pension itself before discharge from the county infirmary.

Section 28 of the Old Age Assistance Act provides as follows:

"The State Board shall have authority to make such rules and regulations as are necessary to carry out the provisions of this Act. The State Board and respective County Boards shall meet at such times and places as may be fixed by the rules of the State Board."

The State Board, having authority to make rules and regulations, we assume will make certain rules regarding inmates of the county infirmary. Section 16 of the Act provides:

> "No person receiving assistance under this Act shall at the same time receive any other relief from any public funds, except for medical and surgical assistance."

In view of the above section, we are of the opinion that an inmate of the county infirmary would not have to be discharged before making application for or receiving old age assistance, but immediately upon receipt of the pension, it would be necessary that the inmate be discharged from the county infirmary, as under Section 16, supra, no one may receive assistance or relief from county funds and at the same time receive the old age assistance in addition thereto.

II

> "In the event that a qualified person receives allowance of an old age pension, has no home nor people, has become accustomed to the surroundings of the county poor farm and does not want to leave, would it be permissible for the county court to allow such pensioner to occupy quarters on the poor farm as a paying patient?"

Section 12950, R.S. Mo. 1929 is as follows:

> "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 12951, R.S. Mo. 1929 is as follows:

> "Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

In the case which you mention, it appears that the inmate is committed to the county infirmary for the reason that he was unable to support himself. If the inmate receive the old age assistance pension, then it may be readily concluded that he is able to support himself financially.

Section 12954, R.S. Mo. 1929 empowers the county court to use its discretion in regard to support of the county poor, and is as follows:

> "The county court shall at all times use its discretion and grant relief to all persons, without regard to residence, who may require its assistance."

None of these sections have been directly interpreted by the Supreme Court. They are reviewed in the case of Jennings v. City of St. Louis, 332 Mo. l.c. 178. At page 179 the Court, in speaking of the duty of a county to support its citizens, said:

> "The good of society demands that when a person 'is without means, and unable, on account of some bodily or mental infirmity, or unavoidable cause, to earn a livelihood', he is entitled to be supported at the expense of the public. 'It is immaterial how the alleged pauper is brought into need, as it is the fact of the situation and not the method of producing it that is important.' 'So the fact that a person's want is the result of gross intemperance does not prevent him from securing relief as a pauper.' 'An able-bodied man, who can, if he chooses obtain employment which will enable him to maintain himself and family, but refuses to accept employment, is not entitled to public relief, though relief may be properly extended to the wives and children of such men.' (21 R.C.L. 705, 706) It necessarily follows that an able-bodied man, who is unable to obtain employment on account of the economic conditions existing at the time, and who is without means of support is entitled to public relief.

"The Supreme Court of Pennsylvania directly passed on this question in the recent case of Commonwealth v. Liverright, 161 Atl. 697, l.c. 710:

'Again we hold that the support of the poor--meaning such persons as have been understood as coming within that class ever since the organization of the Government, persons who were without means of support, the same persons stated in the * * * bill * * * is and always has been a direct charge on the body politic for its preservation and protection; and that as such, in the light of an expense, stands exactly in the same position as the preservation of law and order. The expenditure of money by the state for such purposes is in performance of a governmental function or duty, and is not controlled by the constitutional provision, if the purpose is to supply food and shelter to the poor, including those who are destitute because of enforced unemployment, provided only that the money be not administered through forbidden channels. The appropriation in providing for relief of poor comprehended those who has been driven into that situation through enforced unemployment; they having no means to support themselves. From this cause the ranks of the poor had increased so rapidly as to stagger the people of our state. The fact that their numbers are swollen through unemployment does not change the established concept of poor persons. To hold that the state may not under the Constitution now aid such people, even though it had a governmental duty, would be to deny to the state the right to perform, not only an important, but at this time a most pressing governmental function. To hold that the state cannot or must not aid its poor would strip the state of a means of self-preservation, and might conceive untold hardships and difficulties for the future."

CONCLUSION

It is the opinion of this department that inmates of a county infirmary cannot be permitted to receive the old age assistance pension and at the same time remain at the county farm on a paying basis using the pension for the payment of their board and lodging, for the reason that the statutes contemplate that only persons unable to support themselves may become inmates of a county infirmary. When a person receives an old age assistance pension, the law contemplates that he is no longer unable to support himself financially. And in addition thereto, the statutes in no wise provide for a person being an inmate of a county infirmary and occupying quarters as a paying patient.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

ELEEMOSYNARY INSTITUTIONS: COUNTY COURTS: INSANE PERSONS:

The law is not mandatory that the state eleemosynary institutions return county patients to sending county where keep and expenses are not paid, by the county, but the Board of Managers of the Eleemosynary Institutions have the right to so return such patients.

January 29, 1935

FILED 45

Honorable W. E. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City
Missouri

Dear Mr. Jameson:

Receipt of your letter dated January 12,1935, is acknowledged, inclosing copy of your letter to this office of date December 10, 1934. Your letter of date December 10, 1934, is in part, as follows:

> "The County of Jasper owes to State Hospital #3,Nevada,the sum of $86,527.18. I have been unable to get any action toward the payment of any part of this account from this court.
>
> Does the eleemosynary board have any recourse in a situation of this kind? Would we be justified under the law in returning to Jasper County the patients in this institution for which they so far have failed to pay?"

In our opinion to you of date December 12, 1934, and answering your letter of date December 10,1934, in the next to the concluding paragraph thereof, we stated as our opinion that,

> "We are of the opinion that the Board of Managers of the state

eleemosynary institutions has the right to return to the custody of the respective counties such county patients where payments for their keep or other expenses, as provided by Section 8636 Revised Statutes Missouri 1929, have not been made by the respective counties from which such payments were due."

We do not know how we can make ourselves any clearer than we did in the last quoted portion of our former letter. There is no express mandate in the law requiring you to return county patients to the sending county when the payments for their keep, or other expenses, have not been made by the respective counties from which such payments are due. However, the Board of Managers of the state eleemosynary institutions is the business and executive manager of such institutions in the administration of their affairs. We have pointed out to you what your rights are in the premises and it is a matter for the board to determine what course of action it will take in reference to returning such county patients.

Yours very truly,

GILBERT LAMB
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GL:LC

Circuit Clerks

Circuit Clerks hold office from the first Monday in January of the year following election until the first Monday in January four years later.

FILED 45

February 2nd, 1935.

Mr. C. E. Jeffries,
Clerk of the County Court,
Neosho, Missouri.

Dear Sir:-

We have your letter of January 22, 1935, in which an opinion is requested as follows:

"There is a difference of opinion between the Newton County Court and the outgoing Circuit Clerk, Claude R. Blakeley. Mr. Blakeley has served as Circuit Clerk for the past eight years and has received $20,000 for the eight years work. However, he contends that his term of office was over January 1, 1935, and as he stayed in the office until the first Monday in January, is demanding pay from the county court for five days work.

"It is the County Court's opinion that Mr. Blakeley's term was not over until the first Monday in January, and that as he has already received $2500 for each year's work, is not entitled to the additional salary.

"The court would appreciate very much if you would give your opinion on this matter."

Section 11664 Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 11664. Election--term of office--commission. At the general election in the year eighteen hundred and eighty-two, and every four years thereafter, except as herein provided, the clerks of all courts of record, except of the supreme court, the St. Louis Court of Appeals, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and

shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

Reviewing the above section with due advertence to the apparent legislative intent, expressed and implied, we are of the opinion that the position taken by the outgoing circuit clerk is untenable.

No where in the section is the date "January first" mentioned. The term of office begins on the first Monday in January and ends on the first Monday in January four years later. Further evidence of this is found, if any be needed, in the use of the words "and until their successors shall be duly elected and qualified". Obviously, the new circuit clerk cannot, under any conditions, qualify until the first Monday in January. Of course, should the new circuit clerk for some reason fail to qualify until a later date than that set by statute, there might be some merit to Mr. Blakeley's contention, but we need not pass on that here.

When, however, the new circuit clerk qualifies on the date set by statute, no question of additional compensation for the outgoing clerk can be considered. To hold otherwise would be to nullify, in part, not only the above quoted section but also section 11786 Revised Statutes of Missouri, 1929, providing the amount of annual compensation due circuit clerks for if we adopt Mr. Blakeley's view, there would almost always be extra days, and compensation therefor, to consider.

Both by the language, therefore, and by the clear legislative intent of section 11664 are we committed to the view that the term in question ends not on January first but on the first Monday in January.

Very truly yours,

CHARLES M. HOWELL, Jr.
Assistant Attorney-General.

CMHjr:MB

APPROVED:

Attorney-General.

COUNTY DEPOSITARY:
COUNTY COURTS:

1. County court should advertise for bids at May Term, in odd years, under Sec. 12184 R.S.1929.

2. Question discussed in event no selection made by County Court under Sec. 12184 & 12189.R.S.1929

February 23, 1935.

FILED
45

Hon. Ernest Jadwin,
Clerk of the County Court,
Shannon County,
Eminence, Missouri.

For Attention of: A. L. Deatherage,
Presiding Judge,

W. T. Galbraith,
W. N. Bradford,
District Judges,

of Shannon County
Court.

Dear Sir:

This is to acknowledge receipt of your letter of February 8, 1935, in which you request the opinion of this office on matters suggested therein; which letter is as follows:

"We, the undersigned, members of the Shannon County Court, desire to present for your consideration a statement of facts and to secure from you an opinion relative to the matter to which such facts relate:

The Shannon County Bank, at Eminence, county seat of Shannon county, was chosen as the depository of county such depository under restrictions. A bond for the safekeeping of such funds was given by the banking corporation. In December, 1934, the Finance Commissioner ordered the liquidation of the banks assets and the bank of course, ceased to function as county depository. Immediately thereafter the County Court entered of record an order instructing the County Treasurer to deposit county funds in the Winona Savings Bank, at Winona, Missouri, Shannon

"County, until further notice, but the court did not mention in its records requirement of a rate of interest to be paid nor is there any record of any bond being entered into by said bank as county depository. January 1st this year the undersigned entered upon their duties as members of the Shannon County Court, and at a term of court held in January advertised for bids for county depository, same to be submitted to us at our regular February session. At this session we were advised by the two banking institutions in this county that they would not submit bids, would enter into no bond and would pay no interest for the deposit of county funds, but would accept the deposit of same only as ordinary checking accounts are accepted from other depositors, nor has the court been successful in securing depository arrangements with banking institutions in adjoining counties as provided for by Section 12189, R. S. 1929. At the regular February term we entered on record an order rescinding the order of the preceding court which instructed the county treasurer to deposit the county funds in the Winona Savings Bank, since we can find no authority in law for such an arrangement, the questions we desire to propose are these:

Is there anything this Court can do except permit the County Treasurer to deposit the county funds where he chooses, relying upon the bond of the treasurer for the safekeeping of said funds?

Since the advertisement for bids for a county depository was made prior to the regular February term of our court because the former depository was out of business, will it not be necessary for the court to again advertise for bids to be submitted at the regular May term, 1935, as required by Section 12184, R. S. 1929?

"In case we meet with the same result at the May, 1935, term, and no bids are received, shall the court again proceed without naming a county depository, leaving the matter of deposits entirely to the county treasurer?

Since we can find nothing in the law covering the situation as it now faces us in regard to the selection of a depository when no bids are received, and when we cannot make an arrangement for the deposit of such funds under an agreement for the payment of the minimum rate of interest prescribed by Section 12189, we will greatly appreciate your early assistance in guiding us in the proper course of procedure in this matter."

I.

We note from your statement of facts that the county court of Shannon County had previously selected the Shannon County Bank as a county depository for the county funds and a bond given for the safekeeping of said funds: that in December, 1934, said Bank was ordered closed by the Commissioner of Finance and passed into his hands for liquidation; that thereafter the county court of that county entered of record an order instructing the county treasurer to deposit the county funds in the Winona Savings Bank, and according to your letter no rate of interest was required and no bond executed by the Winona Savings Bank as provided by law.

We also note that the new County Court after January 1, 1935, advertised for bids to be submitted at the regular February, 1935 Term of said court for the county funds; that no bids were received or accepted and no depository selected but that two banks indicated that they would accept the county funds as ordinary checking accounts.

You also state that the county court has not been successful in securing a county depository in the county or any adjoining county under the provisions of Section 12189, R. S. 1929; also that the county court rescinded the order of the old court that the county treasurer deposit the funds in the Winona Savings Bank.

Under the above circumstances you ask whether or not there is anything the county court can do except permit the county treasurer to deposit the county funds where he chooses, relying upon the bond of the county treasurer for safekeeping of said funds.

Since the county court has been unable to select a depository under the provisions of Sections 12184, 12185, 12186 and 12187, R. S. Mo. 1929, and has been unable to make arrangements for a depository with any banking corporation, association or individual banker under the provisions of Section 12189, the county treasurer being the custodian of the county funds in his possession it thereby becomes his duty to safeguard and protect said county funds in his hands without the aid of a duly selected depository.

Coming now to the question of the liability of the county treasurer on his official bond, in the event that no county depository is selected by the county court:

Section 12198, R. S. Mo. 1929, provides as follows:

> "COUNTY TREASURER EXEMPT FROM LIABILITY, WHEN.--The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depositary, but nothing in this article shall release said treasurer from any loss resulting from any official misconduct on his part, or from responsibility for the funds of the county, until a depositary shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him."

There are many cases in Missouri announcing the rule that a public officer instrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer, and that a public officer is an insurer of public funds which he has lawfully received. We cite, as sustaining this rule of law, the following cases,

and many others could be cited:

University City v. Schall, 275 Mo. 667, 205 S. W. 631;
City of Fayette v. Silvey, 290 S. W. 1019, l. c. 1021;
Bragg City Special Road District v. Johnson, 20 S. W. (2d) 22, l. c. 24;
Glaze v. Shumard, 54 S. W. (2d) 726, l. c. 728.

Of course, since the county court has been unable to select a depository according to law, and the county treasurer is the custodian of such funds and he and his sureties primarily liable for the safeguarding of same, it thereby devolves upon him, for the protection of himself and his sureties, to exercise his best judgment in safeguarding said funds and in selecting a place of deposit.

II.

We now come to the question of the county court advertising for bids for depositories of the funds of the county, before the May, 1935, Term of the County Court, and receiving proposals from banking corporations, associations or individual bankers in such county under the provisions of Section 12184 etc.

You ask, "Will it not be necessary for the county court to again advertise for bids at the regular May Term, 1935?"

It is our opinion that it is incumbent upon the county court to readvertise for bids at the May Term of court under the provisions of Section 12184 etc., and if for any reason no acceptable bids are made, then it becomes the duty of the county court to proceed under the provisions of Section 12189. The county court should strictly follow the provisions of these sections even though they might anticipate that no acceptable bids might be made under Section 12184 etc., or that no acceptable arrangements could be made under the provisions of Section 12189. After the county court has strictly followed the statutory requirements and in the event no depository has been selected, we will then be glad to give you an opinion as the situation then exists. The General Assembly, which is now in session, will no doubt have adjourned

by that time and perhaps it will have enacted some legislation which will be helpful to solve just such situations as exist in your County.

We realize that the past financial and banking situation has created some vexatious problems for county officials in regard to the safeguarding of the county funds. But we recognize that the present situation is much better than it has been in the past and the banks, trust companies and banking associations are in a much better condition now and the situation in that respect has been very definitely relieved.

We shall be glad to cooperate with you in rendering such further assistance as we are able to give in this matter at a later date.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

ELEEMOSYNARY BOARD:)
)
SUPERINTENDENT,)
STATE HOSPITAL :)

Power of said board to appoint acting superintendent, one who does not possess the statutory qualifications of superintendent.

4-3

March 28, 1935.

FILED
45

Hon. W. Ed. Jameson
President, Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This is to acknowledge receipt of your letter of March 22, 1935, in which you request the opinion of this Department. Your letter is as follows:

"Please refer to Section 8578, revised statutes of Missouri 1929, reading as follows:

* * * * * * * * *

I would like to ask you the following questions. Would the President of the Board of Managers of the State Eleemosynary Institutions be permitted under this section to appoint a physician who has not quite had five years of experience as acting superintendent until the time that he shall be eligible to election as permanent superintendent under this section?

Would the Board of Managers itself, be permitted under this section to appoint a physician who has not quite served five years as acting superintendent until such time as he is qualified under this bill to be elected as permanent superintendent in one of these institutions?

> Would the Governor of the State of Missouri be permitted under this section to appoint a physician who has not quite had five years experience as acting superintendent until the time that he shall be eligible to election as permanent superintendent under this section?"

We shall answer the three questions set forth in your letter in the order submitted therein, that is, (1) Would the President of the Board of Managers of the State Eleemosynary Institutions; (2) or the Board of Managers itself, or (3) the Governor of the State of Missouri, have the power to appoint one as acting superintendent of a state hospital, who does not possess part of the statutory qualifications, that is, five years' experience as physician, or assistant physician, in a hospital for the treatment of the insane or feeble-minded?

We do not find that the (1) President of the Board of Managers, the (2) Board of Managers itself, or the (3) Governor of the State of Missouri, has the power to appoint an acting superintendent of one of these institutions.

The qualifications of the superintendents of the several hospitals for the insane and for the Missouri State School are found in Sections 8577 and 8578, R. S. Mo. 1929, which are as follows:

(8577)
> "The board of managers shall appoint some suitable person as superintendent for each of the several eleemosynary institutions herein named."

(8578)
> "The persons appointed as superintendents of the several hospitals for the insane and for the Missouri state school shall be skilled in the practice of medicine and in the treatment of mental diseases, and shall have had at least five years'

> experience as physician, or assistant physician in a hospital for the treatment of the insane or feeble-minded."

That part of Section 8578, R. S. Mo. 1929, which provides that the "superintendents of the several hospitals for the insane * * * shall have had at least five years' experience as physician, or assistant physician in a hospital for the treatment of the insane or feeble-minded," was enacted by the Legislature at the 1929 session and found in Laws of Missouri, 1929, page 197.

The duties of the superintendent are set forth in Section 8580, R. S. Mo. 1929, the pertinent part of which is as follows:

> "The person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution with special attention to health and sanitation of the respective institution over which he has been appointed as manager, and shall devote his entire time thereto * * * * *."

It will be seen that the duties of the superintendents of the eleemosynary institutions of the state are wide and varied and special attention by them shall be given to the health and sanitation of the institutions. No doubt it was the intention of the Legislature to raise the qualifications of the superintendent by providing that, in addition to certain qualifications, he must have had at least five years' experience as a physician, or assistant physician in an institution of that character. One who has the responsibility of an institution of this kind, pertaining to the care and welfare of the unfortunate inmates, should be one who not only possesses the medical qualifications but one who has had special training and experience in carrying for the mentally infirm and feeble-minded.

The superintendent of a state hospital was held by the Supreme Court in the case of In Re Moynihan, 62 S. W. 410, l. c. 419, to be a public officer.

The Supreme Court in the recently decided case of State ex inf. McKittrick, Attorney-General, v. Whittle, 63 S. W. 100, l. c. 102, in ruling on the question of who was a public officer, said the following:

> "'A public office is defined to be "the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." Mechem, Pub. Off. l. The individual who is invested with the authority, and is required to perform the duties, is a public officer.
>
> 'The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer.' State ex rel. v. Bus, 135 Mo. 325, loc. cit. 331, 332, 36 S. W. 636, 637, 33 L. R. A. 616. To the same effect, State ex rel. Zevely v. Hackmann, 300 Mo. 59, loc. cit. 66, 67, 254 S. W. 53; Hasting v. Jasper County, 314 Mo. 144, loc. cit. 149, 150, 282 S. W. 700."

The Legislature has the right to fix the qualifications of the officers of the state in the absence of qualifications

fixed by the Constitution,as was said by the Supreme Court in the case of State ex rel. Wingate v. Woodson, 41 Mo. 153, l. c. 154:

> "The power of the State to declare in its fundamental law, or, when that is silent upon the subject, by legislative enactment, what shall constitute the test of eligibility to office, is as clear and unquestionable as is the power to fix the qualifications of voters;"

And it was said by the Supreme Court in the case of State ex rel. Attorney-General v. Seay, 64 Mo. 89, l. c. 101:

> "qualification for office, as defined by the most approved lexicographer, is 'endowment, or accomplishment that fits for an office; having the legal requisites, endowed with qualities fit or suitable for the purpose.'"

22 R. C. L. 400, Section 40.

Under Section 8577, supra, the power to appoint the superintendents of the several eleemosynary institutions is lodged in the Board of Managers who are appointed by the Governor, by and with the consent of the Senate, under Section 8561, R. S. Mo. 1929.

We find no statutory basis for appointing an acting superintendent.

"Acting" has been defined in 1 C. J. 913, as,

> "officiating; doing duty for another; a term employed to designate one performing the duties of an office to which he does not himself claim title."

In Fraser v. United States, 16 Ct. of Claims, 507, l. c. 514, it is said "acting" attached to an officer's title is,

> "A form of expression in constant use and well understood in all the executive departments of the government as designating, not an appointed incumbent, but merely a locum-tenens who is performing the duties of an office to which he does not himself claim title."

To the same effect the term is defined in State Bank of Williams v. Gish, 149 N. W. (Ia.) 600, l. c. 601:

> "The phrase 'acting officer' is used to designate, not an appointed incumbent, but merely a locum tenens who is performing the duties of an office to which he himself does not claim title. I Am. & Eng. Enc. of Law, 577 (2d Ed.); 1 Cyc. 632. Both these authorities cite the same case (Fraser v. U. S., 16 Ct. Cl. 514)."

"Locum tenens" means, "holding the place; a deputy, a lieutenant, or representative."

We do not think that the fact that one has almost the requisite qualifications makes any difference. The statute requires that the superintendent must possess certain qualifications. He is either qualified or not qualified and there is no middle ground whereby one could be appointed who has not quite the qualifications as required by statute. The qualifications are definite and certain. He "shall be skilled in the practice of medicine and in the treatment of mental diseases, and shall have had at least five years experience as physician, or assistant physician in a hospital for the treatment of the insane or feeble-minded." If it were possible to appoint a person, who does not possess the necessary statutory qualifications, for a short time, one might be appointed for the whole time and thereby defeat the purpose of the statute.

CONCLUSION.

It is, therefore, our opinion that the power to appoint an acting superintendent who does not possess the qualifications

as set forth in Sections 8577 and 8578, supra, is not lodged in the President of the Board of Managers, the Board of Managers itself or the Governor of the State of Missouri. The power is lodged in the Board of Managers to appoint as superintendent only such person who possesses all of the statutory qualifications, and one who does not possess such qualifications is ineligible to be appointed either as acting superintendent or superintendent.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

TAXATION: Back tax collections apportioned to respective funds for which originally assessed and levied, and unpaid warrants drawn against same, have priority of payment.

5-2

April 30, 1935.

FILED
45

Hon. W. Ed. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This is to acknowledge your letter as follows:

> "It has been brought to my attention several times that the County Courts claim the only money they are entitled to pay under the new budget law on old accounts is such 1935 funds as might be unexpended at the end of the year. There is a lot of back taxes due in all these counties, and there should be some way it would seem to me that the taxes collected on any year prior to 1935 should be 'ear-marked' and held for the payment of these old accounts.
>
> I would like to have the viewpoint of your department in this matter."

On January 18th, 1934, this Department rendered an opinion to Honorable Edward Cusick, Pulaski County, which we believe answers the question asked in your letter. Copy is hereto attached. We invite your attention to the following found in said opinion:

> "We shall predicate our remarks respecting your inquiry upon the following statement to-wit, back taxes are in no event to be considered as differing essentially from

> current taxes in that their constituent parts lose their identity upon becoming delinquent. * * * They are still levied and assessed for the purposes set out and the County Court has incurred obligations chargeable to the respective funds in anticipation of the collection of these taxes."

And further,

> "It is therefore the opinion of this office that back taxes, when collected, should be accounted for by the county collector as other funds and should be apportioned by the proper officer to the various funds for which the same are levied and collected."

We also direct your attention to Section 12139, R. S. Mo. 1929, which provides as follows:

> "He shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which he is the treasurer stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment: Provided, however, that no warrant issued on account of any debt incurred by any county other than those issued on account of the ordinary and usual expenses of the county, shall be paid until all warrants issued for money due from the county on account of services that are usual, and for all

expenses necessary to maintain the county organization for any one year, shall have been fully paid and liquidated." (Underscoring ours)

From the above and foregoing it is our opinion that when delinquent taxes are paid such shall be apportioned to the respective funds for which they were originally assessed and levied; and unpaid warrants drawn against these respective funds, for which the taxes were assessed and levied, shall have priority of payment.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:
ARH:EG
Enc.

HIGHWAY PATROL: Purchases for State Highway Patrol under jurisdiction of Highway Commission.

6-12

June 10, 1935.

FILED
45

Mr. George C. Johnson,
State Purchasing Agent,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of June 7, 1935 requesting an opinion as to the following state of facts:

> "Please refer to an opinion dated December 6, 1933, written by Mr. Gilbert Lamb and approved by you, in which it is held, among other things, that purchases of the Missouri State Highway Patrol are within the scope of the State Purchasing Agent law.
>
> "Notwithstanding that opinion, the Highway Patrol recently requested the State Highway Department to purchase for them, sixty automobiles. It is our belief, based upon the opinion referred to, that the Highway Patrol, instead, should have requested this office to make the purchases. We enclose copies of correspondence which have passed on this subject.
>
> "It is our further understanding that the Highway Department has asked for bids on these automobiles, such bids to be opened on Monday, June 10. We would appreciate a specific opinion from you confined to the sole question of the status of the Highway Patrol with respect to the State Purchasing Agent, and if such opinion is in line with the opinion dated December 6, 1933, we would appreciate your further advice as to what steps should be taken by us to protect the interests of this department in connection with the above transaction."

The State Purchasing Agent Act (Laws of Mo. 1933, page 410) substantially provides that the Purchasing Agent shall purchase "all supplies except printing, binding and paper, as provided for in Chap. 115, R.S. 1929, for all departments of the State, except as in this Act otherwise provided."

Section 44a, Article IV of the Constitution of the State of Missouri, which said section provides for a State highway system, provides in part as follows:

> "All state motor vehicle registration fees, license taxes or taxes authorized by law on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation shall, after the issuance of any of said bonds and so long as any of said bonds herein authorized remain unpaid, be and stand appropriated without legislative action, to the payment of the principal and interest of the said bonds and for that purpose shall be credited to the State Road Bond Interest and Sinking Fund provided by law."

By this section of the Constitution it is clear that the cost of administering and enforcing any state motor vehicle law should be borne by the motor vehicle registration fees, license taxes and state taxes on the sale or use of motor vehicle fuels.

Section 12 of the Act creating the Missouri State Highway Patrol (Laws of Mo. 1931, page 230, provides in part as follows:

> "It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws

> of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight, and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the Commission.****"

Section 20 of that Act provides:

> "All salaries and expenses of members of the patrol and all expenditures for vehicles,equipment, arms, ammunition, supplies and salaries of subordinates and clerical force and all other expenditures for the operation and maintenance of the patrol shall be paid monthly and shall be paid by the state treasurer out of the proceeds of state motor vehicle fees and license taxes and state taxes on the sale or use of motor vehicle fuels as provided in section 44a of Article IV of the Constitution of this state as amended by a vote of the people at the general election November 6, 1928 upon warrants drawn by the state auditor based upon bills of particular and vouchers certified by the officer or employee designated by the commission."

The case of State of Missouri at the relation of R. Newton McDowell, Inc., a corporation, relator, v. Forrest Smith, State Auditor of the State of Missouri, respondent, 67 S.W. (2d) 50, decided by the Supreme Court of Missouri, En Banc, was an action by relator to compel the State Auditor to audit its account covering a purchase from the relator by the State Highway Commission of specified quantities of crushed rock, being materials for use in the construction of a part of the supplementary system of the state highway system. The court issued its peremptory writ of mandamus against the Auditor. At page 56 of the opinion the court states the issue in that case as follows:

> "We come now to the decisive question in the case: With reference to the purchase, and matters connected therewith and incidental thereto, of

road material by the Commission for use in the construction of state highways, which law prevails as between the State Purchasing Agent Act and what we shall term the Highway Act, if and so far as they may be found to be in conflict?"

* * *

"From the constitutional amendment it is perfectly clear, not only that the raising and expenditure of the money for the construction and maintenance of all roads and state highway system was placed largely in the discretion and under the supervision of the Commission, but that the power to acquire material for construction of the supplementary roads is likewise express and clear. The Legislature is required to enact such laws as may be necessary to carry the amendment into effect."

* * *

"Also it appears that the Highway Act, passed of necessity for the specific purpose of carrying out the constitutional mandate, makes of the legal entity, the Commission, with its subordinates, a self-sufficient, integrated and well-nigh autonomous agency and confers upon it untrammeled power to supervise and control the construction, and to purchase materials used in the construction, of state highways as provided in said Act, and to control all matters incident thereto and connected therewith, - such as plans, specifications, contracts for construction or improvement, or materials therefor; the advertising for bids, passing on the bids, the execution of contracts with the successful bidders, and so forth. All of these powers are conferred in detail and are again included collectively in a section of the Act (8094) which declares that the Commission as created is 'vested with the duties and powers specified in this article and also all powers necessary or proper to enable the

> Commission or any of its officers and employes to carry out fully and effectively all of the purposes of the article.' In respect of road construction and its connected incidents nothing is omitted."

At page 58 of the decision, the Court said:

> "In view of these considerations and the established rules of construction to which reference has been made, it seems altogether clear that the purchase represented by the claim in suit does not come within the operative effect of the State Purchasing Agent Act aforesaid, and that the relator herein was and is, under the controlling law, entitled to the warrant sought at the hands of the respondent."

CONCLUSION

It is apparent from the above decision that insofar as the supplies necessary to be used by the State Highway Commission are concerned, the Commission is exempt from the operation of the State Purchasing Agent Act. The last sentence of Section 44a, Article IV of the Constitution provides that "the General Assembly shall enact such laws as may be necessary to carry into effect this amendment." It is our opinion that the Act creating the Missouri State Highway Patrol is within the scope of this constitutional amendment and was passed by the Legislature of the State of Missouri with the intention of carrying out the purpose of the amendment.

Inasmuch as under Section 20 of the Act the expenses are to be paid as provided in Section 44a, Article IV of the Constitution and are to be paid upon warrants drawn by the State Auditor based upon bills of particular and vouchers certified by the officer or employee designated by the State Highway Commission, the expenses of the State Highway Patrol are in the same class as other expenditures by the State Highway Commission and do not come within the operative effect of the State Purchasing Agent Act.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH

OLD AGE ASSISTANCE: Inmates of county infirmaries not barred from benefits if otherwise qualified.

June 20, 1935.

FILED 45

Hon. W. Ed Jameson,
President Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of June 18, 1935, which is as follows:

> "A great many letters have come to this office in reference to the Old Age Pension. A number of them are asking about the occupants of infirmaries or poorhouses in the counties, as to whether or not they are eligible under the law.
>
> "As I see it, I do not think because a person is a resident of a poor house they should be barred from the benefits of this law, provided they are over 70.
>
> "I would be glad if you would have your office render me an opinion on this particular phase of the question."

Your letter refers to Senate Bill No. 7, same being an Act to provide for, regulate and fix the conditions and requirements for assistance for residents of the State of Missouri over the age of 70 years, as it may apply to inmates of county infirmaries.

Section 4 of said Act is general in its terms and provides as follows:

> "Subject to the provisions and under the restrictions contained in this Act, every aged person who has no income or an income inadequate to

> provide a reasonable subsistence compatible with decency and health, but in any event not exceeding $30.00 per month, shall, while residing in the State, be entitled to assistance in old age. Provided that where a husband and wife, who are living together, are both entitled to assistance under the provisions of this act, the maximum amount to be received by both shall not be more than $45.00 per month."

The qualifications necessary for an old person to obtain assistance in old age as mentioned in Section 4, besides having no income or an income inadequate to provide a reasonable subsistence compatible with decency and health, are set out in Section 6 of the Act, which provides:

> "Old age assistance may be granted only to an applicant who has attained the age of 70 years or upwards, is incapacitated from earning a livelihood and is without adequate means of support, is a citizen of the United States, has resided in the State for 5 years or more within the 9 years immediately preceding application for assistance and for the one year next preceding the date of application for assistance (absence in the service of the State or of the United States shall not be deemed to interrupt residence in the state if domicile be not acquired outside of the state), if not at the date of making application or of receiving aid an inmate of any prison, jail, insane asylum, or any other public reform or correctional institution, and has no child or other person responsible under the law of this state and found by the state board or by the county board able to support him."

Thus, it will be noted that under Section 6, supra, in order to receive assistance a person must (1) have attained the age of 70 years or upwards; (2) be incapacitated from earning a livelihood and without adequate means of support;

(3) be a citizen of the United States; (4) have resided in the State for 5 years or more within the 9 years immediately preceding application for assistance and for the one year next preceding the date of application for assistance; and (5) at the time of making the application or receiving aid not be an inmate of (a) any prison, (b) jail, (c) insane asylum, (d) any public reform or correctional institution, and (e) have no child or other person responsible under the law of the State of Missouri and found by the state board or the county board able to support him.

It is taken for granted that an inmate of a poor farm or infirmary is confined in the institution for the reason that he (or she) has no adequate income on which to support himself--that he is one of the unfortunates of life--otherwise, he would not be so confined.

An institution known as a poorhouse or infirmary is not one of the institutions mentioned in Section 6 which would prevent an inmate thereof from making an application, and if otherwise qualified, from coming within the purview of the Act. Assuming that the inmate can qualify, the question next arises as to the status of his citizenship. Section 6 does not make it compulsory that he be a citizen of this State, but he must be a citizen of the United States.

Sec. 2 of Article VIII of the Constitution of Missouri, with reference to the status of an inmate of a poorhouse and his exercising the right of franchise is as follows:

> "All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Section 10178, R.S. Mo. 1929 also excludes an inmate of a poorhouse from exercising the right of franchise, but the question arises as to whether or not if a person be not entitled to the right to vote, he by the denial of that right, loses his citizenship. This question was decided by our Supreme Court in the case of The State v. Fairlamb, 121 Mo. 137, wherein the Court said (l.c. 150-151):

> "While the right to exercise the elective franchise is the highest evidence of citizenship, a man may be a citizen of the county in which he permanently resides without possessing the necessary qualifications of a voter. 'A citizen is a person born in the United States.' 1 Bouvier's Law Dictionary. Another definition is 'one who owes to government allegiance, service, and money by way of taxation, and to whom the state in turn grants and guarantees liberty of person and of conscience, the right of acquiring and possessing property, of marriage and the social relations, of suit and defense, and security in person, estate and reputation.' 3 Am. and Eng. Encyclopedia of Law, 242. Women are citizens although in this state they can not vote.
>
> "In Amy v. Smith, 1 Litt. (Ky.) 333, it is held that it is not necessary 'even for an adult male to be a citizen, that he should be in the actual enjoyment of all those rights and privileges which belong to a citizen. He may not only not be in the actual enjoyment of those rights and privileges, but he may even not possess those qualifications, of property, of age, or of residence, which most of the states prescribe as requisites to the enjoyment of some of their highest privileges and immunities, and yet be a citizen.
>
> "In Minor v. Happersett, 21 Wallace, 162, it was held that women may be citizens, that they are persons and

> by the fourteenth amendment of the constitution of the United States, 'All persons born or naturalized in the United States and subject to the jurisdiction thereof', are expressly declared to be 'citizens of the United States and of the state wherein they reside.' Robinsons case, 131 Mass. 376."

Further definitions of citizenship bearing directly on the question are found in the case of The State ex rel. v. The County Court of Howard County, 90 Mo. 593, l.c. 598, as follows:

> "A citizen is defined by Webster to be: 'A person native or naturalized who has the privilege of voting for public officers, and who is qualified to fill offices in the gift of the people; also every native born or naturalized person of either sex who is entitled to full protection in the exercise and enjoyment of the so-called private rights.' Bouvier's definition of a citizen, in American law, is: 'One who, under the constitution and laws of the United States, has a right to vote for representatives in congress and other public officers, and who is qualified to fill offices in the gift of the people. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' Abbott defines it thus: 'A person who owes allegiance to, or may claim reciprocal protection from, a government. One who is a member of a nation or of the body politic of a sovereign state. * * * Age or majority is not involved. The most important political rights are not, indeed, acquired until

> the age of twenty-one; but it is not the possession of these which constitute citizenship, nor is citizenship in abeyance while they are. * * * Nor is sex involved. Women are citizens fully and truly as men; * * * nor does a recognition of women's citizenship involve a grant of political rights, such as are, indeed, usually conferred only upon citizens, but do not inhere in that status.' United States v. Anthony, 11 Blatchf. 200; Minor v. Happersett, 21 Wall. 162; United States v. Reese, 92 U.S. 214; 1 McArthur 169; 1 Abb. Dict. 223; Van Volkenburgh v. Brown, 43 Cal. 43. Accepting the definition put upon the word citizen by the highest authority, we must return an affirmative answer to the first two questions propounded by the record."

The only other element relative to whether or not an inmate of a poorhouse comes within the terms of the Act is that of residence. Again referring to Section 6, supra, we find that an applicant for old age assistance must have resided in the state for five years or more within the nine years immediately preceding application for assistance and for the one year next preceding the date of the application.

Section 7, Article VIII of the Constitution of Missouri is as follows:

> "For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service either civil, or military, of this state, or of the United States; nor while engaged in the navigation of the waters of the State, or of the United States, or of the high seas, nor while a student of any institution of learning, nor while kept in a poorhouse or other asylum at public expense, nor while confined in public prison."

It has long been recognized in this state that residence is largely a matter of intention, and intention is to be deduced from the acts and utterances of the person whose residence is in issue. In Re Lankford's Estate, 272 Mo. 1.

Further pursuing the question in the negative, we have read the Act in its entirety and fail to find any provision in any section which precludes an inmate of a poorhouse from receiving benefits as contained therein.

Section 3 of the Act provides for the establishment of a County Old Age Assistance Board - Section 10 provides for the application of a person seeking the benefits to be made to said Board. It then becomes the duty of the Board to investigate the facts. If the Board approves the application, it makes a recommendation of the amount of assistance to be allowed, or it may disapprove. If the County Board disapprove, the applicant may then request a rehearing and the finding of the Board is then forwarded to the State Commissioner. If the State Commissioner and the County Board are unable to agree on the allowance or disallowance, or the amount of assistance, the records are then forwarded to the State Board, which is the Board of Managers of the Eleemosynary Institutions. The decision of the State Board is final, except for the right of appeal as contained in Sec. 25 of the Act.

Section 28 of the Act states that the State Board shall have authority to make such rules and regulations as are necessary to carry out the provisions of the Act.

Section 5 contains the provision that the amount of assistance shall be fixed with due regard to the conditions in each case, but that in no case shall it be an amount which, when added to the income of the applicant from all other sources, shall exceed a total of $30.00 per month.

CONCLUSION

Under Section 6, supra, the Legislature saw fit to place certain qualifications on applicants for benefits under the Act and it enumerated certain institutions, the inmates of which were precluded from the benefits. In the instance of poorhouses and infirmaries, we conclude that by omitting such institutions, there was no intention on the part of the Legislature to disqualify the unfortunates in such institutions.

It was evidently the intention of the Legislature to prevent persons from becoming inmates of such institutions, and we do not believe that we are unreasonable in the conclusion that it was the further intention of the Legislature to make it

possible for inmates possessing the necessary qualifications to be released from such institutions by receiving the benefits under the Act in the form of a pension; however, irrespective of the intention of the Legislature, the fact remains that the Act does not contain any provision which prohibits or precludes the inmates of poorhouses or infirmaries from receiving benefits.

Therefore, it is the opinion of this department that inmates of county infirmaries have the right to make application for benefits under the Old Age Assistance Act, and they are entitled to the same consideration as any other person possessing the necessary qualifications.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

CITY BOOK: In cities of fourth class county clerk should make the city book.

July 5, 1935.

FILED 45

Hon. C. E. Jeffries,
County Clerk,
Newton County,
Neosho, Missouri.

Dear Sir:

Your letter of June 28 is received, which makes the following inquiry:

> "There is some question in this county as to who should make the City Tax Books for the various cities and towns in the county. The Assessor feels that it is his duty and heretofore the County Clerk has always made the books.
>
> "We would like to have your opinion on this matter as soon as possible, as it is now time to make the books."

Replying thereto, we assume that your inquiry relates to the city tax books for cities of the fourth class which do not elect an assessor. Sec. 7047, R.S. Mo. 1929 authorizes such cities to levy taxes.

Sec. 6951 thereof provides that such cities may provide by ordinance for election of a city assessor. Section 6968 provides that the Board of Aldermen shall elect a city clerk. Section 6994 provides that

> "****the city assessor shall jointly, with the county assessor, assess all property in such cities, and such assessment, as made by the

> city assessor and county assessor jointly and after the same has been passed upon by the board of equalization, shall be taken as a basis from which the board of aldermen shall make the levy for city purposes,"

and that the city assessment shall conform to the county assessment and shall be corrected, etc., and further provides that

> "in cities which do not elect an assessor the mayor shall procure from the county clerk of the county in which such city is located, and it shall be the duty of such county clerk to deliver to the mayor on or before the first day of July of each year a certified abstract from his assessment books of all property within such city made taxable by law for state purposes, * * *"

and the assessed valuation as corrected by the Board of Equalization shall be transmitted to the Council, who shall establish by ordinance the tax rate, etc.

Section 6999, R.S. Mo. 1929 provides that the City Clerk shall thereafter "make out appropriate and accurate tax books."

Section 9881, R.S. Mo. 1929 provides the Collector shall give his receipt "indorsed on the aggregate abstract thereof as required to be made out by the clerk." This latter section pertains to the duties of county officials.

Section 9876, R.S. Mo. 1929 is repealed by the Session Acts of 1933, p. 421, and a new law is enacted in lieu thereof having to do with the collection of county taxes and providing that as soon as the assessor's book shall be corrected, the County Clerk shall, within ninety days, "extend the taxes thereon", and this book which was started by the assessor is then completed by the County Clerk and authenticated for the use of the Collector. Such assessor's book, with the taxes so extended therein, shall be called "The Back Tax Book."

The Act of the 1933 Legislature last referred to does

not purport to affect or change the machinery or method by which cities of the fourth class collect their city taxes, and with respect thereto the books required to be made out and the duties of the officials charged therewith are the same since the passage of the 1933 Act as they were prior thereto; therefore, it is our opinion that the County Clerk should make the tax book.

Respectfully submitted,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

DW:AH

OLD AGE ASSISTANCE BOARD: Members of county court disqualified from appointing themselves to county old age assistance board.

7-6

July 6, 1935.

FILED
45

Hon. W. Ed Jameson,
President Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of June 18, which is as follows:

> "I am just in receipt of a letter from the county court of Ralls County, Missouri, asking if the court itself would be permitted to act as an Old Age Pension Board in that county. The law states the court shall appoint an Old Age Assistance Board. Whether they can appoint themselves, I shall have to leave to your office for an opinion.
>
> "Kindly furnish me with an opinion as to the qualifications of the Old Age Assistance Board, making it broad enough so it will apply to the many letters I will be receiving in the next few weeks regarding this matter."

Your letter refers to Senate Bill No. 7, same being an Act to provide for, regulate and fix the conditions and requirements for assistance for residents of the State of Missouri over the age of 70 years.

Section 3 of said Act provides as follows:

> "In every county there shall be established a County Old Age Assistance Board, to consist of

> three persons domiciled in the county, each of whom shall have been a resident taxpaying citizen of the county for a period of five years prior to his or her appointment at least one of whom shall be a woman, who shall be appointed by the county court for a term of four years, except that of the members first appointed, one shall be appointed for a term of two years and one for a term of three years. Vacancies shall be filled in the same way in which the original appointment was made. The members of the county board shall serve without compensation, except that the necessary expenses incurred while in the performance of their duties shall be paid to them."

I

The qualifications for membership on county old age assistance boards are set out in the above section. They are, namely, (1) domiciled in the county; (2) resident taxpaying citizen of the county for a period of five years prior to his or her appointment.

The term "domicile" is defined in 10 American & English Encyclopedia of Law (2d Ed.) page 8 in the following manner:

> "In a strict and legal sense, that is properly the domicile of a person when he has his true, fixed, permanent home and principal establishment and to which, whenever he is absent, he has the intention of returning."

In the case of Wyrick v. Wyrick, 145 S.W. 144, l.c. 146, 172 Mo. App. 723, our court, in defining the word "domicile", said:

> "The 'domicile' of a person is a place in which such person has voluntarily fixed his abode, not for a temporary purpose, but with the permanent intention of making it his permanent home."

14 Cyc. 383:

> "'Domicile' is residence coupled with intention,"

We are of the opinion that a person may be said to be domiciled in a particular county and be eligible for membership on its county old age assistance board when he or she has a fixed, permanent home and principal establishment in that county.

The term "resident" is defined in the case of Bough v. Little, 140 Okla. 206, 282 P. 459, l.c. 461, thus:

> "A resident of a place is one whose place of abode is there and who has no present intention of removing therefrom. See also: Pope 'Legal Definitions' 1401; 7 Words & Phrases, 1st Series, 61, 62."

A person may be said to be a "resident" of Cole County and have his "domicile" in Jackson County. There is not necessarily the idea of permanence connected with the signification of the word "resident" as there is in the word "domicile". With this in mind, we are of the opinion that the Legislature intended that persons, in order to be qualified as members of their county old age assistance boards, must not only have their "domicile" in their county, but must also be a "resident" of their county.

In the case of State ex inf. Bellamy v. Menegali, 307 Mo. 447, 270 S.W. 101, an attempt was made to oust a school director on the ground that she was not a taxpayer who had paid a state and county tax within one year next preceding her election, in violation of a statute. The Court, analyzing the meaning of the term "taxpayer", said:

> "In Webster's New International Dictionary, a taxpayer is defined as: 'One who pays a tax.' In Funk & Wagnall's New Standard Dictionary, a taxpayer is defined as: 'One who pays any tax, or who is liable for the payment of any tax.' The evidence is clear and undisputed that respondent on June 1, 1920, was

> the legal owner of the property heretofore described, and that it was not exempt from taxation."

In the case of Catilo v. State Highway Commission, 312 Mo. 244, 279 S.W. 673 (1925), the status of the plaintiffs as taxpayers having a right to bring an injunction suit on their own behalf and on behalf of others similarly situated was questioned, and the court in discussing the meaning of the term "taxpayer", said:

> "In Black's Law Dictionary, a taxpayer is defined as 'A person chargeable with a tax.' In State ex rel. Sutton v. Fasse, 71 S.W. (Mo.) 745, Goode, J., speaking for the St. Louis Court of Appeals, defines a taxpayer as 'a person owning property in the State subject to taxation and on which he regularly pays taxes.' This definition is adopted in Pope's Legal Definitions."

In deciding whether a person is a taxpayer or not so as to entitle him to some statutory right, it has been held that it makes no difference whether the property on which he claims to be a taxpayer is assessed in his name or not. In the case of State ex rel. Circuit Attorney v. Mecklin, 41 Mo. App. 335 (1890), the Court said:

> "A person is not relieved from paying taxes on property owned by him, simply because it is erroneously assessed to another, nor is he under any legal obligation whatever to pay a tax on realty in which he has no interest, simply because it is assessed to him. The assessment of a tax creates no debt in the ordinary sense of the term. City of Carondelet v. Picot, 38 Mo. 125; Pierce v. City of Boston, 3 Met. 520; Green v. Wood, 7 Ad. & Ell. N.S. 178. If a person owns an interest in property and pays a tax thereon, he pays his tax regardless of the fact to whom the property is assessed."

In conclusion, we are of the opinion that if a person is (1) a married woman, she is a taxpayer within the terms of the Act if she owns any property in the county in which she is a resident and has her domicile, subject to taxation, regardless of whether it is in her own name or not; and (2) if household goods are subject to taxation in the county and a tax has been paid on same, the owner thereof is a taxpayer; and (3) if the owner of the goods referred to in (2) above was a married man, his wife is not a taxpayer unless she owns other goods which would make her a taxpayer.

In the case of Devanney v. Hanson, (W. Va.), 53 S.E. 603, the Court, in defining the term "citizen" as it relates to a county, said:

> "There is no such thing as a citizen of any county. A person may be a citizen of a state or of the Union, because they are sovereign; but a county is a mere subdivision of a state with bodies executing functions assigned to them by the sovereign in process of government, but they are not sovereign. To be a citizen one must be 'a member of an independent political society and as such subject to its law and entitled to its protection in the enjoyment of civil or private rights. 6 Am. & Eng. Enc. L. (2d. Ed.) 15. 'A citizen is one who, as a member of a nation or of the body politic of a sovereign state, owes allegiance to and may claim reciprocal protection from its government. 7 Cyc. 133. A county is not an independent political society. It makes no law save in subordination to the state under authority conferred by it."

In the case of State ex rel. v. Banta, 71 Mo. App. 32, l.c. 42, the Court said:

> "The words 'inhabitant', 'citizen' and 'resident', as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; ***"

We are of the opinion that the word "citizen" as used in Section 3, supra, means substantially the same thing as the word "resident".

II

Section 3, supra, states in part that "in every county there shall be established a county old age assistance board * * * who shall be appointed by the county court * * *" The question is raised whether the members of the county court could appoint themselves to act as the county old age pension board in their county.

The Court, in the case of State ex rel. Smith v. Bowman, 184 Mo. App. 549, 170 S. W. 700, l.c. 703, in holding that officers with the power of appointment could not appoint themselves, said:

> "Tested in this manner, we have no hesitancy in holding that it is against public policy to allow a body of public officials having the appointive power to fill an office to appoint one of their own number to such office. Thus, in 29 Cyc. 1381, the law is stated: 'It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition, all officers who have the appointing power are disqualified from appointment to the offices to which they may appoint. The Constitutions of a number of the states have applied the same rule to the offices which have been created or whose emoluments have been increased by the bodies of which the persons seeking appointment were members at the time the office was created or the emoluments increased.' In 23 Ency. of Law, 338, after stating that it has often been enacted that members of legislative bodies are ineligible to offices created by such bodies, the text adds: 'The same rule applies to officers with the power of appointment. They cannot appoint themselves.'"

* * *

> "We are not without abundant authority for this ruling. The case of Meglemery v. Weissinger, (Ky.) 131 S.W. 40, 31 L. R. A. (N.S.) 575, is a leading case on this subject. The editorial note to that case says: 'The adjudged cases upon the validity of appointment to office made from the membership of the appointing body hold uniformly that such appointments are illegal and to be generally discountenanced.'"

In view of the foregoing, we are of the opinion that the members of the county court authorized to appoint members of the county old age assistance board are disqualified from appointing themselves and that any such attempted appointment would be clearly against the public policy of the State of Missouri.

Respectfully submitted,

W. O. SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW-WOS:AH

OLD AGE ASSISTANCE: Senator or Representative prohibited from being appointed to position of State Old Age Assistance Commissioner or to position on county old age assistance boards.

1-7

July 8, 1935.

FILED
45

Hon. W. Ed Jameson,
President Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of July 2 requesting an opinion as to the following state of facts:

> "I have heard it said that neither a senator or representative who had been elected by the people for a definite term of office would not be eligible for appointment under the Old Age Assistance Board or any other administrative department of the state.
>
> "I have even heard it said that they could not tender their resignation and be eligible.
>
> "I would like for you to write me on this subject for I have occasion to answer letters almost every day in regard to this matter."

Section 12, Article IV of the Constitution of Missouri provides as follows:

> "No Senator or Representative shall, during the term for which he shall have been elected, be appointed to

> any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

In the case of Hastings v. Jasper County, 314 Mo. 144, l.c. 149, the Court said:

> "A public office is defined to be 'the right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be by him exercised for the benefit of the public' (Mechem, Public Officers, 1; State ex rel. Walker v. Bus, 135 Mo. 326) * * * The authorities all agree, substantially, that if an officer receives his authority from the law and discharges some of the functions of government, he will be a public officer."

And in the case of State ex rel. Zevely v. Hackmann, 300 Mo. 59, the Court, in holding the Secretary of the State Tax Commission a public officer of the state, said:

> "A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the office assigned to him by law."

Sec. 2 of Committee Substitute for Senate Bill No. 7 as passed by the 58th General Assembly provides:

> "The Governor shall appoint a State Old Age Assistance Commissioner, by and with the advice and consent of the Senate, who shall be qualified by character, training, and experience, and who shall have been a resident taxpaying citizen of the State of Missouri for five years next preceding his appointment. The State Board shall fix the salary of the State Commissioner which shall not exceed $3,600.00 per annum. The State Board shall administer the provisions of this Act and may appoint such clerical and office assistance, and such deputies as may be appropriated for by the General Assembly. Each member of the State Board shall receive not to exceed $50.00 per month for his services as such in addition to all other compensation provided by law."

The "State Board" referred to in Sec. 2 means the Board of Managers of the Eleemosynary Institutions.

Sec. 3 of said Act provides:

> "In every county there shall be established a County Old Age Assistance Board, to consist of three persons, domiciled in the county, each of whom shall have been a resident taxpaying citizen of the county for a period of five years prior to his or her appointment, at least one of whom shall be a woman, who shall be appointed by the county court for a term of four years, except that of the members first appointed, one shall be appointed for a term of two years and one for a term of three years. Vacancies shall be filled in the same way in which the original appointment was made. The members of the county

board shall serve without compensation, except that the necessary expenses incurred while in the performance of their duties shall be paid to them."

CONCLUSION

In view of the foregoing, it is the opinion of this department that by reason of the prohibition contained in Sec. 12, Article IV of the Constitution of the State of Missouri, a senator or representative may not be appointed to the position of State Old Age Assistance Commissioner, or to a position on the respective county old age assistance boards.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

OLD AGE PENSIONS: State Board has right to appoint clerical help for respective county boards.

1-15

July 12, 1935.

FILED
45

Hon. W. Ed. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This is to acknowledge receipt of your letter of July 2, 1934, in which you request the opinion of this Department on certain questions submitted therein. Your letter reads as follows:

> "The Old Age Pension act provides for the appointment of an Old Age Assistance Board in each county and in the City of St. Louis. It provides no salary but only the expenses of this board.
>
> "Question has come up already in regard to the setup in St. Louis and Kansas City. It is evident that a board working without salary could not handle the affairs in these larger centers without some secretarial and stenographic help.
>
> Please advise if we will be able to supply this help from the funds appropriated for the administration of this act."

Your question is, as we interpret your letter, whether or not you may pay for clerks, stenographers and other employes, selected by you and used by the County Old Age Assistance Board, out of money appropriated by the Legislature for the administration of the Old Age Assistance Law.

Your question relates to Senate Bill No. 7, passed by the 58th General Assembly, approved by the Governor, and which becomes effective August 27, 1935.

Under the provisions of Section 3 of said Act it is provided that a County Old Age Assistance Board shall be established in each county of the State, whose duties are outlined in the act. The members of this board, which shall consist of three persons, are appointed by the respective county courts of the counties, and of the three members, one shall be a woman. However, in the City of St. Louis the Board of Estimate and Apportionment of said city performs the same duties in the City of St. Louis as the county courts do in the other counties of the State.

By Section 3 of said Act it is provided that "the members of the county board shall serve without compensation, except that the necessary expenses incurred while in the performance of their duties shall be paid to them."

Enumerating some of the duties of the county board, we find under Section 7 that it shall be the duty of the county board to appraise the value of the property of persons applying for pensions under this act.

Under the provisions of Section 9 it is provided that the applicant for assistance shall deliver his claim, in writing, to the county board.

Under the provisions of Section 10 it is the duty of the county board to promptly make an investigation of the facts and after hearing the applicant, if it approves the application, shall make a recommendation of the amount of assistance to be allowed, or if it disapprove, make a recommendation that no assistance be allowed. And said section further provides for a rehearing upon proper steps being taken by the applicant, etc.

Under the provisions of Section 11 the county board shall have the power to compel, by subpoena, the attendance and testimony of witnesses and the production of books and papers in their investigation.

Under the provisions of Section 12 it is the duty of the county board to issue to each applicant to whom assistance is allowed, a certificate for one year, stating the amount of each installment.

Under the provisions of Section 13 it is the duty of the county board to issue a certificate for each subsequent year after an investigation, and may make changes in the amount of allowance.

Under the provisions of Section 19 the State Board, if they see fit, may cause a special inquiry to be made by the county board and may suspend payment of any installment, pending inquiry.

Under Section 21 the county board shall stop payment of assistance if one is convicted of a misdemeanor under this law.

Under the provisions of Section 28 it is provided for meetings of the State Board and the respective county boards in such places as may be fixed by the rules of the Board.

It will readily be seen that the county board has many duties to perfrom and many questions will have to be determined by it in the administration of this Act. Files and records will have to be kept and clerical work will have to be done in all of the counties of the State in the administration of the Act, and a great amount of detail work will have to be done by some member of the board or some clerk or stenographer or other person for the board. The law does not provide that the county board may employ any person to do this clerical or secretarial work. But we think, under the provisions of this Act, that the State Board has the power to employe the necessary help for the county board.

By Section 2 of the Act it is provided that the State Board shall administer the provisions of this Act and may appoint such clerical and office assistance and such deputies as may be appropriated for by the General Assembly.

Turning to House Bill No. 541, Section 46-h and 46-h-1, passed at the same session as the Old Age Assistance Act, we find that a large sum of money was appropriated by the Legislature to administer the Act. And in said appropriation bill, among other things, there is provided for "salaries and wages of accountants, auditors, bookkeepers, inspectors, investigators, stenographers, chief clerks * * * and all other necessary employes." For a proper administration of this Act we think it is within the power of the State Board to employ necessary and competent help to do the secretarial and stenographic work for the respective county boards of the State.

It is, therefore, our opinion that the State Board may appoint such clerical and office assistance for the respective county boards as may be necessary to carry out the Act and expedite the handling of the applications and detail work in connection with the performance of the county boards' duties and their compensation may be paid out of funds appropriated by the Legislature under House Bill No. 541 aforesaid.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

STATE ELEEMOSYNARY INSTITUTIONS: The board has implied power to accept a discount on bonds accepted in lieu of a judgment and sell the same.

7-19

July 18, 1935.

FILED 45

Hon. W. Ed. Jameson,
Pres., Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

Sometime ago this department was in receipt of a letter from you requesting certain information in regard to discounting certain bonds. Your letter is as follows:

> "You will recall that suit was brought in St. Joseph against Buchanan County for their old account to State Hospital #2, St. Joseph and the Mo. State Sanatorium, Mt. Vernon. At that time we received judgment for the amount of the original bills in the neighborhood of $41,000, but we received bonds for the amount of the original bill plus accumulated interest, in the amount of $46,250.00.
>
> "If we could get 92¢ on the dollar for these bonds it would just about equal the original amount of our bill, without interest.
>
> "I would like to have your opinion as to our right to sell these bonds at an average of about 8% discount. I certainly think this is the wise thing to do. I have an offer today for $5000.00 of scattered maturities on that basis."

Your right and authority to discount the bonds eight per cent and thereby realize the cash from the sale of the same must be found expressly or impliedly in the statutory powers of the Board of Managers of the State Eleemosynary Institutions.

The statute referring to the demands and debts due the eleemosynary institutions is Section 8615, R. S. Mo. 1929, which is as follows:

> "For all debts and demands whatsoever due any eleemosynary institution, and all damages for failure of contract, and for trespass and other wrongs to the institution or any property thereof, real or personal, actions in any court of competent jurisdiction may be maintained in the name of the board of managers of such institution, naming it. Interest shall be recovered on any and all sums due the institution from the time when the cause of action accrued. In actions for any indebtedness, or for any damages due the institution on account of any patient or inmate thereof, the account therefor, certified by the superintendent, with the seal of the institution attached, shall be prima facie evidence of the amount due."

Section 8636, R. S. Mo. 1929, empowers the county court to discount county warrants for the purpose of raising funds for the maintenance of county patients in institutions, the pertinent part of which is as follows:

> "And for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for. And state hospitals are hereby expressly prohibited from receiving any county warrant in payment of any such sum as may be due by this section."

Section 8567, R. S. Mo. 1929, refers to the penalty which may be incurred by officers of the institutions and board of managers with respect to incurring debts for which there is not at the time adequate appropriation, the pertinent part of which is as follows:

> "Provided, that no such curator, manager, trustee or officer in control, or committeeman, as aforesaid, shall be so liable, as aforesaid, or be deemed guilty, as aforesaid, if at the time of incurring such debt he shall require the ayes and noes to be taken and recorded on the question of incurring such debt, and shall himself vote against incurring such debt: Provided further, that nothing herein shall prohibit such managers of any such institutions from incurring debts for the necessary support of such institutions from January first of the years the general assembly meets, until the appropriations for such institutions are made, when the funds of such institutions are exhausted."

Section 8561, R. S. Mo. 1929, places the control of the eleemosynary institutions in the hands of the board of managers and is as follows:

> "The state eleemosynary institutions as defined in section 8560, of this article, shall hereafter be under the care, management and control of one board of managers consisting of six persons to be appointed by the governor, by and with the consent of the senate, not more than three of whom shall belong to the same political party."

It will be noted by the above section that the control and management of the eleemosynary institutions is completely under the jurisdiction of the board of managers.

The right of the state or its officers to compromise claims and suits was discussed in the case of Commonwealth v. Southern Pac. Co., 120 S. W. 313, likewise in Railroad Company v. Anthony, 75 Mo. 431, in the following language:

> "We understand the rule to be well established that pending litigation to recover on claims that are unliquidated and unsatisfied, the amount may be compromised by the state or any of its political subdivisions at any time before final judgment."

In the case of State ex rel. Bybee v. Hackmann, 276 Mo. l. c. 116, the court lays down this rule:

> "But it is also well settled, if not fundamental law, that whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual, is conferred by implication."

CONCLUSION

There is no express authority provided by the statutes for the board of managers to discount the bonds in question in the amount of eight per cent. However, we are of the opinion that the statutes give the board of managers the implied power to make such discount if Hospital No. 2 and the Sanatorium at Mt. Vernon are in need of the funds and if in the judgment and discretion of the board it is of the opinion that the bid represents the true value of the bonds and is the best bid the board is able to obtain.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

SUPPLEMENTAL FEE BILLS: When witness must make application for fees.

8-22

FILED 45

August 20, 1935

Mr. O. B. Jennings,
Clerk, Circuit Court and Ex-officio Recorder,
Howell County,
West Plains, Missouri.

Dear Sir:

We wish to acknowledge your request for an opinion under date of August 6, 1935, wherein you state as follows:

> "How long, in your opinion does a witness have after a case is completed to claim fees. For instance, a witness comes in a month or more after a case has been completed and a cost bill sent to the State or County to be paid. Can he claim his fees and collect on a supplemental cost bill?"

Section 11799, R. S. Mo. 1929, provides how fees shall be paid witnesses and states as follows:

> "The clerk of each court of record shall, on the application of any witness to have his fees allowed, enter on his book, under the title of the cause in which the witness was summoned or recognized, or if before the grand jury, the name of the witness, the number of days he has attended and the number of miles he has necessarily to travel in consequence of the summons or recognizance, and shall swear the witness to the truth of the facts contained in said entry, and it shall be the duty of the clerk to

> make out and deliver to each witness attending before the grand jury, and entitled to fees therefor, a scrip as required in case of grand jurors, which scrip shall be countersigned by the foreman of the grand jury, and shall be paid by the county treasurer in like manner as now by law required for the pay of grand jurors; and the clerk shall be allowed the same compensation for said services as is now allowed by law for like services in issuing scrip to grand jurors."

It will be noted that witnesses must make application for their fees, and that it is not the duty of the clerks of the courts of record to enter it on their books until same is done.

Section 3841, R. S. Mo. 1929, makes it the duty of the clerk to make out fee bills, thus:

> "The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Under this section the clerk of the court must tax all costs immediately after the adjournment of the court and before the next succeeding term, and it would appear, therefore, that a witness claiming a fee must make application before the next succeeding term of court in which he appeared.

Section 3849, R. S. Mo. 1929, provides when a supplemental fee bill may be issued and states that

> "When the clerk shall send a bill of costs to the state auditor or county court, as provided in the next preceding section, he shall expressly state in his certificate that he has not at any previous time certified or sent a copy of the same bill, or part thereof, for payment: Provided, that if the clerk shall by oversight or mistake, fail to include any costs properly chargeable against the state or county in any fee bill, he may make out and present, as hereinbefore provided for making out bills of costs, a supplemental bill for the costs so omitted: Provided, that the clerk shall in no case charge or receive any fee or fees whatsoever for the issuance of such supplemental fee bill."

The above section provides that if the clerk, by oversight or mistake, fails to include any costs properly chargeable against the state or county in a fee bill, he may issue a supplemental fee bill. Certainly it can not be said that an oversight or mistake has been made when the witness fails to make application for his fees.

In the case of State ex rel. v. Seibert, 130 Mo. 202, l. c. 217, our court said:

> "At common law no recovery of costs was allowable, and when statutes were passed allowing costs they were always strictly construed."

Following a strict rule of construction, we are of the opinion that if a witness fails to make proper application to the court to have his fees allowed either before or immediately after the adjournment of court and before the next succeeding term, he is barred from later appearing before the clerk and making application for same.

Section 11416, R. S. Mo. 1929, provides that claims against the state must be exhibited within two years and

states as follows:

> "Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within two years after such claims shall accrue, and not thereafter."

Under the above section, we are of the opinion that if it can be shown that the witness did make proper application as provided by Section 11799, supra, and that he failed to receive his fees due to an oversight or mistake of the clerk, he may within two years from the final determination of the prosecution make a claim for same by a supplemental fee bill, as provided by Section 3849, supra. (State ex rel. Johnson v. Draper, 48 Mo. 56, l. c. 58.)

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

WOS:
MW:HR

PENSIONS: Old Age Assistance: Costs of investigations payable out of appropriation to State Board; not payable by county.

8-26

August 21, 1935.

FILED 45

Hon. W. Ed. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This is to acknowledge receipt of your letter of August 14, 1935, in which you request the opinion of this Department on a question therein submitted; which letter of request is as follows:

> "The question of 'Who is going to pay the costs of investigating the applicants for old age assistance in the various counties?' has arisen.
>
> "Section 10 of the committee substitute for Senate Bill No. 7 reads as follows:
>
> "'Section 10. Whenever an application is made for old age assistance, the county board shall promptly make investigation of the facts, and, after hearing the applicant, if it approves the application, shall make a recommendation of the amount of assistance to be allowed, or, if it disapprove, make a recommendation that no assistance be allowed.'
>
> "From the above section, it specifically states that the county board shall promptly make investigation of

> the facts, etc. I am asking your opinion on the matter as to whether the county or the state will have to pay the costs of these investigations."

Your question is -- "Who is going to pay the costs of investigating the applicants for old age assistance in the various counties?"

We herewith set forth Sections 10 and 11 of Senate Bill No. 7, which are the sections of said Act applicable to your question, as follows:

> "Section 10. Whenever an application is made for old age assistance, the county board shall promptly make investigation of the facts, and, after hearing the applicant, if it approves the application, shall make a recommendation of the amount of assistance to be allowed, or, if it disapprove, make a recommendation that no assistance be allowed. Upon the request of an applicant, the county board may, if it sees fit, direct a rehearing, of which the applicant shall have at least ten days' notice, and at which he may appear and offer evidence. The decision of the county board shall be forwarded to the state Commissioner who may approve or disapprove, or recommend changes in the decision of the county board. If the state Commissioner and the county board are unable to agree in regard to the allowance, disallowance, or the amount of assistance, the application, along with a record of all the proceedings in regard to it, shall be forwarded to the State Board for review, whose decision shall be final, subject to the

right of appeal as herein otherwise provided. An applicant whose application for assistance has been rejected may not reapply for assistance until the expiration of twelve months from the date of the previous application, unless the rejection of said application shall be solely for failure to qualify as to age and such applicant has within the 12 months period reached the qualifying age.

"Section 11. For the purpose of any such investigation the state board, the county board, or the state Commissioner shall have the power to compel, by subpoena, the attendance and testimony of witnesses and the production of books and papers. The costs of such hearing to be paid by the State Board out of funds appropriated to such Board. All witnesses shall be examined on oath, and any member of the state board, county board, or the state Commissioner may administer said oath."

From a reading of the above two sections, and when same are read in connection with the other sections of said Act, we are of the opinion that the cost of investigations and hearings in connection with applications for old age assistance are to be paid out of the funds appropriated to the State Board by the Legislature. We do not find anywhere in the Act that the county is liable for the cost of making these investigations. It is, therefore, our opinion that the cost of making investigations of applicants for old age assistance is payable out of moneys appropriated to the State Board by the Legislature for the purpose of administering said Act.

Very truly yours,

APPROVED:

COVELL R. HEWITT
Assistant Attorney-General

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General

CRH:EG

OLD AGE PENSION - Payments due from date of filing application.

9-24

August 23, 1935

FILED
45

Honorable W. Ed Jameson, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

We have your request of August 15, 1935 for an opinion, which request is as follows:

> "Section 14 of Committee Substitute of Senate Bill No. 7, reads as follows:
>
> 'The assistance, if allowed, shall commence on the first day of the calendar month, following that on which the petition was received by the county board.'
>
> "For many reasons, it will be very helpful in the administering of this law for us to make our investigation report a part of this application. The pensioner, in that case, would not be entitled to the pension until the investigation had been completed. I am asking your opinion as to whether or not we could do this."

The answer to your question depends upon the particular meaning of the word "received", as contained in Section 14. Under Section 9, an

applicant for assistance shall deliver his claim in writing to the county board. The application must be sworn to by the applicant. Under Section 6, the qualifications for a pensioner are determined as of the date of making the application. It is apparent from the entire act that the report of the investigation cannot be made a part of the application since the application is a sworn written statement of the applicant, while the investigation, as provided for in Section 11, may be the sworn statement of any number of people.

The Legislature, in enacting the old age pension law, was aware of the fact that it was physically impossible for the administration to investigate all applications at the same time they are filed. In order to allow time for proper investigation before funds were paid, the Legislature inserted Section 14 so that those who are entitled to receive a pension, no matter how long and drawn out the investigation, would receive the pension, when paid, from the date they filed their application.

It is, therefore, the opinion of this office that successful applicants for old age pensions are entitled to receive payments from the date of filing their application with the county board.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

FEES - COUNTY CLERK: Not entitled to any fee for signing school bonds.

8-31

August 29, 1935.

FILED
45

Mr. A. Lee Jenkins,
County Clerk, Daviess County,
Gallatin, Missouri.

Dear Sir :

We acknowledge receipt of your inquiry which is as follows:

> "We are writein you for an opinion in reguard to County Clerk. Chargeing for singing Bonds, for School Dis,t. We have two School Districts Refinancing their bonds, which has to be signed and sealed by the County Clerk of their respt, Countyes.
>
> "Has the County Clerk a right to charge fifty cents for each Bond so Signed, and Sealed, or can he make any charge for such service and if so how much.
>
> "Thanking you in advance for your opinion."

Replying thereto, Section 9200, Laws 1931, page 349, is as follows:

> "The board of directors of any school district, organized under any general or special law of this state, is hereby authorized to issue funding and refunding bonds for the district, to be exchanged for outstanding bonds of the district, or sold for the purpose of

meeting and paying any matured or maturing bonded indebtedness thereof. Each bond shall be of the denomination of not more than one thousand and not less than one hundred dollars, and shall bear interest not to exceed six per cent. per annum, and such interest shall be payable semi-annually, and to this end each bond shall have semi-annual coupons attached thereto and be made payable to bearer: Provided, that no bonds issued under this section shall be payable in more than twenty years from the date thereof, and shall be payable, principal and interest, in the city of St. Louis or the city of New York, at the option of the board of directors, or as may be agreed upon by such board of directors and the purchaser of such bonds. Such board of directors shall be empowered to prepare and issue from time to time such number of renewal bonds as may be necessary for the objects and purposes of this law, and each bond shall be signed by the president, countersigned by the secretary or clerk, and authenticated by the seal of such board of directors, if there be one; and shall also be attested by the clerk of the county court of the county in which such district is located, and he shall put the seal of said court on each of said bonds. The secretary or clerk of the board of directors shall keep a record in the books of the school district of all the renewal bonds that may be issued by the board of directors under the provisions of this chapter, noting the date when issued and when due, and also the number and amount of each bond so issued, and shall also keep a full record of all transactions that may be necessary for the identification of such bonds."

We assume this is the section you refer to as requiring you in your official capacity to perform certain acts.

Compensation to the county clerk for his official services performed is allowed only where there is statutory provision for the payment thereof. If there is no statute providing for his compensation, he is not entitled to compensation, notwithstanding the law may make it his official duty to perform certain services.

In the case of State ex rel. Troll v. Brown, 146 Mo. 401, l. c. 406, the Supreme Court of this state says:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Mofford, 115 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

In the case of State ex rel. v. Gordon, 245 Mo. 12, l. c. 27, the Supreme Court of this state declares as follows:

> "Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.
>
> "Throop on Public Officers (Sec. 443) says: 'It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the State. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract but because the law attaches it to the office.'

"Mechem on Public Offices and Officers says: 'Sec. 856. Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth,' * * *

"In Bank v. Refrigerating Co., 236 Mo. 414, Brown, J., speaking for the court says: 'When the law requires a specific service to be performed by a public officer, he must perform that service regardless of whether any provision has been made to pay him for same.'

"Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same.' * * *

And at page 29 the Court said:

"As the Legislature may fix such compensation to a public office as it sees fit, or none at all, we can see no constitutional objection to its attaching such conditions as it deems proper to the payment of the compensation, such conditions to be binding upon any one who thereafter

> enters upon such office and performs its duties. As stated above, the compensation has no relation to the amount or value of the service. There can be no application of the doctrine of quantum meruit. The officer takes the office cum onere. Having accepted it with the conditions imposed by the Legislature, upon whose will he must depend for any compensation at all, he cannot afterwards challenge the power of the Legislature to impose such conditions. * * *"

In the case of King v. Riverland Levee District, 279 S. W. 195, the Court said, l. c. 196:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. * * * * * Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Medeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

CONCLUSION

Bearing in mind that officers are only entitled to fees where the statute so provides and that statutes relating thereto must be strictly construed, and finding no statute authorizing the payment of any fee to the county clerk for so signing the bonds you inquire of, it is our opinion that no fee therefor can be legally charged or collected.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

PRINTING: Multilith work, offsetting and duplicating is printing.

1-9

September 4, 1935.

FILED
45

Honorable W. Ed Jameson,
President, Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

We acknowledge receipt from you of an inquiry as to whether multilith, offsetting and duplicating work properly comes under the definition of printing, and inquiring whether such work may be performed outside of the jurisdiction of the State Printing Commission.

"Multilith" does not appear to be in our dictionary. We understand "offsetting" and "duplicating" to be terms used by the printers indicating more than one copy of the printed matter. We have made inquiry as to what is the meaning of "multilith" and as to what are the physical facts that occur when this sort of work is performed. Without going into detail fully as to the same, we understand that from certain preparations of modern make a plate is first prepared and then a picture of that plate is taken, and then from that picture certain other mechanical steps are taken and ultimately from a plate the matter which is read by the reader thereafter is impressed upon the paper.

Section 13783, R. S. Mo. 1929, states:

> "The printing for the state shall be divided into three classes, to be let in separate contracts, as follows:" and then sets out the three classifications.

Section 13784, R. S. Mo. 1929, provides:

> "The commissioners of public printing shall, on or before the first day of

1-1

> July, 1922, and every two years thereafter, enter into a contract with some responsible person or persons for the printing of the several classes of matter required by the state, for the term of two years from and after the date of such contract * * *."

Section 13790, R. S. Mo. 1929, has to do with the printing for the executive departments.

Sections 13782 to 13806, R. S. Mo. 1929, inclusive, are the code of printing, being a complete set of rules governing the printing of papers, books and periodicals used by the state in its various capacities.

In State ex rel. Publishing Co. v. Hackman, 314 Mo. 33, 42, the Supreme Court says that the term "executive departments" includes all persons upon whom are imposed duties in the administration of public affairs.

The determinative question is, what is printing. If this process which is called multilith work is printing, then it must come under the jurisdiction of the State Printing Commission.

In an opinion by this department dated June 12, 1933, it is said:

> "'The word "printed" has a varied meaning according to the connection in which it is used. If we are referring to an imprint upon calico rags it has a fixed meaning. If we refer to an imprint upon a stone it has a fixed meaning. * * * But if we go to the word "print" used as a noun * * * we find this:
>
> "'4. A printed publication, more especially a newspaper or other periodical.
>
> '"What I have known
> Shall be as public as a print."
> --Beau. and Fl., Philaster, ii, 4.
>
> "'"The prints, about three days after, were filed with the same terms."' --Addison.

> "'There is at least some relation between the verb and the noun, and the definition of the one sheds some light upon the definition of the other. But, after all, we know that the word "print" has a varied meaning, and its meaning in a particular law must of necessity depend upon the context of the whole act. So, after all, the real question is, "What is the meaning of the word "printed" in this law? * * *'
> (In re Publishing the Docket of the Supreme Court, 266 Mo. l. c. 56.)
>
> "So the question to be determined in this instance is the meaning of the word 'printing' under the laws relating to the Commissioners of Public Printing."

It will be noted that in the statute above referred to and relating to printing, the same is defined in an unqualified sense and there are no restrictions or explanations as to what the term shall cover.

In the case of Keene v. Wheatley, et al., 14 Fed. Cases 180, 192, the court said:

> "Writing is a method of originally developing the composition and of adding copies made singly, letter by letter. Printing is a process of multiplying the copies, by sheets. Thus the difference is that between multiplication and addition. Human means of increasing the number of copies by writing are extremely limited. By printing, they may, on the contrary, in the words of Lord Cranworth, be multiplied indefinitely. The books printed by those who first publicly practised the typographic art in Europe usually contained an advertisement that they were not written as all books had previously been, but were made by a new invention, whereby the several sheets were stamped at once, and not made line by line as formerly."

In the case of Arthur v. Moller, 97 U. S. Rep. 365, certain chromo-lithographs, printed from oil-stones upon paper, and known as decalcomanie pictures, were imported, and it was

held that they were, as printed papers, taxable under the tariff laws.

> "The goods in question were chromo-lithographs, consisting of landscapes, scenery, and other figures, printed from oil-stones upon paper, with one color printed on top of the other until the picture is finished.
>
> "They are used for any purpose to which painting by hand can be applied. There are no letters constituting language upon the face of the paper.
>
> "They are made by means of lithographic stones, and printed from the stones successively one after the other, according to the number of colors; the difference between them and a chromo-lithograph being that a chromo is printed positive, while decalcomaine is printed positive and negative, but chiefly negative.
>
> "After the picture is printed, it is sometimes covered with a metal leaf, which is also put on by the process of printing; a sizing is printed on from the stone, the metal leaf being placed on top of the sizing by hand, it being too brittle to be placed on by the roller, and it is run through the press, which prints the metal leaf on top of the picture."

At page 367 the court says that

> "No one would contend * * * that a lithograph taken by a single impression does not fall under that branch of the statute which imposes duties on prints or printed matter.
>
> "We do not perceive that the fact that the result is produced by several impressions, and of a different color at each time, can make a difference in the conclusion. In country places, we see posted the advertisements of circuses and shows and of political

meetings upon sheets of paper of large size, printed in large type of various colors, red, black, and blue, and requiring that the paper should pass more than once through the press. It would be a novel idea that these sheets were not printed matter.

"It is not necessary, however, that the characters produced should be letters or numerals, or the result of types or stereotypes, or be reading matter, but the term 'print' or 'printing' includes the most of the forms of figures or characters or representations, colored or uncolored, that may be impressed on a yielding surface.

"Webster defines 'to print:'--

"2. To take an impression of; to copy or take off the impress of; to stamp.

"3. Hence, specifically, to strike off an impression of, or impressions of, from types, stereotype or engraved plates, or the like, by means of a press; or to print books, handbills, newspapers, pictures, and the like.

"4. To mark by pressure; to form an impression upon; to cover with figures by a press or something analogous to it; as to print calico, etc.

"Print, noun: a mark made by impression; a line, character, figure, or indentation made by the pressure of one body or thing upon another.

"3. A printed cloth; a fabric figured by stamping.

"Lithograph: a print from a drawing on stone, ...as a lithographic picture.

"Worcester says: 'A mark, form, character; a figure made by impression.'

"McElrath's 'Commercial Dictionary,' --

"'Prints...impressions on paper, or engravings on copper, steel, wood, or stone, representing some particular subject or composition, and which may be either colored or uncolored. * * * '

"Homans's 'Encyclopedia of Commerce,' --

"'Prints: impressions, on paper or some substance, of engravings on copper, steel, wood, stone, etc., representing some particular subject or composition. Prints, like painting, embrace every variety of subject, but differ very widely in the manner in which they are engraved.'

"McCulloch's 'Dictionary of Commerce' uses the same language.

"The pictures in question were printed from lithographic stones, by successive impressions, each impression giving a different portion of the view and of a different color. Like other pictures, they are made and used for the purpose of ornament. Equally with engravings, copper-plates, and lighographs, they are printed, and properly fall within the statutory designation of printed matter."

In view of the fact that the Legislature has passed a comprehensive act defining in detail the rights and duties of the State Printing Commission with respect to printing that may be required by the State, it appears to be the legislative intent, as expressed therein, that whatever printed matter is used by the State, whether books, papers or periodicals, which is read by the eye and is not typewritten, comes within the jurisdiction of the State Printing Commission. It is immaterial whether the machine or mechanical contrivance is a large one or a small one, or whether the thing that makes the impression on the paper that is read by the eye is a multitude of small type firmly held in place making the reading matter on the page, or whether the same type is molded together into one composite piece, the paper hitting, in the latter instance,

the one piece of material in being printed, and in the former instance a multitude of pieces of material, i. e., type, in being printed. The essential thing is that an impression is made on the paper and that impression caused by the retention on the paper of the ink or other substance, and it need not necessarily be ink, is the thing that is read by the eye. It makes no difference how many preliminary steps are taken or what number of preliminary stages are passed through before getting to that stage in the printing or operation where the piece of paper has the impression made on it which is read by the eye. The important thing is that the impression is made on the paper, and there is where the printing is accomplished, or, to use the expression of the Supreme Court of the United States, that is the event where "forms of figures or characters or representations, colored or uncolored", are "impressed on a yielding surface."

CONCLUSION

It is our opinion that such work as you inquire about, the same being designated as multilith, offsetting or duplicating, is printing within the meaning of that term as used in Chapter 115, R. S. Mo. 1929, and that such work, if done under the Old Age Assistance law, shall be under the supervision of the State Printing Commission.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

ELEEMOSYNARY BOARD - Authority to fix charges for six weeks' treatment of indigent sane persons;
INDIGENT SANE PERSONS - To be given six weeks' treatment in state hospitals;
COUNTY - Liable for six week's treatment of indigent sane under Laws Mo. 1935, p. 389.

10-3

September 30, 1935

FILED
45

Honorable W. Ed Jameson, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

We have your request of September 17, 1935 for an opinion, which request is as follows:

> "I wish you would refer to Section 8663 A on page 389, of the Laws of Missouri 1935, and construe that section for me. The legislature in passing this law made no provision for the payment of patients entering the hospital under this law providing temporary diagnosis, care and treatment for indigent patients.
>
> "I am sure the law was meant to permit many people who are likely to become a charge, to have the benefit of these institutions in a preliminary way without having been adjudged by the county court as insane. A vast number of these people would respond to the correctional methods of the experts in mental hygiene at these institutions and would be dismissed before the six weeks expired, without the stigma of having been adjudged insane.

> Most of these voluntary entries would be potential patients, but everyone whose health could be restored, would save the county and state the cost of their future care. The state is now paying $12.00 per month and the county $6.00 per month for the care of this class of patients.
>
> "Could their maintenance be charged back to the counties and the state in this proportion, or could the institutions accept sponsorship and payment from the relatives or friends."

You request a construction of Laws Mo. 1935, p. 389, which, for convenience, will be set out in full:

> "Diagnosis, treatment and temporary care, for a period not to exceed six weeks, may be given at any State Hospital, at the discretion of the superintendent, to any indigent resident of this State who is not insane but who is suffering from a nervous or mental illness or other affliction for the treatment of which the hospital has especial facilities and who, in the absence of such treatment or care, is likely to become a public charge. The County or City Health Official shall send his diagnosis with each patient and a request for such treatment as provided in the above act.
>
> "Such diagnosis, treatment or temporary care shall be given in ac-

> cordance with such rules and regulations as the board of managers may prescribe."

You will note that the 1935 law uses the term "indigent resident of this State who is not insane." The term "indigent" has long been construed to mean "one without sufficient estate to pay for his maintenance; one who has no property from which to support himself." Depue vs. District of Columbia, 45 App. 59; Trustees of State Hospital for Insane at Danville vs. Lycoming Co., 86 A. 879, 239 Pa. 402. The term "indigent insane" is defined in Section 8664 R. S. Mo. 1929 to be one without property subject to execution.

If a person is indigent within the meaning of the above law, then it would appear that he is a proper subject for support by the county under Section 12950, R. S. Mo. 1929, which provides as follows:

> "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Such persons who are entitled to county support, according to Section 12951, R. S. Mo. 1929, are those who are,

> "Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them,"

From the 1935 law, it appears that indigent or poor persons, not insane, but who are suffering

from a nervous or mental illness, or other affliction, may receive a diagnosis, treatment and temporary care at a state hospital under such rules and regulations as the hospital may prescribe.

The question arises: If a person is indigent within the meaning of the 1935 law, but is not insane, does the liability of the county for the care of its poor cease merely because such person is suffering from a nervous or mental illness or other affliction for the treatment of which the hospital has especial facilities? We think not. The liability of the county to relieve, maintain and support its poor continues even though the person is entitled to a diagnosis, treatment and temporary care at a state hospital for a period not to exceed six weeks.

The next question arises as to whether or not the appropriation of 1935 (Laws Mo. 1935, p. 177) wherein was appropriated for the use of state hospitals, twelve dollars per month for the support and maintenance of each insane pauper patient in such hospital, is broad enough to cover expenses incurred in the six weeks' diagnosis, treatment and care of persons who are not insane. We are of the opinion that the appropriation act for the support and maintenance of insane paupers cannot be used for the purposes of the act under consideration providing six weeks' treatment for persons who are not insane.

The 1935 law provides that,

> "Such diagnosis, treatment or temporary care shall be given in accordance with such rules and regulations as the board of managers may prescribe."

This means that the eleemosynary board may, by rule, require the payment of a reasonable

and necessary charge for the diagnosis, treatment or temporary care of such persons entitled to receive the six weeks' treatment. However, since the support of poor persons by counties under the provisions of Section 12954, R. S. Mo. 1929 is a matter within the discretion of the county court, such rules could not operate as a mandate on the county court to pay such charges unless the county court agreed to it. If a person is entitled to the six weeks' treatment, it is immaterial whether the county, his friends or relatives, pay the charged fixed by the eleemosynary board.

CONCLUSION.

In conclusion, this office is of the opinion that only indigent sane may be received for diagnosis, care and treatment in one of the state hospitals, and the eleemosynary board may, by rules and regulations, require the payment of certain charges by the county as a condition precedent to the admission of such persons from a county for the six weeks' treatment. If the county court refuses to pay such charges, then the superintendent of the hospital may, in his discretion, as provided in the 1935 law, refuse to receive such persons for the six weeks' treatment.

This office is of the further opinion that such charges as may be made to the counties for such six weeks' treatment must be made under and by virtue of the counties' duty to support its poor, and not under or by virtue of any law or appropriation relating to the care of indigent insane.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

OLD AGE ASSISTANCE BOARDS: Qualifications of County Boards.

10-7

October 7, 1935.

FILED
45

Honorable W. Ed Jameson,
President, Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

We have received your inquiry which is as follows:

> "Question has come up with the Eleemosynary Board as to the flexibility of the appointment of men and women on the County Old Age Assistance Boards.
>
> "The law requires that there should be one woman, and I would like to have your opinion as to whether or not this means only one woman or whether at the discretion of the County Court they can appoint one or more women on these boards."

Replying thereto, Section 3 of the Old Age Assistance Act, Laws of 1935, page 309, is as follows:

> "In every county there shall be established a County Old Age Assistance Board, to consist of three persons domiciled in the county, each of whom shall have been a resident taxpaying citizen of the county for a period of five years prior to his or her appointment at least one of whom shall be a woman, who shall be appointed by the

> county court for a term of four years, except that of the members first appointed, one shall be appointed for a term of two years and one for a term of three years. Vacancies shall be filled in the same way in which the original appointment was made. The members of the county board shall serve without compensation, except that the necessary expenses incurred while in the performance of their duties shall be paid to them."

Section 28 thereof provides that

> "The State Board shall have authority to make such rules and regulations as are necessary to carry out the provisions of this Act."

It will be noted that Section 3 above lays down the requirement that each member of the County Old Age Assistance Board must be domiciled in the county, each of them shall have been a resident taxpaying citizen of the county for a period of five years prior to his or her appointment, and at least one of said three members shall be a woman. There is no provision requiring that the other two be men or women, but whoever is appointed must have the above set forth qualifications.

CONCLUSION

It is our opinion that power is lodged in the discretion of the County Court to appoint one, two or three women as members of the County Old Age Assistance Board, provided they have the other qualifications set forth hereabove.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

X

INSANE POOR: County and State may accept from relative or other person, by way of re-imbursement, money expended by them on insane poor patients.

(Returned letter from Baker and Baker - dated 9/23/35.)

October 29, 1935.

11-2

FILED 45

Mr. W. Ed. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "There are cases in which patients are committed to our state hospitals for insane as county patients, but who in fact are not county patients because the counties are reimbursed by relatives or other persons for the expense incident to the care of such patients.
>
> "As you are aware, under the old statute, all of the expense incident to the care of county patients was borne by the county, but under the new statute (Section 8636, page 388 Laws of Missouri 1935) such expense is divided between the county and state.
>
> "Attached hereto is a letter recently received by me in which inquiry is made as to the proper method of re-imbursing the county and the state under the new statute, for the care of a patient who was committed as a county patient but who in fact has never been a county patient, as the writer of the letter has always re-imbursed the county for the expense incident to the care of this patient.

> "This question was brought up for consideration at the recent meeting of the eleemosynary board, and it was the sense of the board that I should request an opinion from you on this question. Please let me have an opinion from your office at your earliest convenience, and return the attached letter with the opinion."

Section 8636, Laws of Missouri, 1935, page 388, which has repealed and superseded Section 8636, R. S. Mo. 1929, reads as follows:

> "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding six dollars ($6.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

Under the provisions of the above section, the county courts only have power to send to a State hospital their insane poor. It is mandatory upon the counties sending their insane poor to pay semi-annually in cash in advance

such sums for the support and maintenance of said insane poor as the Board of Managers may deem necessary, not exceeding $6.00 per month for each patient; and in addition thereto the actual cost of their clothing and the expense of their removal to and from the hospital; and, if they shall die therein, their burial expenses. The State, in the Appropriation Bill, Section 460, page 177, allots to the four State hospitals an amount not to exceed $12.00 per month for the support and maintenance of each insane pauper patient. Said section reads in part:

> "There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Two Million Four Hundred Thousand Dollars ($2,400,000.00) for the years 1935 and 1936, payable to the Board of Managers of the Eleemosynary Institutions and to be by them, allotted to the four State Hospitals at a rate of not to exceed $12.00 per month for the support and maintenance, (except the expense of clothing, removal to and from said Hospitals, and burial expense,) of each insane pauper patient, ****."

Section 8664, R. S. Mo. 1929, defines the term "insane poor" as follows:

> "**** terms 'insane poor' or 'indigent insane,' when applied to a person without a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state from attachment and execution when owned by any person other than the head of a family; and the same words, when applied to a person having a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state from attachment and execution when owned by the head of a family: Provided, that when the said words are applied to a married woman, her separate estate, if any, and that of her husband

> shall be estimated as aforesaid, and the total amount of both estates shall determine the question aforesaid, whether she be a 'poor' person or not, within the meaning of this chapter. ****"

Sections 8630, 8631, 8632, 8633 and 8634, R. S. Mo. 1929, provides for the admission of pay patients to a State hospital.

Section 8654, R. S. Mo. 1929, provides how a county patient may be made a pay patient, Said section reads as follows:

> "If the county court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate, under his official seal, setting forth that any county patient in the state hospital from his county has sufficient estate to support and maintain him at the hospital. After the receipt of this certificate, the patient shall be a pay patient; and in such cases, charges shall be made out and paid and a bond shall be required and executed as in all other cases of pay patients;and upon a failure thereof, after reasonable delay, the superintendent shall discharge such patient in the manner as provided in this article in case of poor persons."

We think it plain from the above that a pay patient should be admitted to a State hospital according to the provisions of Sections 8630, 8631, 8632, 8633 and 8634. We think it is also clear that a county court has no power to send an insane person to a State hospital unless such person comes within the definition of "insane poor" as defined in Section 8664, supra; and that if the county court commits an insane poor person to a State hospital, they are liable to pay for the support and maintenance of such person, the amount specified in Section 8636, supra.

It is our further opinion that if the county court commits a person to a State hospital and later finds out that such a person has sufficient estate to support and maintain him at the hospital, that such county court should order the clerk to transmit to the Superintendent a certificate setting forth that such county patient has sufficient estate

to support and maintain him at the hospital under the provisions of Section 8654, supra.

We assume from your letter, for the purpose of this opinion that the patient in question was sent to a State hospital by the county court as an insane poor person and does not have sufficient estate to support and maintain him at the hospital, and proceed to answer your question which we understand to be "what is the proper method of a relative re-imbursing the county and State for the money expended by them for the care of an insane poor patient committed as a county patient?" As pointed out above, if the county sends an insane poor person to a State hospital they are liable for the support and maintenance of such person not to exceed the amount specified in Section 8663, supra. Likewise, the State has appropriated to the Board of Managers of Eleemosynary Institutions, $2,400,000.00 to be by them allotted to the four State hospitals at a rate not to exceed $12.00 per month for the support and maintenance of each insane poor patient. If a person committed to a State hospital is not an insane poor person, as defined by Section 8664, supra, of course the county and State should not be liable for his support and maintenance in such hospital. If, however, a patient is an insane poor person, then the county and State are liable for his support and maintenance in such hospital, and no person is legally obligated to reimburse the State for the money expended by them for the patient's support. If any person, whether a relative or not, desires to reimburse the county and State for money expended on any patient in the State hospital, we see no reason why the county and State should refuse to accept such reimbursement.

Under the provisions of Section 7028, R. S. Mo. 1929, the county court has the power and authority to receive any donation for the use and benefit of the county. Said section reads as follows:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such

> sale to the use of the same, and to audit and settle all demands against the county."

Under the provisions of Section 8574, R. S. Mo. 1929, the Board of Managers of the State Eleemosynary Institutions has the power and authority to accept a gift or donation to the use and benefit of any of the State hospitals designated by the donor. Said section provides:

> "The board of managers of the eleemosynary institutions shall have the care and control of the property, real and personal, owned by the state and used in connection with the several institutions, and the title to all real estate or personal property now owned by said eleemosynary institutions or by the state for their use or that may hereafter be purchased by, or donated to such institution, shall be vested in the board of managers, for the use and benefit of said institution; or in the event of a gift or donation to the use and benefit of either of said institutions as may be designated by the donor. The board of managers of said institutions shall not sell or in any manner dispose of any real estate belonging to either of said institutions without an act of the general assembly authorizing such sale or disposal of such real estate."

CONCLUSION.

In view of the above, it is the opinion of this department that the county court and the State Eleemosynary Board may accept by way of reimbursement from a relative or other person the amount of money expended by them for the support and maintenance of an insane poor patient confined in a State hospital.

Yours very truly,

APPROVED:

J. E. TAYLOR
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

X

ELEEMOSYNARY INSTITUTIONS)
APPROPRIATIONS)
EXECUTIVE BUDGET SYSTEM)

Classification of appropriations - Cannot transfer from one classification to another.

November 5, 1935.

11-8

FILED
45

Hon. W. Ed. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This is to acknowledge receipt of your letter of October 8, 1935, in which you request the opinion of this Department. Your letter is as follows:

> "As you are well aware, the manner of making up the budget for the various state agencies, under the old Budget Law, (Art. 4, Chap. 59, R. S. 1929), was under the supervision and control of the State Tax Commission but, under the new Budget Law, (Laws of 1933, pp. 459-463), the whole system of budgeting was changed in such a way as to be under the general supervision and control of the Governor, with the assistance of a Budget Director.
>
> "Under the old Budget Law, (Sec. 9835 R. S. 1929), all requests for appropriations by state agencies were required to be divided into five distinct classes, (A, B, C, D, & E), covering different items of contemplated expenditures, and the old Budget Law, (Sec. 9838 R. S. 1929) prohibited the transfer of items appropriated under one class to any other class. These two sections of the old Budget Law, (Sec. 9835 and 9838), along with other sections of the old Budget Law, were expressly repealed by the new Budget Law, (Sec. 16, p. 463, Laws of 1933) and under the new Budget Law, (Sec. 12, p. 462, Laws of 1933)

it is expressly provided that, 'At the end of any quarterly period any department may make changes in their allotments for the remaining periods, upon approval of the Governor.' Of course, this section, (Sec. 12), also provides that requests for appropriations by state agencies shall be originally classified in such manner as the Budget Director shall prescribe, subject to the approval of the Governor, as to all appropriations under the control of the Governor, but, if my understanding of the provision above quoted is correct, my Department may, with the approval of the Governor, make any changes or transfers in its original classification of contemplated expenditures as may seem necessary and proper in serving the best interests of the Department, at the end of any quarterly period.

"If my Department is authorized to make changes in its original allotments, as above indicated, I shall be able to meet the requirements of the WPA in the matter of additional federal aid for my Department, and thereby procure for my Department much needed financial assistance and save the state a considerable sum of money. For these reasons you will readily appreciate my very deep interest in the proper construction of Section 12 of the new Budget law.

"Please have your office furnish me with an opinion on this question at your earliest convenience."

If we understand your question correctly, which was supplemented by the writer's conference with you, it is this:

Does Section 12, of what is termed "Executive Budget System", Laws of Missouri, 1933, at pages 459-463, inclusive, give to your Department authority to reclassify its appropriations and shift funds from one division of its appropriation

act to another? For example, taking the appropriation for State Hospital No. 1, page 40, Laws of Missouri, 1935, would the Board of Managers of Eleemosynary Institutions have the authority, if the Board of Managers of Eleemosynary Institutions should conclude that it would be advisable to take $50,000 from Section "C", Repairs and Replacements, and place same in Section "B", Additions, with the approval of the Governor? With this restatement of your question we shall proceed to answer your request.

At the General Election, November 8, 1932, Constitutional Amendment No. 3 was submitted by initiative petition and was adopted by the people, which repealed Section 13, Article V, and adopted new Section 13 in lieu thereof, which is as follows(Laws of Missouri, 1933, page 480):

> "The Governor shall, not later than fifteen days after the convening of the General Assembly in each biennial session, submit a budget showing estimated available revenues of the state for the ensuing biennium and recommending a complete plan of expenditures. All recommended expenditures and appropriations shall be itemized. If any bill presented to the Governor contain several items of appropriation of money, he may object to one or more items or portions of items while approving other portions of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items, or portions of items, to which he objects, and the appropriations, or portions thereof, (so) objected to shall not take effect. If the General Assembly be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items or portions thereof objected to shall be separately reconsidered. If it be not in session, then he shall transmit the same within thirty days to the office of the Secretary of State, with

> his approval or reasons for disapproval. Provided, however, nothing herein contained shall be construed as authorizing the Governor to reduce any appropriation for free public school purposes."
> (We have underscored portions added by the November, 1932, Amendment.)

Following the adoption of new Section 13, Article V, aforesaid, the General Assembly at the 1933 Session passed Senate Bill 227, Laws of Missouri, 1933, pages 459-463, namely the "Executive Budget System" and at the same time repealed Sections 9832 to 9847, inclusive, R. S. Mo. 1929. The material changes in Constitutional Amendment, Section 13, Article V, are that in requiring the Governor, not later than fifteen days after the convening of the General Assembly, at each annual session, to submit a budget, also that he shall recommend expenditures and appropriations to be itemized, and permitting the Governor to object to portions of each item if he sees fit; also limiting the power of the Governor to reduce any appropriation for free public school purposes. We find nothing in the provisions of Section 13, Article V, and Section 12 of the "Executive Budget System" which authorizes the transfer of money appropriated for one purpose in the Appropriation Act to another classification and to be spent for some other purpose than for which it was appropriated.

Section 43, Article IV, of the Missouri Constitution provides in part as follows:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

And Article X, Section 19 of the Missouri Constitution provides as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the

> funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

It was decided in the case of State ex rel. v. Holladay, 66 Mo. 385, that Section 19, Article X, is self-enforcing.

In construing said sections of the Constitution the Supreme Court in the case of State ex rel. v. Gordon, 236 Mo. 142, l. c. 158, said the following:

> "The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have no difficulty in deciding that in the absence of an appropriation made by the General Assembly for that purpose no funds could be lawfully paid out of the State treasury for the support and maintenance of the game department, nor would relator be entitled to the audit and allowance of his accounts for salary and expenses. (See Secs. 11828 and 11836, R. S. 1909; State v. Holladay, 65 Mo. 77; State ex rel. v. Holladay, 66 Mo. l. c. 389; Fusz v. Spaunhorst, 67 Mo. l. c. 268; State ex rel. v. Henderson, 160 Mo. l. c. 213, 214) In

> addition to the foregoing citations it should be added that the General Assembly which enacted the game and fish law appropriated out of the State treasury the sum of two hundred thousand dollars, or so much thereof as should be necessary, from the game protection fund, to meet the expenses of the department for the biennial period therein named, and by so doing gave a legislative construction to the law and the Constitution as to the necessity of a biennial appropriation."

The Supreme Court in the case of State ex rel. Publishing Co. v. Hackmann, 314 Mo. 33, l. c. 53, said the following:

> "It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid. And since under the provisions of Section 19, Article X, of the Constitution, no money may be paid out of the State Treasury, except in pursuance of an appropriation by law the respondent was and is without authority to issue a warrant in payment of relator's claim. For it cannot be said that a claim is paid pursuant to an appropriation act where it is paid out of money specifically appropriated for a different purpose."

And Section 8674, R. S. Mo. 1929, provides in part as follows:

> "The boards of managers shall not use any money appropriated by the state for any other purpose than that for which the same was appropriated, * * * "

In the case of Schwartz v. City of Chicago, 223 Ill. App. 184, l. c. 192, the court said the following regarding

what constitutes an "appropriation":

> "What constitutes an appropriation has been the subject of consideration in many cases, and it is variously defined as 'A setting apart from public revenue of a certain sum of money for a specific object, in such manner that the executive officers of the government are authorized to use that money and no more for that purpose and no other.' 4 Corpus Juris, 1460. Webster's definition of 'appropriation' so far as here pertaining is: 'The act of setting apart or assigning to a particular use or person in exclusion of all others; application to a special use or purpose, as of money to carry out some object.' Numerous other definitions are given but all to the same effect. The question then recurs, are the appropriations mentioned in the bill of complaint valid or invalid?"

In your request for the opinion you refer particularly to that portion of Section 12, page 462, Laws of Missouri, 1933, as follows:

> "At the end of any quarterly period any department may make changes in their allotments for the remaining periods upon approval of the Governor."

We see nothing in said clause that would permit you to transfer a sum of money appropriated, from one classification of the appropriation to another classification, with the approval of the Governor. If such were the case and classifications "B", Additions, and "C", Repairs and Replacements, by and with the consent of the Governor, could be transferred to classification "A", Personal Service, it thus would thwart the will of the Legislature and the Legislature could just as well appropriate a lump sum to a department and then that department could spend said sum in any manner it saw fit, with the approval of the Governor. We do not think that it was the intention of the Legislature to give any such broad powers to the head of a

department. While the money might be spent judiciously and to the better advantage of the department, yet, we do not think that this authority has been delegated to the department to spend the money as it sees fit.

We refer you to our opinions of February 8, 1934, May 10, 1934, and July 5, 1934, which, in our opinion, bear on the same question, in some degree, as submitted in this request.

Conclusion.

From the above and foregoing Constitutional provisions, statutes and constructions placed thereon by our Supreme Court and by other courts, it is our opinion that you have no authority to transfer moneys from one classification of your appropriation to another classification, even with the consent of the Governor so to do. In this opinion we do not mean to infer that the money would not be well spent and judiciously spent, but that the Constitution and the statutes do not permit same to be done as suggested in your letter.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

CRH:EG

ELEEMOSYNARY BOARD:) Board has no authority to transfer
) funds from one classification of
APPROPRIATIONS:) appropriation to another.

11-25

November 22, 1935.

FILED
45

Hon. W. Ed. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This is to acknowledge receipt of your letter of November 14, 1935, in which you request the opinion of this Department. Your letter is as follows:

> "I wish you would refer to the appropriations of State Hospital #1, 2, 3 and 4 and let me have your opinion as to whether or not I can use any part of the appropriation classified as "D", which classifies materials and supplies, for the purchase of such commodities as cement, reinforcing rods, furniture, sand, crushed rock, paint, glass, etc.
>
> "If I can obtain a favorable opinion from your office there is a vast amount of improvements that I can make in these institutions at a great saving to the taxpayers of the state."

Your question is whether or not you may transfer money from one sub-division of an appropriation to another sub-division of an appropriation, for example: In the appropriation to State Hospital No. 1 as shown at page 40, Laws of Missouri, 1935, whether funds appropriated under

"D. Operation" may be transferred to "C. Repairs and Replacements." The appropriation under "C. Repairs and Replacements" is as follows:

"C. Repairs and Replacements:

Labor, material and supplies for repairing or replacing buildings, building equipment, operative equipment, and structures other than buildings . . . . . 51,300.00"

And the appropriation under "D. Operation" is as follows:

"D. Operation:

General expense, and material and supplies . . . . . .633,500.00"

We take it from your letter, if we understand you correctly, that inasmuch as the word "material" is used in sub-division "C" and the word "material" is used in sub-division "D", that it thereby authorizes you to transfer funds from "D" to "C" and vice versa. The word "material" is a word of broad meaning and may cover a great many articles. However, its meaning as given in any particular sentence must be arrived at from its context and the relation to other words in the sentence. The term "material" in "C" from its context means "building material" etc., such as cement, reinforcing rods, sand, crushed rock, paint and glass as mentioned in your letter, and things that might be used in making repairs and replacements in said hospital.

Now coming to the word "material" in "D. Operation," it is used in an entirely different sense and meaning and in that sense means things that might be used and are necessary in the operation of the hospital.

In making up the budget for appropriations the Committee on Appropriations no doubt had before it the estimates for each classification and sub-division and appropriated money for material for repairs and replacements under "C" and appropriated material for operation under "D."

Section 43, Article IV, and Section 19, Article X, of the Missouri Constitution pertain and are applicable to the subject of appropriations, and are respectively as follows:

Section 43, Article IV-

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. All appropriations of money by the successive General Assemblies shall be made in the following order:

* * * * * * * * "

Section 19, Article X -

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

And we further cite Section 8674, R. S. Mo. 1929, which provides in part as follows:

"The boards of managers shall not use any money appropriated by the state for any other purpose than that for which the same was appropriated, * *"

In our opinion to you of date, November 5, 1935, we stated that:

> "It is our opinion that you have no authority to transfer moneys from one classification of your appropriation to another classification, even with the consent of the Governor so to do. In this opinion we do not mean to infer that the money would not be well spent and judiciously spent, but that the Constitution and the statutes do not permit same to be done as suggested in your letter."

From the above and foregoing, it is our opinion that you are not authorized to transfer funds from "D. Operation" to "C. Repairs and Replacements" even though the term "material" is used in both classifications, for the reason that in each classification the word has a different meaning and applies in each to different things.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

ELEEMOSYNARY BOARD: No appropriation to pay for real estate.

12-3

December 2, 1935.

FILED
45

Hon. W. Ed Jameson,
President Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of November 14 requesting an opinion as to the following state of facts:

> "We have an opportunity to purchase for the Mo. State Sanatorium, at Mt. Vernon, at a very great sacrifice, a real bargain to the institution - a tract of land containing 140 acres of land, which we are now renting at $500.00 per year. The owner offers to sell us this land for $3500.00 and refund $250.00 of this year's rent, or a net price of $3250.00, which is far less than it is worth, and the institution needs it very badly.
>
> "Would we be permitted to exchange, with the permission of the Purchasing Agent, any live stock that we produce ourselves at this institution? If so, we could pay for the tract of land in less than one year."

The Appropriation Act of 1935 for the Missouri State Sanatorium at Mt. Vernon provides as follows (Laws of Missouri, 1935, p. 43):

A. Personal Service:

Salaries, wages, and per diem of the superintendent, assistant physicians, dentist and steward.....$40,000.00

B. Purchase of new X-ray machine and equipment, not to exceed.....15,000.00

D. Operation:

General expense, and material and supplies....225,000.00

Total State revenue fund....$280,000.00 "

This department has previously ruled that the Eleemosynary Board is without authority to purchase real estate, and that under the provisions of Sec. 2, Laws of Missouri, 1935, page 411, the Purchasing Agent must purchase all lands.

However this may be, we have searched in vain for any provision in the Appropriation Act heretofore set out authorizing the purchase of land for the Mt. Vernon Sanatorium. Absent such an appropriation, the Purchasing Agent would, of course, have no authority to purchase land for said Sanatorium, and we therefore do not at this time pass upon the question as to whether or not personal property may be exchanged for said real estate.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

TAXATION & REVENUE: Authority of Collector to employ attorney to assist in collection of delinquent personal property taxes.

January 3, 1935.

FILED
46

Jones & Wesner
Attorneys at Law
45-48 Kahn Bldg.
Second & OhioStreets
Sedalia, Missouri

Gentlemen:

Your request for an opinion dated November 28, 1934, has been assigned to me. In said request you state as follows:

"At the request of Mr. Lon E. Leslie, Collector of Pettis County, Missouri, I beg to request for him an opinion on Section 9952 relating to delinquent and back taxes, which repealed Section 9952, Article 9, Chapter 59, of the Revised Statutes of Missouri, 1929.

In view of the acts passed by the 57th General Assembly of Missouri, relating to taxation and revenue, Mr. Leslie desires to know whether or not he can employ such attorneys as he may deem necessary and institute, at this time, suits to collect delinquent and back taxes contained in the Back Tax Book and which are due and unpaid at this time.

It seems that some collectors are proceeding to file suits for taxes contained in their back tax books at this time. Mr. Leslie does not want to institute any suits unless he is sure that he is authorized to do so under these new Acts passed by the 57th General Assembly.

Will you kindly advise Mr. Leslie at your earliest convenience so that he may proceed to file suits if authorized to do so."

In the foregoing request you do not designate which Section 9952 you refer to. Senate Bill 94 repealed Section 9952 of the 1929 revision as did House Bill 44. Each reenacted new sections by that number. Senate Bill 94 found at page 425 et seq. and House Bill 44 found at page 465 Laws of Missouri 1933. I presume that it is the reenactment of Section 9952 contained in House Bill 44 which caused your collector to inquire as to the authority to bring suit for delinquent and back taxes. We think that it is recognized that the term "back taxes" generally applies to real estate taxes and our remarks are made in reference to delinquent real estate taxes.

The 57th General Assembly by the enactment of Senate Bill 94 radically changed the method of procedure in the collection of delinquent real estate taxes. Section 9952 of the 1929 revision together with a number of other sections thereof were repealed. House Bill 44 purported to repeal Section 9952 of the 1929 Revision and to enact a new section by the same number. The only change in Section 9952 before and after the passage of House Bill 44 was the proviso attached to such Section. This proviso affected only Greene County, Missouri and provided that the Prosecuting Attorney should act as delinquent tax attorney for such county.

In an opinion of this office dated August 8, 1933, to the State Tax Commission of this State, this office held that Senate Bill 94 and House Bill 44 were in Pari Materia and were to be construed together. It was held that House Bill 44 in no way affected the procedure established by Senate Bill 94 after the effective date of the latter named enactment, to-wit, July 24, 1933, and thatafter such date there was no statutory authority for the enforcement of delinquent real estate taxes by suit. This opinion was affirmed and enlarged upon in an opinion of this office dated September 4, 1934 to Hon. Charles M.Hay, CityCounsellor of the Cityof St.Louis.

In the fall of 1934 a proceeding in prohibition was instituted in the Supreme Court to enjoin the Judge of Division No. 1 of the St.Louis Circuit Court from proceeding to enforce the lien of state taxes by means of suit. Edmund Koeln as collectorof the City of St.Louis had instituted a suit in said court to enforce the payment of delinquent real estate taxes alleging that he was authorized to do so under the provisions of House Bill 44 hereinbefore referred to and that Senate Bill 94 was unconstitutional and unworkable. This case was entitled State ex rel. Karbe vs. Bader et al. being No. 33955. In the decision handed down on December 22, 1934, Judge Leedy writing the opinion for the Court held:

> "There was nothing in House Bill #44 in the nature of new legislation. Its sole object was to amend Section 9952 (the effective law at the time House Bill #44 was introduced) insofar as it related to back tax attorneys in counties of a designated population. It seems obvious, and we hold that the nominal reenactment of section 9952 by House Bill #44 was not intended to, nor did it have the effect of impliedly repealing or otherwise disturbing the Jones-Munger act. We think that by attaching an emergency clause to House Bill #44, the Legislature intended that it should be operative only until such time as Senate Bill #94 took effect. The latter measure not having received executive approval at the time the former was passed. But we must hold bad, as the parties tacitly concede, the emergency clause just mentioned because invalid on its face and, therefore, wholly ineffectual to make House Bill #44 operative upon being signed by the Governor, and so upon the happening of the latter event House Bill #44 became nugatory, and as if never passed. This ruling is in harmony with controlling canons of construction, and, as we believe, causes the true legislative intent to speak."

It therefore conclusively appears that there is no authority to institute suit for delinquent real estate taxes at this time.

Our next concern is the method of collecting delinquent personal taxes. Section 9940 R. S. Mo. 1929, is the law, relative to the collection of delinquent personal property taxes. This Section adopts that part of Section 9952 R. S. Mo. 1929, relative to the employment of attorneys to collect delinquent personal property taxes. However, Section 2, Laws of 1933, page 429, repeals said Section 9952 R. S. Mo. 1929, and we are confronted, apparently, with the proposition of the law, relative to hiring attorneys to collect delinquent personal property taxes, being repealed.

It is evident that the legislature was only attempting to change the law respecting the collection of delinquent real estate taxes and, apparently, had no intention of changing the method of collecting delinquent personal property taxes, as set forth by Section 9940 R. S. Mo. 1929.

Said Section 9940 refers and adopts into it any sections pertaining to the employment of attorneys found in Article 9, Chapter 59, so that Section 9952 R. S. Mo. 1929, by this method of adoption

was incorporated into Section 9940, and became a part thereof.

In Crohn v. Telephone Co., 131 Mo. App. 313, l. c. 320, the Kansas City Court of Appeals, in discussing such a method of adoption by reference in statutes, said the following:

> "In Endlich on Interpretation of statutes, Section 85 it is said: 'An act adopting by reference the whole or a portion of another statute, means the law as existing at the time of adoption and does not adopt any subsequent addition thereto or modification thereof.' This rule is generally recognized, 'Sutherland on Statutory Construction, Section 257; 26 Am. and Eng. Enc. of Law (2Ed.), 714; Postal Tel. C. v. Railroad, 89 Fed. 190; Jones v. Dexter, 8 Fla. 275; Culver v. People, 161 Ill. 96; 43 N. E. 813; Darmstaeter v. Maloney, 45 Mich. 621, 8 N. W. R. 574; Matter of Main Street, 98 N.Y. 454; Commonwealth v. Kendall, 144 Mass. 357; Gaston v. Lamkin, 115 Mo. 20.) Further it is said by the same author (Section 492); 'Where the provisions of a statute are incorporated by reference in another (where one statute refers to another for the powers givenor rules of procedure prescribed by the former, the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute; and if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statute, obviously continue in force, so far as they form part of the second enactment." To the same effect is Gaston v. Lamkin, 115 Mo. 20, where the Supreme Court of this State said: 'The general rule governing in such cases seems to be that where one statute refers to another for rules of procedure prescribed by the former, the former statute, if specifically referred to, becomes a part of the referring statute, and the rules of procedure prescribed by the earlier statute, so far as they form a part of the second enactment, continue in force, although the earlier

statute be afterwards modified or repealed.'

Under these rules, that part of Section 2865, relating to parties and procedure became by adoption an integral part of Section 2866 to the same extent, as though it had been written into the latter statute and neither a subsequent amendment nor repeal of section 2864 could affect the referring section."

The above case is analogous to the situation at hand and is authority for our conclusion.

It is therefore the opinion of this office that delinquent real estate taxes should be collected under and by virtue of the provisions of Senate Bill 94, page 425 Laws of Missouri 1933, and that such does not require the employment of an attorney.

It is our further opinion that delinquent personal taxes should be collected under the provisions of Section 9940 R. S. Mo. 1929, and that into such section there should be incorporated that part of Section 9952 R. S. Mo. 1929 which reads:

"and for the purpose of collecting such tax and prosecuting suits for taxes under this article, the collector shall have power, with the approval of the county court* * * * to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed etc;* * **

Respectfully submitted,

Harry G. Waltner, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM

COUNTY BUDGET LAW: Obligations of Class 5 may be carried over to following year and paid out of revenue from delinquent taxes if there are no funds in Class 6 and the funds in class 5 have been exhausted.

1-14

January 11, 1935.

FILED
46

Hon. R.L. Jones,
Clerk of County Court,
New Madrid, Missouri.

Dear Sir:

This department is in receipt of your letter of recent date relating to the new County Budget Law, your letter being as follows:

> "This department does not fully understand the Budget Law as it applies to the paragraph below. Our total estimated net receipts for the current year is $83,155.42, and our budget of anticipated expenditures for the current year is $80,292.56. In making up our budget we failed to allow a sum sufficient in making it up to pay all the State Institutions, as we had more inmates committed than we originally thought we would, and we realize that this is our first obligation and will no doubt take up the remaining $2,000.00, the difference between our estimated receipts (based on 90% collections) and our expenditures.
>
> Now we are confronted with this situation. We have some three or four offices that have bills on file to pay which are in excess of the amount allotted them in the budget, as approved by the Court. Practically all the offices with these exceptions will just about use up the amounts allotted them. We have not, of course, issued any warrants for these bills in excess of the amounts originally allotted them, however they are on file and the Court is desirous of knowing just what disposition is to be made of them. Practically all of these bills are in class five, for the Sheriff's coal, light, water bills, and for the

support of paupers on the County Farm.

We are of the opinion that if these bills are carried over and paid out of next year's budget that it will defeat the purpose of the budget, that is, that they will continue this practice and at the end of each year we will have numerous bills on file as has been the practice heretofore. Some contend that these bills will fall in class six for the year 1935, while others contend that the officers are personally responsible for any bills made over and above their allotment in the budget."

You are correct in your statement that it is necessary for you to use any funds now on hand or in any other classes to take care of the obligations of Class 1, as this is given priority in the Act. Section 1, Laws of Missouri 1933, page 341 contains the sentence, "The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

As to the second question presented in your letter, i.e., as to the payment of expenses incurred by several of the officers in excess of the amount allotted to them in the budget, it presents a more difficult situation. You do not state the nature of the expenses contracted by these various officers in excess of the amount stated in the estimates of the needs of their offices; however, we assume that the same will come within Class 4, which is as follows:

"The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

and which does not include furniture, office machines and other equipment. If the excess consists of both character of supplies, the latter mentioned would fall in Class 6.

Section 3, page 342, Laws of Mo. 1933 is as follows:

> "It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested, also he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class 4 and class 6. Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary revenue. No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been furnished. The clerk of the county court shall prepare and file an estimate for his office; also for the expense of the judges of the county court. If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."

Section 4 provides in part as follows:

> "****Less all known lawful obligations against the county December 31, last, and for which warrants were not drawn at that date (itemized list of these obligations must be attached to the estimate.)
>
> Total unpaid obligations of the county on January 1st of current year. (This shall include unpaid warrants and out-

standing bills for which warrants may issue). ****"

We are quoting the two above paragraphs to show that when a deficiency occurs in the financial affairs of a county for a fiscal year, the same is to be taken into consideration by the county clerk with respect to his duties.

None of the sections, from 1 to 9 inclusive, which are applicable to counties of the population of your county, contain any provision dealing with your question. We must, therefore, draw our conclusions from the whole purpose of the Act. The purpose of the Act primarily was to create five classes, each succeeding class having a prior lien on the funds of the county. In order to keep the financial structure of the county in a more efficient and economical manner, and to repeal certain sections of the old law which were in conflict therewith, the new Budget Act was enacted; otherwise, the business of the county, along the same general lines, is as in the past.

The county has always been liable for the supplies and expenses incidental to a county office. We assume that the officers in question, when they made their original estimate, were honest and conscientious and that the bills and the supplies which were purchased in excess of their estimate were reasonable in price, necessary and incidental to their respective offices, and that the county would be liable for the same under the situation as it existed prior to the passage of the County Budget Law.

We realize that an officer, regardless of the fact that he may be careful and conscientious in preparing his estimate, cannot with absolute accuracy determine the exact amount he will need for supplies, etc. in his office for any fiscal year and it is our opinion that the Legislature did not intend that such excess should be borne by the officer himself, or that the amount should go unpaid.

CONCLUSION

Bearing in mind that it is the duty of the county clerk to list all unpaid obligations, as set forth in Section 4, supra, it is the opinion of this department that if no funds are available in Class 6 for the expenses referred to it will be necessary to carry the same over to the year 1935 and the obligations then be taken care of as the revenue from delinquent taxes comes into the hands of the county.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,

LABOR AND INDUSTRIAL INSPECTION: Commissioner has authority to inspect all restaurants and charge a fee for such inspection.

FILED
46

February 21, 1935.

Mr. Otis K. Jones
Director of The Board
St. Louis Restaurant Assoc. Inc.
5540 Pershing Avenue
St. Louis, Missouri

Dear Sir:

This is to acknowledge receipt of your letter, requesting an opinion from this office, which reads as follows:

> "As Chairman of the Legislative Committee of the St. Louis Restaurant Assoc. and in behalf of some of the small restaurant owners with three and four employees who are members of our Assoc. have requested that our Committee gather some information as to duties of the Missouri Industrial and Labor Inspection Bureau.
>
> "We have shown a copy of the law to some of these members and they feel it is an unjust imposition on them by the State and I have had one incedent where a restaurant owner with three employees brought this matter before our Board of Directors and as I recall it is to be voted upon soon to test the law in a test case.

" * * * * * * * * * * * * * * * * * * *

" Mr. McKittrick as Chairman of the Legislative Committee I ask you to please show us the Courtesy of a reply and you can rest assured it will be appreciated by this organization.

" * * * * * * * * * * * * * * * * * * * ."

We trust you appreciate the fact that this office in giving an opinion must be guided strictly by the law and cannot pass on the fairness or unfairness of its application.

Section 12318, R. S. Mo. 1929, makes it the duty of the Commissioner of Labor and Industrial Inspection, his assistants er deputy inspectors, to make not less than two inspections each year of the various places of business including restaurants, said section reads as follows:

"The state commissioner of labor and industrial inspection may divide the state into districts, assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another. It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theatres, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops.

> The last inspection shall be completed on or before the first day of October of each year, and the commissioner shall enforce all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. Any municipal ordinance relating to said establishments or their inspection shall be enforced by the commissioner. The commissioner, his assistants and deputy inspectors, may administer oaths and take affidavits in matters concerning the enforcement of the various inspection laws, relating to these establishments: Provided, that the provision of this section shall not apply to mercantile establishments that employ less than ten persons that are located in towns and cities that have three thousand inhabitants or less."

Under the provisions of Section 13219, R. S. Mo. 1929, the commissioner is entitled to demand and receive certain fees for making said inspections. Section 13219, supra, reads in part as follows:

> "The commissioner provided for in this article shall be entitled to demand and receive from the owner, superintendent, manager or other person in charge of every establishment inspected, as provided for by law, the following fee for each inspection made in accordance with the provisions of articles 4,5,6,8,9 and 10, chapter 95, R. S. 1929, or elsewhere authorized or required of said inspector by law to be made: For the inspection of every building or shop in which three or less persons are employed or found at work, the sum of fifty cents; for the inspection, of every building or shop in which more than three and not exceeding thirteen persons are employed, the sum of one dollar; for the inspection of every building or shop in which more than thirteen and not exceeding twenty-six persons are employed, the sum of two dollars; for the inspection of every building or shop in which more than twenty-six and less than fifty persons are employed, the sum of three dol-

> lars; for the inspection of every building or shop in which more than fifty persons and less than eighty persons are employed, the sum of four dollars; and in every building or shop in which more than eighty persons are employed an additional fee of one dollar shall be charged and collected for every fifty additional persons employed, or any additional fraction thereof; and the fee herein provided for shall be due immediately upon completion of the inspection. ****"

Formerly, this State had a factory inspection law which was similar to the present inspection law in question. The constitutionality of the factory inspection law was passed upon in the case of State v. Vickens, 186 Mo. 103. In that case, Judge Gantt, speaking for the Court, at pages 105 to 107 inclusive said:

> "By said act it is provided the Governor shall appoint a State factory inspector, who was authorized to appoint from time to time seven assistants and to divide the State into districts and assign one inspector to each district and each inspector was required to make two inspections each year of all factories, and for each inspection such inspector was required to collect one dollar as an inspection fee, and all such fees were required to be paid into the State treasury. The failure to pay the fee for the inspection made May 6, 1902, is the ground of this prosecution. The information, though somewhat inartistically drawn, follows the statute, and is sufficient.
>
> "The objections to the law are that it 'violates sections 3 and 4 of article 10 of the Missouri Constitution, in that it imposes a burden of taxation for the maintaining of the inspection department upon one class of citizens, and discriminates against said class.
>
> "'Second. That they provide for the taking of money and liberty from manufacturers without due process of law, and deny to them the equal protection of the laws.
>
> "'Third. That they vest judicial powers

in the factory inspector.

"'Fourth. That they are a delegation of legislative power to the factory inspector.

"'Fifth. That they discriminate against city manufacturers, and place greater burdens upon them than upon country manufacturers.

"Sixth. That they are in violation of the fourteenth amendment to the Constitution of the United States, in that they deprive defendant of his liberty without due process of law and deny him the equal protection of the law.'

"The first, second and sixth objections to the law may be grouped under one head. The answer to each and all of them is that this is a police regulation for the protection of the lives, health and morals of the employees in factories, and is clearly within the power of the Legislature to enact. Such being the obvious purpose and scope of the enactment, there can be no doubt of its constitutionality and validity, so far as these objections to it go. (State v. Whitaker, 160 Mo.59; State v. Layton, 160 Mo. 474.)

"II. The third and fourth objections to the act, to-wit, that the act vests judicial and legislative powers in the factory inspector, are clearly without merit. The act provides for the appointment of the inspectors and makes it their duty to inspect all factories and requires them to give the proprietors a certificate of the result of such inspection.

"Their duties are ministerial, involving only that discretion which every ministerial officer must exercise in the discharge of his duties, and are in no sense judicial or legislative as those terms are understood in our system of laws.

"III. The fifty assignment is equally ground-

less. There is no discrimination in the act between the burdens imposed upon manufacturers in cities not imposed upon those in the country. By its terms it applies to all factories in the State without exception or distinction. (State v. Thomas, 138 Mo. 100; State v. Thompson, 160 Mo. 333; State ex inf. v. Washburn, 167 Mo. 680.)

"IV. As a police regulation the State has the unquestioned right to exact and demand an inspection fee for the inspection and certificate of inspection required by the act. It has never been ruled that an inspection fee pure and simple is a tax upon property. (Cooley on Taxation, 586; State ex rel. v. Hudson, 78 Mo. 302; St. Charles v. Elsner, 155 Mo. 671; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345; Willis v. Standard Oil Co., 50 Minn. 290.)

"The inspection fee of one dollar for the inspection and certificate is so manifestly reasonable that it is clear that it is not objectionable on that ground.

"The very mention of an inspection law suggests the exercise of police power by the State and the requirement that the persons or things inspected shall pay for it. The fact that the manufacturers are required to pay the inspection fee provided by this act in no manner infringes any constitutional right of the defendant. The court of criminal correction committed no error in so holding, and its judgment is affirmed."

We are therefore of the opinion that the commissioner of labor and industrial inspection has the legal right to inspect all restaurants and to charge for such inspections, the fees specified in Section 13219, supra.

Yours very truly,

APPROVED:

James L. HornBostel,
Assistant Attorney-General.

ROY McKITTRICK
Attorney-General.

JET/JLH:afj

SCHOOLS: Mandamus will lie to compel a superintendent of schools to release for credit at another high school the credits of a pupil who has met every lawful requirement therefor.

April 17, 1935.

FILED
46

Hon. G. C. Jones
County Superintendent of Schools
Laclede County
Lebanon, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date requesting an opinion from this office which reads as follows:

> "I would like to have the opinion of your office on a matter which is in regard to the holding up of high school boys' and girls' credits because of the fact that their parents have not paid some back incidental fees that the Superintendent charged as tuition under the new law of 1931.
>
> "Here is what happened: A number of boys and girls have attended the Lebanon High School for three years, did the work outlined by the Superintendent and teachers, made passing grades, which are recorded on the books of the Lebanon High School. Some of them have moved to another county and entered High School for the purpose of finishing their last year's work and are now ready for graduation, but the Superintendent of the Lebanon High School has refused to give them a transcript of their grades made in that school unless the parents pay up these incidental fees which are in arrears and which have been charged by him.

> "We want to know what recourse the boys and girls have, as it seems unfair for them to be deprived of their diplomas. Can the Superintendent of the Lebanon High School be compelled to issue a transcript of the grades of these pupils regardless of whether or not the above mentioned fees have been paid by their parents?"

This department, in an opinion rendered under date of August 28, 1934, signed by James L. HornBostel, Assistant Attorney-General and approved by Attorney-General Roy McKittrick held that,

> "We conclude and such is our opinion that, **** (2) If the High School accepts non-resident pupils then it cannot charge the pupils any fee (tuition or incidental)."

Thus, we start with the premise that a high school cannot charge a non-resident pupil any tuition or incidental fee. We now pass to the question of whether the Superintendent can be compelled to issue grades to non-resident pupils who have not paid the incidental fee charged by said high school?

In the case of State ex rel. Roberts v. Wilson, 297 S. W.419, it was held that mandamus would lie to compel the principal and board of directors of an incorporated school district to issue a certificate of graduation to a pupil who has met every requirement for its issuance except the payment of a tuition fee which the board's predecessor had attempted, without legal authority, to exact and it was further held that mandamus would lie to compel the principal and board of directors of a public school district to release for credit at another high school the school credits of a pupil who has met every lawful requirement therefor. The Court at loc. cit. page 422 said:

> "(8) Will mandamus lie to compel the removal of the condition upon the release of relator's high school credits? The question here presented is, in effect, disposed of supra. We have already ruled that the board of directors had no lawful right or authority to

exact tuition of relator for attending the high school. Such being the case, there is no ground for refusing to remove the condition upon the release of relator's high school credits. By refusing to remove the condition upon demand or request, respondents, as in their refusal to deliver the certificate of attainment, approved the action of their predecessors, and the condition became their condition, not only by succession, but by ratification, and approval.

"* * * * * * * * * * * * * * * * * * * *

"It is our conclusion that mandamus will lie against respondents to compel the removal of the condition upon the release of the high school credits."

CONCLUSION.

It is therefore the opinion of this department that a Superintendent of a High School and the Board of Directors thereof can be compelled by a writ of mandamus to release for credit at another high school the full credits of a pupil who has met every requirement therefor except the payment of a tuition fee which the board of directors has attempted to exact without legal authority.

Yours very truly,

APPROVED:

J. E. TAYLOR
Assistant Attorney-General.

ROY McKITTRICK
Attorney-General

JET/afj

SCHOOLS: County Superintendent's salary, clerk hire and traveling expenses.

May 29, 1935.

FILED
46

Mr. G. C. Jones
County Superintendent
Department of Education
Laclede County
Lebanon, Missouri

Dear Sir:

Your request for an opinion, dated May 18, 1935, reads as follows:

> "As the first of July is the beginning of the new term of County Superintendents and the county court is lining up on the salary and traveling expenses with the expectation of finding some way to cut same, especially the traveling expense and clerk hire; this being the case, I will appreciate your opinion on the matter of traveling expense and clerk hire of County Superintendent.
>
> "Section 9457 of Missouri Laws mentions the County Superintendents powers as far as supervision is concerned, then section 9467 allows the County Superintendent $3.00 per teacher UNDER HIS JURISDICTION. Now it seems to me that the county superintendent would have jurisdiction over all teachers in his county, even though he did not have supervision over them.
>
> "Under section 9470 the county Superintendent has power to grant certificates to teachers in his county whether they teach in a first class school or a rural, also under section 9476 he has power to revoke county certificates and must also take part in revocation of state certificates, in other words, all cases of revocation of certificates

must come under the jurisdiction of county superintendent.

"All teachers are required to register their certificates with the county superintendent; we must also receive reports from all classes of schools, must furnish blanks etc. This being the case I feel that section 9467 intended that we should be paid for all teachers of the county instead of just those under our direct supervision. I will appreciate your opinion on this matter. Thanking you in advance."

At the last census Laclede County had a population of 16,320 inhabitants.

Section 9463, Laws 1933, page 384, provides for the salary of County Superintendents of Schools in Missouri, and reads:

"In counties having less than seven thousand population the County Superintendent of Schools shall receive One Thousand and Fifty Dollars; in counties having a population of more than seven thousand and less than ten thousand he shall receive Twelve Hundred Dollars; in counties having a population of more than ten thousand and less than twelve thousand he shall receive One Thousand Three Hundred and Fifty Dollars; in counties having a population of more than twelve thousand and less than fifteen thousand he shall receive One Thousand Six Hundred Dollars; in counties having a population of more than fifteen thousand and less than twenty-five thousand he shall receive One Thousand Eight Hundred Dollars; in counties having a population of more than twenty-five thousand and less than thirty-six thousand he shall receive Two Thousand Dollars; in counties having a population of more than thirty-six thousand and less than seventy thousand

> he shall receive Two Thousand One Hundred Dollars; and in counties having a population of more than seventy thousand and less than one hundred thousand he shall receive Two thousand Two Hundred and Fifty Dollars, of which the State of Missouri shall appropriate annually out of the general revenue fund of the state of Missouri four hundred dollars to each and every county. The county superintendent shall receive his salary monthly from the county revenue fund in the form of a warrant drawn upon the county treasurer."

Section 9465, Laws 1933, page 385, provides:

> "For the purpose of ascertaining the population of any county in this state in order to determine the salaries of County Superintendents of public schools, the last previous decennial census of the United States shall be conclusive."

Section 9467, R. S. Mo. 1929, provides for the County's liability for traveling expenses and necessary clerical hire in the office of County Superintendent of Schools and reads:

> "That the county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent. of his annual salary for traveling expenses and necessary clerical assistance, <u>provided</u> such allowance shall not exceed three dollars ($3.00) annually for every teacher under his jurisdiction. The county court shall, upon presentation of his bill properly setting forth his actual expenditures for traveling expenses and clerical hire, draw a warrant upon the county treasury for the payment of same: <u>Provided,</u> when the county superintendent shall fur-

nish his own conveyance, the rate allowed for mileage shall be four cents per mile for each mile actually and necessarily traveled."

Section 9457 R. S. Mo. 1929, delegates to the County Superintendent of Schools his supervisory powers, and reads as follows:

"The county superintendent shall have general supervision over all the schools of his county, except in city, town and village school districts employing a superintendent who devotes at least one-half of his time to the direct work of supervision. He shall visit each school under his jurisdiction at least once each year, and as many other times as practicable; he shall examine the classification of pupils, the methods of instruction, the manner of discipline, the order maintained, the results secured, and make such suggestions to teachers and school boards as he may deem advisable; he shall inspect the ventilation, note the conditions of the building, furniture, apparatus, grounds and appurtenances thereto belonging, and report the same to the board in writing, with such suggestions as he may consider necessary to the health, comfort and progress of the pupils; he shall examine the teacher's register and the district clerk's record and see that they are kept according to law; he shall furnish, annually, statements to the district clerks showing the assessed valuation of their respective districts; he shall receive, and, if properly made, approve estimates and enumeration lists and turn same over to the county clerk; he shall assist the district clerks, when necessary, in making their reports, and see that all warrants have been duly issued 'by order of the board,' either for services actually rendered or for material actually furnished."

CONCLUSION.

It is our opinion that the salary of the Superintendent of Schools of Laclede County, based upon the last census, would be the salary for the counties of more than fifteen thousand and less than twenty-five thousand population, or exactly One Thousand Eight Hundred Dollars.

It is our opinion that the traveling expenses and necessary clerical hire of the County Superintendent of Schools for Laclede County is limited in Section 9467, supra, by a triple limitation. He cannot legally exceed 25% of $1,800.00, or his claim against the County Treasury will be excessive, nor can he exceed $3.00 for every teacher under his jurisdiction, or his claim against the County Treasury will be excessive. Under the law, as a public officer, he is entitled to only that necessary clerk hire and traveling expenses. For example, if he had one hundred fifty teachers under his jurisdiction, he could legally expend and demand $450.00 from the County Treasury for necessary clerk hire and traveling expenses. On the other hand, if he had only one hundred teachers under his jurisdiction, his limit for a legal expenditure and demand against the County Treasury would be $300.00 for necessary clerk hire and traveling expenses. The County's liability for this expenditure decreases $3.00 from the $450.00 limit for every teacher under one hundred fifty under his jurisdiction.

It is our further opinion that the phrase "teachers under his jurisdiction" as used in Section 9467, supra, in computing allowable expenditure, does not mean to include those pupils who, under the Statutes, happen to qualify for teachers by reason of having to take the teachers' examination under his direction and examination, for which he be required to issue certificates to qualified candidates, nor does the phrase judicially comprehand those teachers who hold their county certificate subject to his right under the Statutes to revoke for cause. When the Legislature used the word "jurisdiction" they used it in the sense of supervision. His very title is that of Superintendent which means one who supervises. The fact that he has power under the Statutes to issue and revoke teachers' certificates, gives him no jurisdiction over the

teachers who receive their certificates from him, hence they cannot legally be said to be teachers under his jurisdiction. The certificate to teach is only a statutory incident, a collateral prerequisite to the right to practice a profession in Missouri. The teacher does not come under the Superintendent's jurisdiction, under the provisions of Section 9467, supra, until the relationship of Superintendent and teacher exists as provided in Section 9457, supra. A teacher does not come within his jurisdiction until employed to teach in a school over which the County Superintendent is empowered to exercise a supervisory control. The Superintendent's duty is to visit schools under his jurisdiction and it was for this visitation that the Legislature provided how he is to redoup his traveling expenses.

Where the Superintendent uses his own conveyance in traveling, the transportation is to be computed at four cents per mile when audited by the County Court.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

COUNTY BUDGET ACT: Circuit Judge may purchase books for office from Class 5 providing he does not jeopardize listed and estimated expenditures in Class 5, or same may be paid out of any available funds in Class 6.

6-13

June 13, 1935

FILED
46

Hon. Alfred C. Jones,
Clerk of Circuit Court,
Randolph County,
Moberly, Missouri.

Dear Sir:

This department is in receipt of a letter under date of June 6, 1935 from Hon. Aubrey R. Hammett, Judge of the Ninth Judicial Circuit, requesting that an opinion be rendered relative to certain law books needed for his library in Moberly. He requests that the opinion be rendered to you, and we accordingly follow his instructions. His letter is as follows:

> "The Circuit Court at Moberly was created by act of Legislature found at page 116, in the Session Acts of 1885. Section 2 of the act provides that the Circuit Judge of the Randolph County Court shall select a suitable place for holding said court, at the city of Moberly, and for the various offices herein provided for. Further on in said section it provides: 'and cause the same and said offices to be furnished in a proper manner for said Court and its officers and report the rental cost and expense thereof to the County Court of Randolph County which shall pay the same as other claims against said County are paid, out of the county treasury.' Section 7 provides: 'The books, stationary, furniture, fuel, light, rent and other incidental expenses necessary for said Court and offices shall be, from time to time supplies and paid for out of the county treasury.'
>
> "I am wondering if, as Circuit Judge, I would not have the right to buy a few very much needed books for the office of Circuit

> Judge at the City of Moberly, namely, the Missouri Digest, Southwestern Reporter, beginning where the higher courts began cutting part of their decisions out of the regular bound reports, Shepard's Citator, and possibly Kelly's Criminal Guide, and a book on instructions.
>
> "Would you be good enough to give us your opinion on this letter and address your opinion to the Clerk of the Circuit Court at Moberly, Missouri?"

The County of Randolph has two places for holding court, viz., Moberly and Huntsville. In 1885 the Legislature of Missouri established the place of holding court in Moberly. Laws of Missouri 1885, page 116, Sec. 2, provides as follows:

> "The judge of the circuit court in Randolph County shall select a suitable place for holding said court at the city of Moberly, and for the various offices herein provided for, and the place so selected by the said judge for the holding the said courts shall be known and designated as the court house at the city of Moberly; and cause the same and said offices to be furnished in a proper manner for said court and its officers and report the rental, cost and expense thereof to the county court of Randolph county, which shall pay the same as other claims against said county are paid out of the county treasury, and the judge of said court may change the place of holding said court in said city of Moberly when he deems it advisable, to some other place in said city."

It will be noted that the above section gives the Circuit Judge authority to furnish proper offices and equip the same. Section 7 of the same Act provides:

> "The books, stationery, furniture,

> fuel, light, rent and other incidental expenses necessary for said court and offices shall be from time to time supplied and paid for out of the county treasury."

It must be conceded that a circuit judge has the authority to equip his office with the law books essential thereto. However, the question arises as to whether or not the County Budget Act, now in effect, would preclude the purchase of such books at this time. Laws of Missouri, 1933, Sec. 1, page 341 contains the following provision:

> "* * *The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1 and ending December 31."

Section 2 of the Act (same page) divides proposed expenditures into six classes. The first four classes are definite in their terms and preclude the purchase of the books enumerated from those classes. Class 4 is as follows:

> "The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

The salaries and supplies of an expendible nature mentioned in Class 4 refer to county officers. A circuit judge receives his salary from the State of Missouri; his salary, therefore, is not included in the estimate in Class 4 and in our opinion the supplies for his office cannot be included in the estimate for that class.

Under Sec. 3 of the County Budget Act (Laws of Mo. 1933, page 342) it is made the duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court on or before the 15th day of January of each year an itemized statement of the estimated amount so required. Evidently, the Circuit Judge made no request at that time for the books in question, and we are assuming that the county court did not include any such estimate in making up the final budget, and this question now arises several months after the filing of the budget.

Class 5, Section 2 of the Act is as follows (page 342):

> "The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay cohtingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

Under Section 5 of the County Budget Act (page 344) the classes of expenditures are set out and the duties of the county court enumerated. Relating to the classification of Class 5, the statute says:

> "Contingent and emergency expense, not to exceed one-fifth of the total estimated revenue to be received. Purposes for which the court proposes the funds in this class shall be used shall be shown."

CONCLUSION

It must be conceded that the books enumerated by the Circuit Judge are highly essential to his office as Circuit Judge of Randolph County, and that such books should be in the library of every circuit judge; hence, we deem the request therefor to be an emergency expense within the meaning of the statute.

As above stated, it is the duty of the county court to list the "purposes for which the court proposes the funds in Class 5 shall be used shall be shown", and it is assumed that the cost of the necessary books was not included or listed. However, it is the opinion of this department that if there are sufficient funds in Class 5 to pay for said books without jeopardizing the payment of the listed proposed expenditures, the books may be purchased.

We are further of the opinion that if there are any funds in Class 6, the cost of the books may be paid therefrom, as the statute provides "the county court may expend any balance for any lawful purpose."

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting)Attorney General

OWN:AH

LIQUOR CONTROL ACT: A person cannot obtai. license to sell intoxicating liquor and 3.2 beer license on the same premises.

6-14

June 14, 1935.

FILED
46

Hon. Alvin H. Juergensmeyer,
Prosecuting Attorney,
Warren County,
Warrenton, Missouri.

Dear Sir:

This department is in receipt of your letter of recent date relative to the following questions:

> "Section 2092 R.S.M. 1929 provides that mileage shall be charged by the County Judges once for each regular term.
>
> "Question 1. At the close of the regular May term Court adjourns until the first Monday in June at which time it will adjourn until the first Monday in July. Are the County Judges entitled to mileage for the adjourned terms of court?
>
> "Question 2. Are the County Judges entitled to mileage at a special term of the County Court?
>
> "I should also like to have a copy of your opinion on the new liquor law, especially on the following question:
>
> "Can a retailer in a city of more than 500 which has voted 'no' on the sale of hard liquor by the drink, obtain both a license to sell liquor in the original package and a 5% and 3.2 beer license?"

I. - II.

"Are the County Judges entitled to mileage at a special term of the County Court?"

"Are the County Judges entitled to mileage at a special term of the County Court?"

Your first two questions relate to the mileage which may be charged by the members of the county court. On March 1, 1934 an opinion was written by Assistant Attorney General Franklin E. Reagan to Honorable W.S. Mathews, Clerk of the County Court of Lincoln County, Troy, Missouri, in which this question was decided. We are enclosing a copy of this opinion and believe that it properly answers your questions.

III.

"Can a retailer in a city of more than 500 which has voted 'no' on the sale of hard liquor by the drink, obtain both a license to sell liquor in the original package and a 5% and 3.2 beer license?"

Section 22 of the Liquor Control Act as amended by the 58th General Assembly, provides that intoxicating liquor shall be sold at retail in the original package upon a license granted by the Supervisor of Liquor Control, and said intoxicating liquor so sold shall not be consumed upon the premises where sold, nor the original package opened on said premises of the vendor, except as otherwise provided in said act.

We must next consider as to whether or not a 3.2 beer license may be obtained along with the intoxicating liquor license. Section 13139-h-1 of the Non-intoxicating Beer Law provides:

> "Any person holding a permit under this article to sell non-intoxicating beer at retail, who shall have or keep or secrete in or about the premises described in and covered by his permit, any intoxicating liquor of any kind or character, or any manufacturer

> or wholesale distributor who shall sell intoxicating liquor containing alcohol in excess of 3.2% by weight to any retail distributor holding a license or permit for the sale of non-intoxicating beer only, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for a term of not more than one year or by a fine of not less than Fifty Dollars ($50.00) nor more than One Thousand Dollars ($1,000.00) or by both such fine and jail sentence."

CONCLUSION

In view of the above, it is the opinion of this department that a person cannot obtain a license entitling him to sell intoxicating liquor and also obtain a 3.2 beer license entitling him to sell non-intoxicating beer on the same premises.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH

SCHOOLS - BONDS - Interest after default in payment of principal.

1-15

July 12, 1935.

FILED
46

Mr. H. Sam Jones,
Secretary-Treasurer,
Senath Consolidated Schools,
Senath, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of July 2, 1935, such request being in the following terms:

> "We have several outstanding bonds which are past due and I am just wondering if, under the law, we would be required to pay default interest since the bonds were coupon bonds and all the coupons have been paid. We are planning to refund these bonds and I would like to have your opinion as to what we should do about the default interest."

We have no specimen of these bonds and, therefore, we do not know what they provide as to interest, which, under R. S. Missouri, 1929, Section 9199, is "to be agreed upon by the parties", nor whether the bonds are in proper form, or valid obligations, but assuming that they are valid, if there is a provision fixing the rate of interest after default in payment of the principal, such interest must be paid for the period of such default. If there is no such provision in the bonds, interest from maturity would be payable at the legal rate of 6%, which is fixed by R. S. Missouri, 1929, Section 2839, for obligations on which no other rate is agreed upon.

There are no coupons to cover interest after default in payment of the principal, for the obligation of the bond is such that if it is complied with, the obligation will be satisfied on its maturity date. Consequently, the fact that all the interest coupons have been paid, has no relevance to the obligation to pay interest after maturity of the principal, nor would an intention to refund such bonds have any effect on the obligation to pay interest.

In conclusion, it is our opinion that when there is a default in the payment of the principal amount of a valid school bond at its maturity date, such bond would bear interest from that date at the rate provided in the bond, if any, and in the absence of such a provision, at the legal rate of 6%.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TRUCKS) No liability on counties for injuries caused by

COUNTIES) negligence.

8-30

August 30, 1935

FILED
46

Hon. A. H. Juergensmeyer
Prosecuting Attorney
Warren County
Warrenton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of August 8, 1935 reading as follows:

> "I should like to have an opinion on the following:
>
> 1. The County owns a number of trucks which are used in the construction and maintenance of county roads. Would the county be liable for personal and property damage should one of these trucks collide with a motor vehicle?
>
> 2. Assuming the County would not be liable, if the County would take out insurance for both personal and property damage, could the insurance company set up the same defense as the county?
>
> 3. Would the County obligate itself by taking out insurance on its trucks and operators?"

In Cassidy v. City of St.Joseph 247 Mo. 197, 152 S. W. 306, the Court said:

> "Neither the State nor those quasi-corporations consisting of political

> subdivisions which, like counties and townships, are formed for the sole purpose of exercising purely governmental powers, are, in the absence of some express statute to that effect, liable in an action for damages either for the non-exercise of such powers, or for their improper exercise, by those charged with their execution. This applies alike to the acts of all persons exercising these governmental functions, whether they be public officers whose duties are directly imposed by statute, or employees whose duties are imposed by officers and agents having general authority to do so."

In McQuillin on Municipal Corporations, Vol. 6, Section 2775, the following is said with reference to liability of quasi-municipal corporations:

> "It is not within the scope of this work to consider in detail the law relating to quasi-municipal corporations such as counties, towns, school districts, etc. However, it is proper to state here that there is a distinction between municipal corporations and quasi-municipal corporations as to liability for torts, and that the general rule is that the latter are not liable for torts, unless allowed by statute. So, generally, as referred to in the following chapter, in the absence of statutory authorization, counties, towns and other quasi-municipal corporations are not liable for injuries from defective highways."

The following is found in Ruling Case Law, Vol. 7 page 954:

> "Still the law is well settled that counties being organized for public purposes and charged with the performance of duties as an arm or branch of the state government, are never to be held liable in a private action for neglect to perform a corporate duty, or for acts done while engaged in the performance of such duties, or because they are not performed in a manner most conducive to the safety of its employees or the public, unless such liability is expressly fixed by statute.* * * * * * since a county is but a political subdivision of the state, a suit against the county is, in effect, a suit against the state, and that therefore an action will not lie without the consent of the legislature."

In 46 S. W. (2d) Bush v. State Highway Commission of Missouri, the question for decision before the court was similar to the first question involved here, namely, the liability of the State Highway Commission in tort for acts of its agents and employees. In rendering its opinion the Court said:

> "At the time the opinion was rendered in State v. Bates, supra, the antecedent case of State ex rel. v. Hackmann, supra, was the law on the proposition that the State Highway Commission was 'a subordinate branch of the executive department.' State ex rel. v. Hackmann was not overruled by State v. Bates. The decision that the State Highway Commission was 'a subordinate branch of the executive department' was essential to the determination of the issues raised in State ex rel.v. Hackmann, and the classification given to the Commission by the last named decision

> is the law in the instant case. It thus having been determined that the commission is a subordinate branch of the executive department, it is not liable in Tort for the acts of its agents and employees upon grounds of public policy heretofore stated."

In Reardon v. St. Louis County 36 Mo. 555, the Court said:

> "Counties are quasi corporations created by the Legislature for the purpose of public policy, and are not responsible for the neglect of duties enjoined on them, unless the action is given by statute."

In Richardson v. City of Hannibal 50 S. W. (2d) 650, plaintiff asked to recover $10,950.00 for damages alleged to have been sustained by plaintiff as the result of a collision of a fire department motor hook and ladder truck belonging to the City of Hannibal, Missouri, with plaintiff's car while plaintiff's car was parked on the south side of Broadway in the City of Hannibal. The Supreme Court, in affirming the decision of the lower court directing a verdict in favor of the plaintiff city, said:

> "The fact that the doctrine of 'respondeat superior' does not apply to the State or the several political subdivisions thereof, when exercising a governmental function, is so well established in our system of government that we do not find any cases where the courts have held to the contrary."

Applying the decisions of the above cases to the question at hand, it is our opinion that counties are not

liable for damages when a truck owned by the county and used on county business collides with a privately owned car. We do not comment on the right of a county to recover damages sustained in an accident.

In view of the foregoing holding that counties are not liable in tort we deem it unnecessary to answer the last two questions contained in your letter for the reasons (1) a wrong premise would have to be assumed, and, further, (2) the answer would be only academic.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JLH:
ARH:LC

SCHOOL DISTRICTS: When entitled to credit due resident under Section 9207, R. S. Mo. 1929.

11-22

November 21, 1935.

FILED
46

Hon. Alvin H. Juergensmeyer,
Prosecuting Attorney,
Warren County,
Warrenton, Missouri.

Dear Sir:

This is to acknowledge your letter dated November 1, 1935, as follows:

> "I would appreciate an opinion on the following questions:
>
> "1. A lives in school district B and owns property in Warrenton, Missouri, where a high school is located. If A send his children to high school in Warrenton will school district B be required to pay the full amount of tuition or is district B entitled to credit on the high school tuition of said students in a sum equal to the amount of the school taxes paid by A in the city of Warrenton as per Section 9207 RSM 1929?
>
> "2. School district C has been paying high school tuition for students out of district C who are attending high school at Warrenton. One of the students has reached the age of 20 years and another is 21 years. Is district C required, under Section 9213 RSM 1929, to pay the tuition of said students until they complete the high school course regardless of their age?"

I.

We assume from your inquiry that School District B does not maintain an approved high school offering work through the twelfth grade, and by reason of that fact are sending their pupils to Warrenton, which we further assume is an approved high school and located in another district of the same or adjoining county.

Laws of Missouri, 1935, Section 16, page 351, provides that under the above circumstances, School District B must pay tuition for such pupils.

Section 16, supra, provides:

> "The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered; but the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year, if said district is entitled to an equalization quota; if the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year; but the attendance of such pupils shall not be counted in determining the teaching units of the school

> attended; and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental purposes. In case of any disagreement as to the amount of tuition to be paid, the facts shall be submitted to the state superintendent of schools, and his decision in the matter shall be final. Subject to the limitations in this section, each pupil shall be free to attend the school of his or her choice; but no school shall be required to admit any pupil, nor shall any school be denied the right to collect tuition from a pupil, parent, or guardian, if the same is not paid in full as herein before provided. In no case, however, shall the amount collected from a pupil, parent, or guardian exceed the difference between fifty dollars and the per-pupil amount actually paid by the state, nor shall the amount the district of the pupil's residence is required to pay exceed the amount by which the per-pupil cost of maintaining the school attended is greater than fifty dollars. If, for any year, the amount collected from a pupil, parent or guardian exceeds the difference between fifty dollars and the per-pupil amount actually paid by the state, the excess shall be refunded as soon as the fact of an overcharge is ascertained."

In this case A, who resides in District B, is paying taxes on property which he owns in Warrenton.

Section 9207, R. S. Mo. 1929, provides:

> "The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district -- said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit

> forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same: Provided, that the following children, if they be unable to pay tuition, shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support: Provided further, that any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax."

The above section permits a credit to A on the amount charged for tuition to the extent of such school tax by virtue of paying a tax on property in Warrenton. Since District B is required under Section 16, supra, to pay tuition for A's children who attend Warrenton High School, as a matter of equity, the school district should be entitled to the credit due A under Section 9207, supra.

The court in the case of Davenport v. Timmonds, 138 S. W. 349, 157 Mo. App. 360, l. c. 365, in discussing the matter and theory of the right of subrogation, said:

> "Subrogation is based on rules of equity. It is a creation of the law whereby substantial justice may be accomplished, regardless of contract relation. In the recent case of Holland Banking Co. v. See, 130 S. W. 354, we had occasion to review the

authorities generally on the question of subrogation, and we made the following quotations:

"'Subrogation is a doctrine of equity jurisprudence. It does not depend on privity or contract, express or implied, except in so far as the known equity may be supposed to be imported into the transaction. It is a consequence which equity attaches to certain conditions. The parties may not have contracted for it either expressly or by legal implication, but if, in the performance of that contract which they did make, certain conditions have resulted which make it necessary for equity to interpose its authority in this respect it will do so, provided that in so doing it will violate no law and not alter the contract.'

"'The doctrine of subrogation has kept pace with the growth of the equitable principles until at the present time it exists in all its pristine vigor, and is extended to whomsoever as a matter of right and good conscience it should be applied.'

"'It is treated as the child of equity and is applied to secure a real and essential justice regardless of form, and independent of any privity of contract, or consideration between the parties affected by it.'

"'The doctrine of subrogation is not a fixed and inflexible rule of law and equity. It does not owe its origin to statute or custom. It is a creature of the equity courts, invented and applied by them to do justice or prevent an injustice being done in a particular case, and under a particular state of facts where the law is powerless in the premises.'"

From the foregoing, we are of the opinion that the facts and circumstances in this case make it one to which the principle of equitable lien or subrogation is specially applicable, and therefore School District B is entitled to a credit on the high school tuition for A's children in a sum equal to the amount of the school taxes paid by A in the City of Warrenton.

II.

In answer to your second question, we respectfully direct your attention to an opinion rendered you under date of October 30, 1934, a copy of which we are enclosing, wherein this department held that persons over twenty years of age are not entitled to gratuitous instruction. Hence School District C may refuse to pay tuition for students attending high school at Warrenton who are over the age of twenty years, even though they have as yet not completed their high school course. However, it is to be noted in the second part of the enclosed opinion that if the board wishes to provide gratuitous instruction for persons over the age of twenty years, it may do so just so long as it is not paid out of funds derived by virtue of Section 6, Article XI, of the Constitution of Missouri.

Yours very truly,

James L. HornBostel,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

COUNTY BUDGET ACT: Appropriation made to County Farm Bureau organizations should be placed in Class 6; County Health Officer in Class 4; Government Relief Officer in Class 6; Probation Officer in Class 4; County Highway Engineer in Class 4.

12-21

December 19, 1935

FILED
46

Mr. R. L. Jones
County Clerk
New Madrid County
New Madrid, Missouri

Dear Sir;

This Department is in receipt of your letter regarding questions which have arisen in connection with the County Budget Act, Laws of Missouri 1933, page 340. Your letter is as follows:

> "Some few days ago, one of your assistants called in our office to check our payments to the State Institutions, and called our attention to the fact that we were possibly paying one or two officers from the wrong class under the present budget law.
>
> "The offices in which he particularly called our attention to were the New Madrid County Farm Bureau, in which we appropriated the sum of $1,500.00 for the year 1935, for the purpose of paying his secretary and general office expense. The other was for the New Madrid County Health Unit, for which we appropriated the sum of $2,550.00, to be used as salary for the physician in charge and one stenographer. We gained the impression from him that these two appropriations should be made from class six.

"We would like to know if we should pay the above payments to the New Madrid County Farm Bureau, County Health Officer, Government Relief Office (postage and office supplies) and Probation Officer, (as appointed by the Circuit Judge) from the funds of Class 4, Salary & Operation, or should these non-elective officers be paid from some other fund?

"We understood from your assistant that non-elective officers were not entitled to pay from Salary & Operation. Would appreciate an early reply before we make up our budget for the year 1936."

I

It has been rather a difficult question to classify the County Farm Bureau Agent and his secretary, likewise, the County Nurse. In view of the fact that under Section 12616,Revised Statutes Missouri 1929, the County Court is authorized and empowered to appropriate,out of the general funds of the county,such sums as it may deem proper for the support of county farm organizations, we came to the conclusion that the Farm Bureau Agent was not a county officer in the sense as used in the statute relating to the officers, as contained in Class 4, page 341, and further, it appears by Section 12616 it is discretionary with the county court as to whether or not a farm bureau agent shall be employed or money for the support of county farm organizations shall be appropriated. Hence, the appropriation for County Farm Bureau Agent was placed in Class 6. A copy of an opinion to this effect this office rendered on April 16, 1935, to Honorable C. H. Robards, Presiding Judge of the County Court, Kennett, Missouri, is herewith inclosed.

II

Regarding the other officers which you have mentioned

in your letter and the question as to whether or not Class 4 includes non-elective officers, we shall discuss each case individually. Class 4 of the County Budget Act, page 341, Laws of Missouri 1933, is as follows:

> "The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

Under Section 5, page 344, in the class of expenditures, Class 4 is as follows:

> "Pay or salaries of officers and office expenses. List each office separately and the deputy hire separately."

In the case of County Health Officer it was formerly mandatory upon the county court to appoint such officer at the February term of the county court, as provided in Section 9025 Revised Statutes Missouri 1929. Upon the failure of the county court to appoint what the section designated as State Commissioner of Health, commonly known as county physician, the duty devolved upon the State Board of Health to make such appointment, the compensation and expenses of the county physician being paid out of the county treasury of the county.

The legislature amended said section in Laws of Missouri 1933, page 271, and now said section reads as follows:

> "At the first regular February term of the county court in each county

> of the State after this article becomes effective and at the regular February term of said county court every year thereafter, said court may appoint a reputable physician, as a Deputy State commissioner of health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

You will note that by the terms of the amended section the county court appears to have the power to use its own discretion in regard to the appointment of a county physician; hence, it would appear that the county physician would be in the same category of the appropriation made for the farm bureau and funds would be taken from Class 6. However, we are of the opinion that the county physician is a county officer, and, as the terms of the budget act placed the imperative duty, page 341, at the regular February term of the county court, to prepare and enter of record and file with the county treasurer and State Auditor a budget of the estimated receipts and expenditures for the year beginning January 1 and ending December 31, the appointment of the county physician is for one year, whereas, the appropriation for the county farm bureas is for three years; hence the county court can fix the compensation of the county

physician at the time it makes the appointment and at the time the budget is prepared for the fiscal year. Therefore, we are of the opinion that the class of officers mentioned in Class 4 includes the county physician, even though he be a non-elective officer. For your information, we have also construed Class 4 to include the salary of the county highway engineer.

With reference to the Government relief office (postage and office supplies), we are of the opinion such officer is not a county officer, either elective or non-elective, and hence, any appropriation of funds should come from Class 6.

With reference to the probation officer, under Section 14144, Revised Statutes Missouri 1929, it is the duty of the Circuit Judge of the Juvenile Court to appoint a probation officer to serve during the pleasure of the court.

In the case of Hastings v. County 314 Mo. 144, it was held that the probation officer was a county and public officer, hence, we are of the opinion that the salary of the probation officer should be included in the budget under Class 4, even though he be a non-elective officer. There has been considerable discussion as to whether or not Class 4 of the Budget Act refers solely to elective officers. But for the reason that Class 4 contains the provision "made payable out of the ordinary revenue of the county," we are of the opinion that said class may include non-elective officers as well as elective officers, the statutes governing the appointment and the manner in which said appointed officers are paid will determine, in most instances. Therefore, as to whether or not each appointive officer is to be placed in Class 4 or Class 6 will have to be determined by the incidents of the office.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

OWN:LC

Inclosure

IN RE: HOUSE BILL NO. 74, Relating to placing of employees under the provisions of the Workmen's Compensation Act, in conflict with Section 44a of Article IV. Missouri Constitution.

2-19

February 4, 1935.

FILED
47

Honorable E. J. Keating
Fifty-Eighth General Assembly
House of Representatives
Jefferson City, Missouri

Dear Sir:

We wish to acknowledge your letter of January 25th, wherein you state as follows:

> "I have been appointed Chairman of a sub-committee of the Judiciary Committee of the House to write a committee substitute for House Bill No. 74 relating to placing the employees of the State Highways Commissions under the provisions of the Workmen's Compensation Act. I feel that this bill is probably in conflict with Section 44a, Article 4 of the Constitution in that the payments will be from funds of the Highway Department. The sub-committee will appreciate it very much if you will give us an opinion as to the constitutionality of this proposed act and any suggestions you will make will be deeply appreciated."

House Bill No. 74 of the Fifty-Eighth General Assembly provides:

> "Section 1. That Article 13, Chapter 42, Revised Statutes of Missouri, 1929, be and the same is hereby amended by adding a new section thereto to be known as Section 8104a and to read as follows:

> "Section 8104a. When the State Highway Commission shall undertake the construction of maintenance, under its own direction and supervision, of any road, culvert or bridge or any part thereof as provided in this Article, it shall be liable for injuries suffered by laborers and foremen incurred in such construction or maintenance and the amount of such liability shall be determined as provided in the Workmen's Compensation Law and shall be paid out of the funds under the control of said Commission as salaries and wages are paid, and such compensation shall be deemed a part of the salary or wage of the person so injured."

Section 44a of Article IV of the Missouri Constitution providing for a state highway system provides in part thus:

> "The said bonds and the interest that will accrue thereon shall be paid out of a fund to be provided by the levy and collection of a direct annual tax upon all taxable property in the State. All state motor vehicle registration fees, license taxes or taxes authorized by law on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation shall, after the issuance of any

of said bonds and so long as any of said bonds herein authorized remain unpaid, be and stand appropriated without legislative action, to the payment of the principal and interest of the said bonds and for that purpose shall be credited to the State Road Bond Interest and Sinking Fund provided by law. If in any year there should be any balance in the State Road Bond Interest and Sinking Fund beyond the requirements of the next succeeding calendar year for interest and sinking fund of the said bonds, such balance shall be transferred and credited to the State Road Fund to be administered and expended under the direction and supervision of the State Highway Commission for the following purposes: to complete and widen or otherwise improve, and maintain the state system of primary and secondary highways as designated and laid out under existing law; to reimburse the various counties and political or civil subdivisions (including road districts) of the State for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the State as permanent parts of the state highway system to the extent of the value to the State of such roads and bridges at the time taken over, not exceeding in any case the amount expended by such counties or subdivisions in the construction or acquisition of such roads and bridges; to construct and maintain other state highways and bridges, and to widen or otherwise improve existing state highways and bridges in the congested traffic areas adjacent to the cities of St. Louis and Kansas City; to locate, establish, acquire, construct, and maintain, as hereinafter provided, supplementary state highways and bridges in each county of the State, in addition to those state highways and bridges designated and laid out under existing law, and to acquire materials therefor, and for such other purposes, and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the State Highway Commission may deem proper.

> "After the principal and interest of all of said bonds shall have been paid, all state motor vehicle registration fees, license fees or taxes, authorized by law, on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels, authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation, shall be and stand appropriated without legislative action to the State Road Fund, to be administered and expended under the direction and supervision of the State Highway Commission for the purposes and in the manner hereinbefore set forth."

The following question presents itself: Whether the General Assembly, by virtue of Section 44a of Article IV of the Missouri Constitution, may dictate to the State Highway Commission as to the manner in which the funds are to be spent?

It will be noted from a reading of Section 44a of Article IV of the Missouri Constitution, supra, that the proceeds of the sale of the bonds therein authorized are to be expended under the direction and supervision of the State Highway Commission; and it follows with the purposes that the money may be expended for.

> "The proceeds of the sale **** of additional bonds herein authorized shall be expended under the direction and supervision of the State Highway Commission for the following purposes: ****."
>
> "***** be and stand appropriated without legislative action, to the payment of the principal and interest of said bonds and for that purpose shall be credited to the State Road Bond Interest and Sinking Fund provided by law. If

in any year there should be any balance in the State Road Bond Interest and Sinking Fund beyond the requirements of the next succeeding calendar year for interest and sinking fund beyond the requirements of the next succeeding calendar for interest and sinking fund of the said bonds, such balance shall be transferred and credited to the State Road Fund to be administered and expended under the direction and supervision of the State Highway Commission for the following purposes: ****

"After the principal and interest of all of said bonds shall have been paid **** shall be and stand appropriated without legislative action to the State Road Fund, to be administered and expended under the direction and supervision of the State Highway Commission and in the manner hereinbefore set forth. *****

"Said supplementary state highways to be constructed or improved and maintained in each of the counties of the State shall be selected by mutual agreement of the State Highway Commission, and the officials of such counties or political or civil subdivisions ****.

"**** the State Highway Commission is hereby authorized and empowered to locate, construct, and maintain from the funds herein provided for construction of primary and secondary highways and from the State Road Fund **** and from such funds the State Highway Commission is hereby also authorized and empowered to locate, construct, and maintain highways and bridges in state parks, ******

"All the highways and bridges to be constructed and improved with the funds herein provided, shall be constructed, improved and maintained under the direction and supervision of the State Highway Commission ****.

> "If, at any time the State Highway Commission should find that the proceeds from the fees, *** hereinabove provided, will not be sufficient to pay all expenses herein authorized ****.
>
> "The remaining fifteen million dollars of bonds herein authorized shall never be issued until, in the opinion of the State Highway Commission ****.

The above sections are set out for the purpose of showing that the constitutional amendment authorizes the expenditure of funds under the direction and supervision of the State Highway Commission, and sets out the specific purposes for which the proceeds of the bonds shall be expended. Under its provisions it is clearly evident that the people of Missouri did not intend the General Assembly to dictate to the State Highway Commission as to the manner in which the proceeds are to be spent. The program of the State Highway Department involved the expenditure of millions of dollars, and they made certain that the work would not be hampered by naming the body under whose directions, and the specific purposes for which, the proceeds of the bonds were to be expended.

The Court in the case of State v. Thompson, 19 S.W. (2d) (Mo.) 642, l. c. 647,648, bears out the above contention in the following language:

> "The court will take cognizance of the fact that the State Highway Department is one of the largest, if not the largest, department operating under the State government at this time. The work of the Department probably has a more direct contact with every section of this state than any other department of government. The importance of its work in the construction of highways and bridges throughout the State, and the magnitude of its responsibilities will be recognized at once. Its program involves the expenditure of millions of dollars and the employment of thousands of skilled and unskilled laborers, in addition to its extensive staff of engineers and other employees.

> The necessity for keeping the department supplied with funds with which to carry on its work, readily suggests itself. Any cessation, even though it be temporary, might disrupt a thoroughly organized, trained and efficient organization. The lack of funds would of necessity compel the disintegration of the Highway Department's organization, and, as well, would prevent the making of further contracts for the doing of other and additional work until such time as funds therefor might become available. These arguments were all made and considered in the campaign which resulted in the constitutional amendment known as Proposition No. 3. It was for the very purpose of preventing the occurrence of any lapse in activities of the Highway Department that the people of Missouri authorized this amendment to the Constitution."

From the foregoing, we are of the opinion that House Bill No. 74, supra, relating to the placing of employees of the State Highway Commission under the provisions of the Workmen's Compensation Act, is clearly in conflict with Section 44a of Article IV of the Constitution in that it dictates to the State Highway Commission the manner and purposes for which its funds are to be spent.

This opinion is not to be construed as holding that under the provisions of Section 44a of Article IV of the Missouri Constitution, the State Highway Commission cannot elect to become an employer within the terms of the Workmen's Compensation Act and use the funds at its command for such purposes, and such question is not before us for consideration. The only question before us is whether House Bill No. 74, supra, is in conflict with Section 44a of Article IV of the Missouri Constitution, and we are of such opinion.

Respectfully submitted,

APPROVED:

WM. ORR SAWYERS,
Assistant Attorney-General.

ROY McKITTRICK,
Attorney-General.

MW/WOS:afj

ROADS AND BRIDGES - Limitation on special road district incorporated under Article 9, Chapter 42, R. S. Missouri, 1929, in incurring indebtedness.

2-20

February 7, 1935.

FILED
47

Mr. O. A. Kamp,
Prosecuting Attorney,
Montgomery County,
Montgomery City, Mo.

Dear Sir:

A request for an opinion has been received from you under date of December 28th, 1934, such request being in the following terms:

> "I have a letter from the Secretary of the Jonesburg Special Road District, Board of Road Commissioners, stating that he had written your department for an opinion relative to the Commissioners of the District purchasing a tractor and obligating the district for the payment of same, and that you advised him to have me write for the opinion.
>
> It is my understanding of the law that the only provisions for a Board of Commissioners to place an indebtedness against a district is by a bond issue, to be voted upon by the voters. However, I have advised them that it is not unusual for a Board of Commissioners to borrow money for a legitimate purpose, such as the purchasing of a tractor which is needed, but that it would not relieve them from personal liability on the note, in case serious opposition to that action was taken by the taxpayers of the district. I would like to have your opinion on that question so I can advise them of same on this question, about them obligating the district for a new tractor, when they do not have the money to pay for it."

We believe that the answer to your question is found in R. S. Missouri, 1929, Section 8053, which provides

as follows:

> "Such board may issue warrants on the treasurer of the board in payment of the expenses and obligations which the board are authorized to incur in behalf of such special road districts and such warrants may be issued in anticipation of the income and revenue provided for the year for which the debt or obligation for which the warrant is issued was incurred; but such districts or such board on behalf thereof shall not become indebted in any manner or for any purpose to an amount exceeding in any one year the income and revenue provided for such year; provided however, that this shall not prevent the incurring of indebtedness under bond issue as is or may be provided by law."

There have been no cases decided construing this section, and we believe that its language is sufficiently clear to show the statutory limits of indebtedness which can be incurred by special road districts incorporated under Article 9 of Chapter 42 of the 1929 statutes. In such article the sources of funds for such districts are set out, including proceeds from the sale of property of the district (Section 8037), proceeds of certain licenses (Section 8041), taxes for road purposes (Section 8042), poll taxes (Sections 8043 et seq.), and money refunded by the State Highway Commission (Section 8060). There can be no doubt that the Board of Commissioners would have the right to buy a tractor, if the money were available, as Section 8033 authorizes such Board to "buy * * * all kinds of motor power, and all things needful to carry on such road work", but Section 8053, above quoted, limits the indebtedness which such Board may incur in any one year to the income and revenue provided for such year, although such section does not require such money to be on hand at the time of incurring an indebtedness, if such money is provided in the income and revenue for that year.

In conclusion it is our opinion that a special road district incorporated under R. S. Missouri, 1929, Chapter 42, Article 9, has no authority, through its Board of Commissioners, to incur indebtedness in any one year, aside from bonded indebt-

edness, exceeding the income and revenue provided for such year, and that the members of such Board would be legally responsible for violating Section 8053, which so provides.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

LICENSES: Justices of the Peace and Police Judges have no jurisdiction to revoke or cancel State automobile licenses or to stay execution of punishment conditioned on good behavior.

5-7

May 3, 1935.

FILED 47

Honorable Edgar J. Keating
House of Representatives
Jefferson City, Missouri

Dear Sir:

Your letter of May 1, 1935, requesting an opinion of this office is as follows:

> "A conference committee of the House and Senate meeting to consider perfected committee substitute for senate bill 163 permitting municipalities gnnerally to enact drivers' license laws and charge a fee for the licenses, respectfully request that you render them an opinion on the following questions:
>
> "1. Are the police judges and justices of the peace of Missouri authorized to grant stay of execution upon condition that the accused refrain from driving his automobile for a certain specified time?
>
> "2. Have they the power to revoke or cancel the state automobile license for violation of the driving ordinances or statutes?
>
> "The committee desires to have a meeting on this matter at 1:30 p. m. tomorrow, May 2, and would appreciate an opinion in time to discuss the same at that meeting."

The Missouri Consitution, Article VI, Section 37, provides:

> "In each county there shall be appointed, or elected, as many justices

> of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law."

In the case of Brownfield v. Thompson, 96 Mo. App. 340, l. c. 342, the Appellate Court said:

> "A justice's court is not only a court of limited jurisdiction, but its powers are limited within its jurisdiction. It can only do such things where it has jurisdiction as the Legislature has provided it may. The manner of exercising its jurisdiction is limited by the same law that created it.* * * * The Legislature has defined the jurisdiction of justices of the peace and has provided in a very careful and specific manner their duties and their mode of procedure."

CONCLUSION.

It is the opinion of this office that a Justice's Court is a court of limited jurisdiction, and that its powers are even limited within its jurisdiction. A Justice of the Peace has no power beyond the Constitution and Statutes and is limited in power to act only within the Constitution and Statutes. Except for powers expressly allowed or necessarily implied from the Constitution and Statutes, he has no other authority upon which to justify his acts. Any act beyond his authority to act is void.

The powers of a municipal police judge are even more limited than those of a justice of the peace.

We find no constitutional or statutory provision authorizing justices of the peace or police judges in Missouri to grant stays of execution conditioned "that the accused refrain from driving his automobile for a certain specified time." At the present time such an order would be beyond the jurisdiction of a Justice of the Peace or Police Judge and void.

We find no constitutional or statutory provision giving justices of the peace or police judges power to revoke or cancel a State Automobile License for violation of any municipal drivers' ordinance or any Statute authorizing said ordinance. At the present time a cancellation of State automobile licence by a Justice of the Peace or Police Judge would b e void.

These officers are creaturesof the Statutes. For these officers to have such power the Legislature must give it to them or it must delegate the right to cities to give it to them through ordinances.

Nothing in the present existing law or in Committee Substituted to Senate Bill 163 gives justices or police judges the powers inquired about.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

INTOXICATING LIQUOR: Corporations shall employ resident managers for their various places of business with the proper qualifications as provided in Section 27 of the Liquor Control Act.

SEE: State v. Hughes, 173 S.W.2 877

June 25, 1935.

FILED
47

Hon. Roy L. Kay
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

This will acknowledge your request for an opinion which reads as follows:

> "Section number 27 of the New Liquor law, of Senate Bill number 30, uses the following language 'Unless the Managing Officer of such Corporation is of good moral character, and a qualified voter and taxpaying citizen of the county, city or Village.' Does the language prohibit corporations from hiring resident citizens as managers of the place of business and in engaging in the sale of Package of Liquors in Packages? Was the law designed to confine corporations in the sale of Liquors to the place of residence of the President of the Corporation, or was it intended to allow corporations to hire managers, resident of the county or city and allow corporations to sell liquors in the package at their several places of business, say in as many cities and counties as the corporation has places of business. "

Section 27 of the Liquor Control Act provides in part:

> "****, nor shall any corporation be granted a license hereunder unless

the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village; ****".

It is evident therefore that no corporation shall be granted a license to engage in the sale of intoxicating liquor unless the managing officer of said corporation be of good moral character, a qualified voter and a taxpaying citizen of the county, town, city or village. In our opinion, the intent of the Legislature was to the effect that if corporations were conducting branches or places of business located in various cities within the city, that the managers of the respective places of business must be qualified as provided in Section 2 supra. If a company has its principal office and conducts a place of business in another opinion that in the latter city the manager must be of a good moral character and a qualified voter and a taxpaying citizen of that city. In other words it would not be permissible for a corporation having its principal place of business in one city to send a manager in its employ from that city to one of its places of business in another city to manage such business, unless he were properly qualified.

It is our opinion that it was not the intent of the Legislature to restrict corporations in the sale of intoxicating liquors in the original package in any particular city. We therefore are of the further opinion that the language of the above statute would in effect be mandatory that corporations employ resident managers of the proper qualifications as provided in the Act.

Very truly yours,

APPROVED:

RUSSELL C. STONE
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

INTOXICATING LIQUORS: Licensees under a Liquor Control Act cannot form a co-partnership with others and operate under a license issued to one of partners.

1-29

July 22, 1935.

FILED
47

Honorable Roy L. Kay
Prosecuting Attorney
California, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "I would like to have your opinion on the following state of facts. 'A' obtains a license from the state, county and city to sell 5% beer. Later and during the term covered by his license, 'A' forms a partnership with others, who do not have a license and the partnership continues in the business of selling 5% beer on the license obtained by 'A.' Has the new partnership as such a legal right to continue to sell 5% beer on the license issued to 'A?'
>
> "Section 16 of the new liquor laws of the state reads as follows; 'No license issued under this act shall be transferable or assignable.' "

It is our opinion that Section 16 of the Liquor Control Act, which you have above mentioned is inapplicable as applied to your hypothesis.

Your attention is directed to Section 21 of the Liquor Control Act, which provides in part as follows:

> "No person, partnership, association of persons or corporation shall manufacture or distill in-

> toxicating liquor within this state, and no person, partnership, association of persons or corporation shall sell or give away, or offer for sale, at wholesale or retail, nor shall any person, partnership, association of persons or corporation blend intoxicating liquor, nor shall any person, partnership, association of persons or corporation, who shall import intoxicating liquor into this state, offer same for sale without first procuring a license therefor from the Supervisor of Liquor Control.

From a careful perusal of the above section you will note that a partnership is prohibited from engaging in the sale of intoxicating liquors without obtaining a license therefor. The license issued to "A" in your hypothetical question would be inoperative, inasmuch as there has been a change of condition in the licensee, that is, the licensee has formed a partnership with others who are engaged in the sale of intoxicating liquors under a license issued to "A". Therefore, the partnership would have to obtain a license.

Your attention is further directed to Section 43-a of the Liquor Control Act, which provides as follows:

> "The term 'person' as used in this Act shall mean and include any individual, association, joint stock company, syndicate, co-partnership, corporation, receiver, trustee, conservator, or other officer appointed by any State or Federal Court."

It is the opinion of this Department that the partnership above mentioned has no legal right to engage in the sale of intoxicating liquors without obtaining a license, further that such partnership is liable to prosecution under the provisions of Section 43-a supra.

Respectfully submitted

APPROVED:

RUSSELL C. STONE
Assistant Attorney General.

ROY McKITTRICK
Attorney General.
RCS:H

PUBLICATION--TAX: Interpretation of the Law of 1935, page 403, Section 9952b, relating to publication of delinquent tax list.

10-10

October 9, 1935.

FILED
47

Honorable C. W. Keller, Secretary
Missouri Press Association
Columbia, Missouri

Dear Sir:

Answering your request for an opinion dated September 17, 1935, as contained in the several exhibits attached to your letter, we take it that your request is as follows:

> "(1) How is the publisher of the 1935 delinquent tax list to be paid under the Laws of 1935? That is to say: Where land published in 1934, under the existing law, was not sold pursuant to said publication and is readvertised under the Laws of 1935, is the publisher to make his charge under the old law or under the Laws of 1935? Under the old law the publication was properly charged to the purchaser at the tax sale.
>
> "(2) Under the 1935 law, who does the publisher bill for costs of publication, and how is the bill to be legally computed as a proper charge? Does each delinquent year require publication of a separate description of the same tract, or does the law contemplate publication of one description, stating the several years delinquency back to and including five years delinquency, and striking a grand total of delinquency.
>
> "(3) Under the 1935 Law, can the delinquent tax list be divided into several township delinquent tax lists and several newspapers in the county legally publish that part of the delinquent tax list, which pertains to township land in or contiguous to the township where the several newspapers are published."

The present law relating to publication of delinquent tax lists is found in the law of 1935, page 403, Section 9952b.

> "The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.; provided, however, that if a part or parts of any forty-acre tract or other legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof, then, as to such land or lots, such list shall be so prepared and separated. To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter, until all are offered. The county collector shall, on or before the day of sale, insert at the foot of such list on his record a copy of such notice and certify

on said record immediately following such notice the name of the newspaper of the county in which such notice was printed and published and the dates of insertions of such notice in such newspaper. The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

CONCLUSION.

Answering your first question: We are of the opinion that under the now existing law it is the duty of the County Collector to publish the delinquent tax list in some newspaper of general circulation. Charge for publication made in 1934 is properly charged against the purchaser who purchased pursuant to said publication, but where no purchase was made no legal charge for that publication can be made against the county.

The 1935 law contemplated a yearly publication of delinquent lands and lots. Lands and lots not sold in prior years must be annually republished, including delinquencies which are not outlawed. The fact that some lands and lots happen to be readvertised annually, yet the advertisement is to be paid annually, the same as on land advertised for the first time. Under the new law the expense of advertising is henceforth payable out of the County Treasury. The publisher of the list who is authorized by the County Collector is to limit his charge not to exceed the rate fixed in the county printing contract in those counties which have let a county printing contract. The charge, in no event, can be more than $1.00 per description per tract, the county printing contract to the contrary notwithstanding. The charge may be less than the charge of the county printing contract, but not more. If the cost of printing the description, when measured by the rate of the county printing contract, is less than $1.00, then the cost as so measured shall be the charge against that tract.

Answering your second question: The law contemplates publication of one description to include all land assessed wholly to any one delinquent person, and when two or more persons have been assessed and become delinquent for the same land, then the list is to describe the said land separate from individually owned land, even though some of the owners be delinquent in land on which they were assessed as sole owners. After the legal description of said land or lots the published list is to itemize the yearly delinquency on the thus described land for five previous years, and is to show the sum of the total delinquency. Formality as to size of type, style or form, is not provided for in the law. The publisher is to bill the County for the charge of publication of the delinquent tax list, and it should be paid as other charges against a county are paid.

Answering your third question: The law allowing publication of delinquent tax list does not contemplate that the list be divided into township delinquent tax lists so that several newspapers in the County can publish and be paid severally for that part of the delinquent tax list which pertains to township land in or contiguous to townships where the several newspapers are published.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

OLD AGE ASSISTANCE: Interpretation of appropriation Act.

10-21

October 16, 1935.

FILED
47

St.Louis Old Age Assistance Board
154 Municipal Courts Building
St.Louis, Missouri

Attention of Doctor R. Emmet Kane,
Chairman.

Gentlemen:

Acknowledgment is herewith made of your request for an opinion of this office on the following matter:

> "I have the honor to direct your attention to the following provision contained in Section 46H of the Appropriation Bill for the Support of Departments, Relief, Pensions, Deficiencies, etc., as the same appears on page 179 of the Laws of Missouri 1935: 'General expenses consisting of communications, postage, stationery, books, binding and printing, office supplies, office rent, travel, expenses of each County Old Age Assistance Board and Board of Estimate and Apportionment of the City of St.Louis and other general and miscellaneous expenses, $135,000."
>
> Will you please advise me as Chairman of the Old Age Assistance Board of the City of Saint Louis whether in your opinion salaries of office personnel can be construed as coming within the designation "expenses of each County Old Age Assistance Board and Board of Estimate and Apportionment of the City of Saint Louis and other general and miscellaneous expenses.'"

You have requested an interpretation of Section 46H of House Bill 541, Fifty-Eighth General Assembly, as found at page 178, Laws of Missouri 1935. This Section reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue fund, the sum of Two Hundred and Thirty Thousand Dollars ($230,000.00) to the Board of Managers of the Eleemosynary Institutions as a State Board to administer the Old Age Assistance Law, for the payment of salaries, wages and per diem; for the original purchase of transporting and conveying equipment and for the original purchase of all necessary office furniture and equipment; for the repair and replacement of property and for the operative expenses and other general and miscellaneous expenses; for the purpose of administering the Old Age Assistance law passed by the Fifty-eighth General Assembly, during the years 1935 and 1936, as follows:

A. Personal Service:

For salaries and wages of accountants, auditors, bookkeepers, inspectors, investigators, stenographers, chief clerk, clerks, State Old Age Assistance Commissioner, Assistant Commissioner, janitor, services of members of State Board, and all other necessary employees.....$85,000.00

B. Additions:

Original purchase of transporting and conveying equipment and original purchase of all necessary office furniture and equipment for the administration of the Old Age Assistance Act..... 10,000.00

C. Operations.
General expenses consisting of communications, postage, stationery, books, binding and printing, office supplies, office rent, travel, expenses of each county old age assistance board and Board of Estimate and Apportionment of the City of St. Louis and other general and miscellaneous expenses.....$135,000.00."

This appropriation is of course to be interpreted in connection with the Old Age Assistance Law, referred to in the appropriation, for the administration of which the funds are appropriated. The phrase "expenses of each county Old Age Assistance Board" should be taken inconjunction withthhe provisions of the Old Age Assistance Law and have interpretation given it consistent with the legislative intent as shown by the Old Age Assistance Law and the Appropriation Act. It is of course the first rule of construction that we should ascertain the legislative intent by their expressions upon the subject.

Section 3 of the Old Age Assistance Law, page 309, Laws of Missouri 1935, provides in part:

"The members of the County Board shall serve without compensation, except that the necessary expenses incurred while in the performance of their duties shall be paid to them."

No provision is to be found authorizing the County Board to employ assistants or clerks. In view of these two salient features it seems clear that the "expenses of each county Old Age Assistance Board" refers to those expenses which each member of the board personally incurs in performance of the duties placed upon him by the Act and could not contemplate the payment of salaries to employees, the hiring of which the law does not authorize.

This conclusion is entirely consistent with the entire appropriation act for it is to be noted that the phrase "expenses of each county Old Age Assistance Board" occurs under the heading of "operations" which includes general traveling and personal expenses.

The appropriation act contains a specific subdivision entitled "Personal Service", which division it is certain that the Legislature intended to include the payment of all salaries and wages to officers and employees performing services under the provisions of the Old Age Assistance Law. In other words, by the placing of the phrase "expenses of each county Old Age Assistance Board" under the heading of "operations" rather than placing it under the heading of "personal service" the Legislature has expressed an intention that such "expenses be confined to those expenses other than salaries and wages to officers and employees.

The term "other general and miscellaneous expenses" found in Subdivision C of Section 46H, means general and miscellaneous expenses of the same type and character as those enumerated immediately preceding the phrase. Under this general clause it was intended that other expenses similar to stationery, books, binding, postage, etc. should be paid from this appropriation of $135,000, but the phrase could not by any rule of construction be extended to include salaries and wages which clearly are governed by Subdivision A of said Section.

CONCLUSION.

It is therefore the opinion of this office that the term "expenses of each county Old Age Assistance Board and Board of Estimate and Apportionment of the City of St.Louis and other general and miscellaneous expenses" found inSubdivision C of Section 46H, page 178, Laws of Missouri 1935, was not intended to include salaries of office personnel of the County Old Age Assistance Board or the Boad of Estimate and Apportionment of the City of St.Louis.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

TAXATION: Property of Woods Brothers located in Moniteau County on June 1st, subject to Missouri taxes.

11-6

November 4, 1935.

FILED
47

Honorable Roy L. Kay
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

We acknowledge your request for an opinion dated October 10, 1935, wherein you state as follows:

> "The Woods Brothers Construction Company, a foreign corporation, is engaged in River Improvement work, under a contract with the Federal Government, on the Moniteau county side of the Missouri River. It has several boats, pile drivers and other floating equipment used in the performance of its work on the Moniteau county side of the Missouri River. This property was located on the 1st day of June, 1935, in Moniteau county, that is to the Moniteau county side of the center of the channel of the river.
>
> "There can be no question of its being personal property. If assessed at the domiciliary residence of the corporation, which appears to be the fact, is it also subject to taxation in Moniteau County.
>
> "If it is then does the 'Full Faith and Credit clause of the U. S. Const.' bar Missouri from taxing the property for State and local purposes, if assessed in theState of residence?"

We assume for the basis of this opinion that the boats, pile drivers and other floating equipment were

found within the jurisdiction of Moniteau County on June 1, 1935, and therefore subject to Section 9746, R. S. Mo. 1929, which provides that:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

We assume further that the method and manner of making assessments in Missouri as set out in Section 9756, R.S. Mo. 1929, was properly carried out by the assessor, which states in part that:

> "The assessor or his deputy or deputies shall between the first days of June and January * * * proceed to take a list of the taxable personal property in his county * * * and shall require such persons to make a correct statement of all taxable property owned by such person * * *. Such lists shall contain * * * interest held in steamboats, keelboats, wharfboats, and other vessels * * * and every other species of property not exempt by law from taxation."

61 C. J., p. 201, Sec. 172, declares that boats and vessels are personal property and states as follows:

> "Boats and vessels are personal property and are taxable like all other such property within the jurisdiction of the state, if within the terms of the tax statute invoked, there being nothing in their floating character and habitual change of location to exempt them from taxation."

Having determined the character of the property, the question arises whether, same having been taxed

at the domiciliary residence of a corporation, it may again be assessed and taxed by the State of Missouri without violating the Full Faith and Credit Clause of the United States Constitution.

61 C. J., p. 224, Sec. 210, answers the above question in the affirmative, stating in part that:

> "While the registration of a vessel at a particular port may, it seems, fix the situs for taxation there in the absence of a situs elsewhere, registration or enrollment at a particular port does not fix the situs absolutely or conclusively, and while a vessel registered or enrolled and having its home port in one state is not subject to taxation in another state where it may happen to be temporarily and transiently as an incident to the commerce in which it is engaged, a vessel which is employed exclusively or for an indefinite length of time, or permanently moored, in one state may be taxed in that state, although it is registered or enrolled in another state, and the owner is a non-resident. * * * The determination as to whether or not a vessel is taxable in a state other than that of the domicile of the owner does not depend on whether or not it has been taxed in the state of domicile."

To the same effect is the language found in 26 R. C. L., Sec. 247, p. 281, which states in part that:

> "A vessel is not taxable in a port of a state other than that in which her owner resides to which she plies and at which she is temporarily staying while loading or unloading

> her cargo or even when she is laid up for the winter when through the rigor of the climate navigation is closed. When, however, a vessel is kept and used wholly within the limits of a state other than that in which her owner resides, she acquires a situs in such state for the purposes of taxation which controls the situs of the owner's domicil, and this is so even if the vessel is employed in interstate commerce, if she is so employed wholly within the limits of a state. A local situs for purposes of taxation may be acquired by a seagoing steam dredge engaged for a long period of time on a dredging contract in a state other than that in which the owner resided."

The reason for such a rule is well expressed in the case of Northwestern Lumber Co. v. Chehalis County, 64 Pac. 906, l. c. 911 (Wash.), wherein the court says:

> "Sound reasons exist for the right of the state to tax these vessels that are permanently here transacting local business. They receive the full protection of the local government, and, if mere registry in another port is conclusive against the right to tax here, a boat can operate in our local waters, confined entirely to local business, and, if owned elsewhere, may evade all taxation in this state. Such construction should not be adopted unless imperatively demanded by superior authority. Under the revenue law of this state, personal property is taxed at its situs, and without reference to the residence of the owner."

Attention must be directed to the fact that a situs for the purpose of taxation is only acquired by this state when the vessel of the non-resident is employed

exclusively or for an indefinite length of time or permanently moored in this state. The case of North American Dredging Co. v. Taylor, 106 Pac. 162, l. c. 163, 164, discusses this question, citing numerous authorities. It states that:

> "It is the general rule that vessels engaged in state or interstate traffic with no established situs, but going in and out of a port upon a fixed run, or as the necessities of the business engaged upon may demand, or when engaged upon no fixed schedule, but sailing from one port to another as a carrier of state, interstate, or international traffic, shall be assessed at the home port, or at the domicile of the owner. Northwestern Lumber Co. v. Chehalis County, 25 Wash. 95, 64 Pac. 909, 54 L. R. A. 212, 87 Am. St. Rep. 747; Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 26 Sup. Ct. 679, 50 L. Ed. 1082; Commonwealth v. Am. Dredging Co., 122 Pa. 386, 15 Atl. 443, 1 L.R.A. 237, 9 Am. St. Rep. 116; California Shipping Co. v. City & County of San Francisco, 150 Cal. 145, 88 Pac. 704; Olson v. City & County of San Francisco, 148 Cal. 80, 82 Pac. 850, 2 L. R. A. (N. S.) 197, 113 Am. St. Rep. 191; Johnson v. De Bary-Baya Merchants Line, 37 Fla. 499, 19 South. 640, 37 L. R. A. 518; Am. Mail S. S. Co. v. Crowell (N. J. Sup.) 68 Atl. 752; People ex rel. Pacific Mail S. S. Co. v. Com'rs, etc., 58 N. Y. 242. However, a vessel may be assessed without reference to the home port or the residence of the principal owner or agent when it is put to such use as to impress it with a local character. National Dredging Co. v. State, 99 Ala. 462, 12 South. 720; McRae v. Bowers Dredging Co. (C. C.) 90 Fed. 360; Galveston v.

J. M. Guffey Petroleum Co. (Tex. Civ. App.) 113 S. W. 585; State v. Higgins Oil & Fuel Co. (Tex. Civ. App) 116 S. W. 617; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. Ed. 1059, Id., 102 Va. 576, 46 S. E. 783, 102 Am. St. Rep. 855. * * *.

" ' * * *There is nothing in the nature of this particular property to take it out of the general principle. The fact that it is floating property, and may be moved from place to place and port to port by water, furnishes no more reason for exempting it from taxation here than would exist for the exemption of property which did not float, and could be moved from place to place only over land.'

"There must be some reasonable limit to the rule that overcomes the ordinary rule of situs when applied to such property, and we think it must be found in the answer to the question whether the presence in Pierce county of the dredger was temporary or merely indefinite. If the former, it would probably not be taxable. If the latter, it would be, so long as it was there at a time when the levy was made and the lien attached. Otherwise, the property might remain an indefinite time running over the period of one or a dozen contracts, or so long as it found profitable employment, and yet be exempt from taxation, although during the whole time the property would receive the protection of the local laws. If the intention merely were allowed to control, we

opine that property of this character would never be taxed, unless the conscience of the owner moved him to list it at the home port or at his domicile, which under the facts of this case he would not be bound to do. Am. Mail S. S. Co. v. Crowell (N. J. Sup.) 68 Atl. 752."

CONCLUSION.

The Woods Brothers Construction Company being engaged in river improvement work under a contract with the Federal Government, it is quite evident that the property will be within the jurisdiction of this state for an indefinite length of time; hence if the property was found within the jurisdiction of Moniteau County as of June 1, 1935, and properly assessed, we are of the opinion that it is taxable in this state even though it is also taxed at its domiciliary residence.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

SCHOOLS: A flag of the United States shall be flown during school hours, except during rainy or stormy weather.

December 17, 1935.

1-18

FILED
48

Mr. J. C. Kennedy
Superintendent
Richards Public Schools
Richards, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

> "The School Law of Missouri states that the flag of the United States of America shall be flown while school is in session. Is there any exception made to this law when the weather is rainy, or otherwise stormy? I would appreciate a clarification of this law on this matter from your department."

The statute referred to in your letter, pertaining to the display of the flag of the United States, is found in Laws of Missouri, 1931, page 352, Section 9270a, and reads as follows:

> "Every school in this state which is supported in whole or in part by public moneys shall, during the hours while school is in session, display in some prominent place either upon the outside of the school building or upon a pole erected in the school yard the flag of the United States of America."

The above section is mandatory and requires the displaying of the flag of the United States during school hours.

However, the question arises as to whether the flag should be flown during inclement weather. The above statute makes no exception as to weather. Consequently, we must look to other sources of information pertaining to the proper display of the flag.

The flying of the flag in inclement weather does not amount to a desecration of the flag, in our opinion. There is no United States law that prohibits the flag of the United States from being flown in inclement weather. United States Code Annotated, 1934 Cumulative Annual Pocket Part, Title 4, page 27, Article 3, says the following:

> "The desecration or improper use of the national flag outside the District of Columbia has not been made a federal offense, but should Congress wish to assume such control, it has power under the Constitution to do so. (1925) 34 Op. Atty. Gen. 483."

The Army Regulations issued by the War Department, Washington, November 20, 1931, page 7, has the following to say relative to the flying of the flag at Army Posts:

> "The post flag will be 10 feet hoist by 19 feet fly. It will be furnished to all garrisoned posts, national cemeteries, and nongarrisoned historic posts, and will be hoisted in pleasant weather."

Mr. Harrison S. Kerrick in his book on "The Flag of the United States--Your Flag and Mine", at pages 100-101 says the following:

> "Flags can be kept bright and joyous if care is exercised when raising and lowering the flag, and by exposing it to the elements only in the daytime and in clear weather, from a modern, tubular steel pole with revolving truck."

And at page 107, further writes:

> "The Flag should be displayed only from sunrise to sunset, or between such hours as may be designated by proper authority. The Flag should be hoisted briskly but should be lowered slowly and ceremoniously. The Flag should be displayed on all National and State holidays and on historic and special occasions. (However, being the Emblem of our County, it ought to fly from every flag pole every day throughout the year, weather permitting.)"

When the Legislature enacted Section 9270a, supra, we believe that it was their intention that the flag should be displayed in accordance with standard principles and rules pertaining to the displaying of the flag of the United States. We do not believe that the Legislature intended that the flag should be displayed in inclement or bad weather. It is common knowledge that flags cost money, and if a flag is flown in stormy or rainy weather it would cause it to deteriorate much more rapidly and thus add extra expense to the district in purchasing new ones. It is, therefore, our opinion that the flag must be displayed during school hours, weather permitting.

It is our further opinion that if the flag is not flown on stormy or rainy days that failure thereof would not be a violation of Section 9270a, supra.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG

MOTOR VEHICLES:) A person engaged in transporting property over
TRUCKS:) the highways of this State must have license
to do so as contract hauler.

1-14

January 10, 1935.

FILED
44

Mr. J. W. Kirtley
c/o Burrus & Burrus
Attorneys at Law
Hill Building
Independence, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

> "Will you please advise whether a truck owned by a private individual engaged in the hauling of coal for a coal operator from the mine to the coal yard comes within the provisions of the Public Service laws of the State of Missouri, and is required to have a permit to operate upon the highways?"

Laws of Missouri, 1931, page 304, article 8, pertains to transportation of property by Motor Vehicles. Said article and sections were before the District Court of the Western District of Missouri, Central Division, in the case of Schwartzman Service, Inc., v. Stahl et al., 60 F. (2d) 1034. Judge Reeves, District Judge, in writing the opinion said the following (l. c. 1035):

> "The original act may be found in article 8 of chapter 33, Revised Statutes of Missouri 1929, but the General Assembly of the state, at its session in 1931 (Laws 1931, p. 304 (Mo. St. Ann. Secs. 5264-5280)), amended said law by repealing the whole of said article 8 and enacting in lieu thereof seventeen new sections, numbered 5264 to 5280, both inclusive. The new article was thereafter designated

> as article 8, and was intended 'for the supervision, regulation and licensing of transportation of persons and property for hire over the public highways of the state of Missouri by motor vehicles; conferring jurisdiction upon the public service commission to license, regulate and supervise such transportation; providing for the enforcement of the provisions of this act and for the punishment for violation thereof.'"

Your letter is not specific enough as to facts, so that in writing this opinion we are forced to assume certain major premises. We assume that the truck in question is not exempted by Sections 5265 and 5280, Laws of Missouri, 1931, which we will hereinafter quote and refer to. We further assume that the person who owns the truck and engaged in the hauling of coal does so for compensation or hire and as his principal business and uses the highways in doing such.

The court in the Schwartzman case, supra, at page 1037, said the following:

> "At the outset it must be acknowledged that the state has the power to regulate and control the movements of motor vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection of the highways."

And further,

> "The highways belong to the state. It may make provisions appropriate for securing the safety and convenience of the public in the use of them."

And further,

> "Assuming, therefore, the power and right of the state to regulate and supervise its highways, such right cannot be hampered or restricted within narrow bounds. On

> the contrary, to the end that such right might be fully enjoyed and exercised, there is a constant recognition of the principle that the state 'has a broad discretion in classification in the exercise of its power of regulation.' Smith v. Cahoon, 283 U. S. 553, loc. cit. 566, 51 S. Ct. 582, 587, 75 L. Ed. 1264. Upon such classification, no person can interpose an objection, save only in those cases where the classification or discrimination is entirely arbitrary."

Section 5264, Article 8, Laws of Missouri, 1931, page 305, Paragraph "(c)", provides as follows:

> "The term 'contract hauler,' when used in this act, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as herein defined."

Section 5265 of said article provides as follows:

> "The provisions of this act shall not apply to any motor vehicle of a carrying capacity of not to exceed five persons, or one ton of freight, when operated under contract with the federal government for carrying the United States mail and when on the trip provided in said contract; nor any motor vehicle owned, controlled or operated as a school bus; nor taxicab, as herein defined; nor to motor vehicles used exclusively in transporting farm and dairy products from

> the farm or dairy to warehouse, creamery, or other original storage or market; nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this act shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This act shall not apply to trucks used in work for the state or any civil subdivision thereof."

Section 5280 provides as follows:

> "It is hereby declared that the legislation herein contained is enacted for the sole purpose of promoting and conserving the interests and convenience of the public, and that no right, privilege, or permit granted or obtained under or by virtue of this act shall ever be construed as a vested right, privilege, or permit; and the general assembly retains full legislative power over, concerning and pertaining to the subject or subjects legislated upon in this act and the power and right to alter, amend or repeal this act at its pleasure. Provided, the provision of this act shall not apply to trucks of one and one-half ton capacity and less."

A reading of the above sections shows that the Legislature defined a "contract holder" as one transporting property or persons over the highways for hire, with certain exemptions, however, namely: (1) A common carrier; (2) not operating in the corporate limits of a city or town or its suburban territory as defined; (3) exemptions provided in Section 5265, supra, and (4) this exemption found in Section 5280, supra, namely, "Provided, the provision of this act shall not apply to trucks of one and one-half ton capacity and less."

As stated hereinbefore, for the purpose of this opinion, we assume that the truck that is hauling coal from the mine to the coal yard is one of greater capacity than one and one-half tons.

Section 5271, Paragraph "(a)", in part provides as follows:

> "It is hereby declared unlawful for any contract hauler except as provided in section 5265 of this act to operate or furnish transportation for persons or property, or both, for hire over the highways of this state, without first have (having) obtained from the commission a contrct hauler's permit."

In the Schwartzman case, supra, page 1035, the court said the following pertaining to that section:

> "Section 5271 imposes upon such contract haulers the duty to obtain permits from the Public Service Commission. This permit is characterized as a 'contract hauler permit.' The object of such permit is to enable the Public Service Commission to determine the need for such service and the effect of such added transportation facility 'upon other transportation service being rendered.' All contract haulers are required by said enactment to file an application for a permit in writing; to give information concerning the ownership, financial condition, equipment to be used, and the physical property of the applicant, as well as a statement as to the complete route over which the applicant desires to operate or the territory to be served, and to which shall be added a schedule or schedules of proposed rates."

In your letter you state that an individual owning a truck is engaged in transporting property, namely, coal, over the highways and we assume for compensation or hire and as his principal business, and you desire to know if he must have a permit to do such.

In our opinion such person must obtain a permit from the Public Service Commission and is subject to its rules and regulations for the reason that such person is a contract hauler as defined by Paragraph "(c)" of Section 5264, supra.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

COUNTY CLERK: DEPUTY; (1) Deputy county clerk must be approved by the county court,
(2) County court may refuse to approve, for what reasons.

FILED
49

March 15, 1935

Honorable Randall R. Kitt
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of March 5, 1935 requesting an opinion from this office, which reads as follows:

> "The County Court of Livingston County has asked me to write you for an opinion upon the following question:
>
> Is the County Court required to approve a deputy of the County Clerk, who has been duly appointed as a deputy by the County Clerk, and if it is not required to do so, in what instances can the County Court refuse to approve the appointment of the Deputy?
>
> I gave the County Court a short time ago my opinion to the effect that if the Deputy Clerk has been duly appointed by the County Clerk and the deputy fulfills the requirements of Sections 11650 and 11680 R. S. Mo., 1929, then the approval of the appointment by the county Court is a ministerial act and in that case the County Court could be compelled to

to approve the appointment of the deputy.

I cite you in this connection the following cases:

Better Built Homes and Mortgage Company v. Nolte, Mayor, et al. 249 S. W. 743.

The State of Missouri ex rel John P. Strother, Respondent, v. Jos. V. Chase, et al.,42 Mo. App.,343.

I would appreciate your sending me your opinion upon this question at your earliest convenience."

I.

Section 11680 Revised Statutes Missouri 1929, reads as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

The term "court," as used in Section 11680, refers to all courts of record including the county court. It therefore appears, with reference to the appointment of deputy county clerks, that two acts are necessary,

(1) The appointment of such deputy by the county clerk,

(2) The approval of such appointment by the county court or by two judges of the county court.

The duty to appoint a deputy county clerk is placed upon the county clerk and it is the duty of the county court to approve or disapprove such appointment.

Such is the construction placed upon a similar term "approved by the court" in Butler v. Sullivan 108 Mo. 630, l. c. 638. In that case the statute gave the county clerk the power to employ attorneys "with the approval of the county court" to aid the prosecuting attorney in the handling of tax suits. The Supreme Court, in construing this term in that case, l. c. 638, said:

"The statute neither authorizes the county court to employ counsel nor to charge the county with liability for his compensation. The power to employ an attorney is granted solely to the collector; this compensation and the liability therefor is provided for by the law. The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court."

22 R. C. L. Section 84, page 433, makes this statement:

"Wherever, under a constitutional or statutory provision, the appointment is required to be made with the approval of some officer or body, such

> appointment must be approved before the person is legally entitled to the office."

In the case of State v. Stafford 34 Pac. (2nd) l. c. page 379, the court said:

> "Thus it is apparent that the phrases used in the two constitutional provisions and that employed in the act creating the Bureau of Agriculture do not differ in effect, but under each the appointments under consideration come within the general rule that 'where a person is appointed to an office under a constitutional or statutory provision that the appointment may be made with the approval of some officer or body, such appointment must be approved before the person is legally entitled to the office, except in the case of such a vacancy in the office that the duties of the office are no longer being discharged.' "

In Apfel v. Mellon 33 Fed. (2nd) l. c. 806, the court defines the term "approve" or "give approval" as follows:

> "We agree with the contention of the appellees. The statute provides that an association formed under the act shall not become a body corporate until after the articles of association and organization certificate have been duly made and filed, and after the Federal Reserve Board has approved the same and issued a permit to it to begin business. The word 'approved' naturally imports the exercise of judgment and discretion; and the power to approve ordinarily implies a power to disapprove.
>
> To 'approve' or give 'approval' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another.

> The word 'approve' does not, ex vi termini, necessarily import the exercise of discretion, but from the connection in which the term is used it often involves the idea of discretion and adjudication, and is seldom construed as requiring a mere ministerial act. 4 C. J. 1464."

In the case of State v. Standard Oil Company 16 S. W. (2nd) l. c. 582, the court said:

> "The word 'direct' has many meanings, but, as used here, we think it means that, when the tax commission, on investigation, finds that a suit should be instituted, it has the authority to cause the Attorney General to institute such a suit, and the word 'approved' necessarily implies the exercise of discretion on the part of the tax commission in permitting such a suit to be instituted."

The city ordinance of the City of Jefferson provides that when a vacancy exists or shall occur in the regular police force of this city, it shall be the duty of the marshal, with the advice and consent of a majority of the members elected to the city council, to appoint some suitable and competent person to fill such vacancy. In the case of Schulte v. City of Jefferson 273 S. W. at page 170, the marshal of said city appointed the plaintiff a regular city policeman, but the city council refused to confirm said appointment. Plaintiff brought suit against the city to recover salary alleged to be due from defendant for performing the services of a police officer. The court, l.c. page 172, said:

> "(1) It is well settled -
>
> 'Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the

> action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc.p. 1372; Meachem's Public Office and Officers, Secs.114, 124; 22 R. C. L. p. 433, Sec.84.
>
> (2) Plaintiff was not a de jure officer until at least confirmed by the council. If anything at all, he was a de facto officer, and such officer is not entitled to the emoluments of the office. 29 Cyc. 1393; Sheridan v. City of St.Louis, 183 Mo. 25,39, 40, 81 S. W. 1082, 2 Ann. Cas. 480; Luth v. Kansas City, 203 Mo. App. 110, 113, 218 S. W. 901; Throop on Public Officers, Sec. 517."

In the case of Huls v. Lawrence 300 S. W. 1. c. 1018, the court states:

> "The word 'approves'carries with it the idea of doing something more than merely substituting the answers of the jury for the judgment of the court. It shows that he did something more than to formally or mechanically, so to speak, accept the opinion of the jury."

The meaning of a power or duty conferred upon an official to approve or disapprove another official act, is set out in Makenson v. Dillon, et al. 171 Pac. 673, l. c. 676, in the following language:

> "The grant to New Mexico is to be effectuated by selection, not only of these lands granted in quantity, but also as indemnity, and they are

> to be selected under the direction and subject to the approval of the Secretary of the Interior. The words 'subject to the approval' we do not regard as giving the Secretary of the Interior discretion to arbitrarily refuse a selection for no reason at all. These words are to be understood to mean that the Secretary of the Interior shall investigate and pass upon and render judgment as to whether the lands selected are within the terms of the grant, and, if so, it is his duty to list them to the State."

In view of the above, it is the opinion of this office that a person who has been appointed deputy county clerk, by the county clerk, must be approved by the county court before he is legally entitled to the office or the emoluments thereof.

The county court has the right to investigate and pass upon and render judgment as to whether the deputy county clerk has the necessary qualifications to hold said office; they may refuse to approve said deputy upon any reasonable grounds, but may not arbitrarily refuse to do so for no reason at all.

II.

You ask in what instances can the county court refuse to approve the appointment of the deputy.

In our opinion, the county court could, in the exercise of its sound distrection, refuse to approve a deputy county clerk for many reasons. If said deputy was incompetent or incapable of performing the duties of the office for any reason, or if he were disqualified by virtue of the provisions of the statutes or constitution, they would certainly be justified in refusing to approve said appointment. In this connection, we call your

attention to Section 19, Article II of the Constitution of Missouri, which reads as follows:

> "That no person who is now or may hereafter become a collector or receiver of public moneys or assistant or deputy of such collector or receiver, shall be eligible to any office of trust or profit in the State of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable."

It is,therefore,our opinion that a county court may refuse to approve the appointment of a deputy county clerk when they have reasonable ground to believe that said deputy is incapable of performing the duties of said office, for any reason, or is disqualified by virtue of the provisions of any statute or the constitution.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JLH
JET:LC

SCHOOLS: **Judgment for damages for breach of contract for teaching school must be paid out of the teachers' fund.**

57

May 4, 1935.

FILED
49

Honorable Lloyd W. King
State Superintendent of Public Schools
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "The school board for the Jamestown School District No. 11, Moniteau County, has asked this office to advise them the proper fund from which to pay teacher salary judgments.
>
> "The chief facts applicable to this question as reported to this office are as follows:
>
> "The school board made an oral agreement to employ a certain teachers for the 1933-34 school year. The verbal agreement was entered into record and accepted in the minutes of the board. The school board later employed other teachers and denied there was a contract with the first teachers employed. These teachers then brought suit in the circuit court, which held there was sufficient showing in writing to justify it to find that there was a contract and gave the plaintiff judgment for damages for the full amount of the contract salary. The case was appealed, but the Kansas City Court of Appeals sustained the

lower court's findings.

"Bailey vs. Jamestown School District, No. 11, Moniteau Co. Kansas City Court of Appeals - December 3, 1934, 77 S.W. 2d 1017.

"The school board was enjoined from paying the teachers who were employed to replace the first teachers who were denied contracts. To date neither group of teachers has been paid.

"The school board probably has enough money in the teachers fund to pay only one group of teachers. The incidental fund is practically depleted.

"Questions:

1. When the court has granted judgment for damages to teachers on contract, is it legal for the judgment to be paid from the teachers' fund? If not, shall said judgment be paid from the incidental fund? (Section 9312, R.S. 1929 requires teachers to be paid from the teachers' fund. Also Section 9316, R.S. 1929 prohibits the board from issuing warrants to teachers except for services rendered. Section 9233, R.S. 1929 requires services rendered before teachers can be paid).

2. If the law requires damages to be paid from the incidental fund, what shall be the school board's procedure when such funds are exhausted? (Section 9233, R.S. 1929 seems to limit the school board in its expenditures to the amount actually provided for the school year and prohibits its use of the succeeding year's revenue.)

3. If not possible to pay teacher contract judgments from either the teachers or incidental fund, is it mandatory for the board to make a tax levy for the specific

purpose of paying this judgment?

I shall appreciate receiving an opinion on this problem at your earliest convenience."

The judgment about which you inquire was obtained by Nellie Bailey against the Jamestown School District No. 11, Moniteau County, Missouri. The defendant appealed and the judgment was affirmed by the Kansas City Court of Appeals in 77 S.W. (2d) page 1017. It is plain from a reading of said case that the judgment obtained was for breach of a contract for teaching school. Judge Shain, speaking for the Court, in stating the nature of the case, at page 1017 said:

"In this action the respondent, hereinafter designated as plaintiff, brings this action for damages against the appellant, hereinafter designated as defendant, to recover $480 for alleged breach of contract for teaching school."

The question about which you inquire and which now confronts us is - out of what fund should a judgment for damages for breach of contract for teaching school be paid? We do not deem it necessary to set out the statutes in regard to the payment of district indebtedness for the reason that we know you are familiar with them. Suffice to say that all moneys for teachers' wages must be drawn on the teachers' fund; all moneys used in the purchase of a site, erection of a building thereon and furnishing the same must be drawn on the building fund; and all other expenses must be paid out of the incidental fund.

The case of State ex rel. v. District School Board, 97 Mo. App. 613, was a proceeding by mandamus to compel the board of directors of District No. 2, Township 50, Range 32, in Jackson County, Missouri, to draw a warrant for payment of a judgment obtained by R.O. Kerby, Relator, against said district for breach of contract. The writ of mandamus did not state the nature of the contract for the breach of which judgment was given. The court held that the board could not be compelled by mandamus to issue a warrant for payment of said judgment for the reason that it did not appear out of what specific fund said judgment should be satisfied. At pages 618-619 the court said:

"Under the prohibitory mandates of the statute, a board of directors may not order, nor a county

treasurer pay, a warrant unless it be specified therein whether or not the claim of indebtedness be either for services as teacher, material purchased for use of the school, or for labor in the erection of a schoolhouse. No claim against a school district payable out of any one of the specified funds can arise except out of a contract and therefore the presentation of a claim whether it be in the form of a judgment or otherwise, which shows no more than that it arose on a contract without specifying the subject-matter of such contract is too vague and indefinite to justify the board of directors in ordering a warrant to be drawn therefor on any specified fund. How can it (the board) in such case tell which is the appropriate fund on which to order the warrant? The claim may be for teachers' wages, for material purchased for use of the school, or services of a janitor, or for material, or labor in the erection of a schoolhouse, and yet arise out of 'breach of contract.' The board of directors is not at its peril required to guess the fund against which it is to order the warrant drawn for the amount of the claim. Neither of these specified funds can be applied to the payment of a claim which the statute requires to be paid out of one of the others. If the writ had stated the nature of the contract for the breach of which the judgment of the justice was given, then in all probability we would be able to determine whether or not it was the duty of the respondents to order a warrant to be drawn on any specific fund, but in the absence of such a statement we are unable to say they have neglected any particular duty."

It will be noted, the Court said, that if the writ of mandamus had stated the nature of the contract for the breach of which the judgment was given, they would have in all probability been able to determine whether or not it was the duty of the board to order the warrant to be drawn on a specified fund.

In the above case, the court denied Relator's contention that a claim merged into a judgment must be satisfied out of the "incidental fund". At page 619 it was said:

> "We are unable to yield our assent to the relator's contention that since his claim is merged into a judgment and thereby becomes extinguished, it results as a legal consequence that the judgment must be satisfied out of the 'incidental fund.' Suppose the claim arose out of a breach of contract for the payment of teachers' wages, or for materials or services for the erection of a schoolhouse, can it be that such claim because merged into a judgment becomes payable out of the ' incidental fund'? If this is so, what becomes of the statutory requirement that each indebtedness of the district must be paid out of the appropriate fund? Can an indebtedness for teachers' wages or for services in erecting a schoolhouse be made to become a charge against the 'incidental fund' by converting it into a judgment? The bare statement of this proposition furnishes its own refutation."

CONCLUSION

In view of the above, it is the opinion of this department that a judgment for damages against a school district for breach of contract for teaching school must be paid out of the teachers' fund.

Yours very truly,

J.E. TAYLOR,
Assistant Attorney-General.

APPROVED:

Attorney General

SCHOOLS: State Superintendent of Schools has power to deny state aid to district when he requires transportation of pupils under Section 20, Laws of Mo.,1931.

5-7

May 6, 1935.

FILED
49

Hon. Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Attention: Mr. Geo. B. John,
School Finance Division

Dear Sir:

This is to acknowledge your letter dated May 2, 1935, as follows:

> "Please advise this department concerning the state school moneys apportionment relative to rural districts with less than 15 pupils in average daily attendance. I refer you to the provisions of Section 20, Page 346, Laws of Missouri, 1931.
>
> Has the State Superintendent of Schools authority to deny state aid to any school district with an average daily attendance of less than fifteen pupils when it refuses to transport its pupils to another school when required to do so by the State Superintendent after he has investigated the conditions of the district and has found it to the best interest of all concerned to transport?"

The statute referred to in your letter, namely, Section 20, Laws of Missouri, 1931, page 346, reads as follows:

> "If any district in this state shall

> "have an average daily attendance of less than 15 pupils as shown by the records of the last previous school year, the state superintendent shall, in lieu of such state aid, after investigation that convinces him that it would be to the best interests of all concerned, require the board to provide for the transportation of the pupils of such district to other public school or schools, provided that the total expense, including transportation and tuition paid by the state, shall not exceed the amount that the state would have otherwise paid to such district."

Section 21, Laws of Missouri, 1931, page 346, reads as follows:

> "All laws and/or parts of laws relating to state aid for schools and apportionment of state funds for the maintenance thereof inconsistent with, or in conflict with, the provisions of this act are hereby declared to be repealed and of no further force and/or effect."

Section 20, supra, provides that if the average daily attendance in any district is less than fifteen pupils the State Superintendent of Schools shall require the board to provide for the transportation of the pupils of such district to other public school or schools. However, before the State Superintendent of Schools can require the board to provide the transportation of the pupils, he must first conduct an investigation that convinces him that it is to the best interest that the pupils be transported. When the State Superintendent requires the transportation of pupils, after investigation, the school does not receive state aid, but

"that the total expense, including transportation and tuition paid by the state, shall not exceed the amount that the state would have otherwise paid to such district."

In view of the foregoing statute it is our opinion that if the State Superintendent of Schools requires a district to transport its pupils as contemplated by Section 20, supra, and the board will not comply with his demand, then he has the authority to deny such district state aid. The State Superintendent could by mandamus action compel a school board to comply with his wishes in transporting of pupils required by Section 20, supra. However, we do not believe it would be necessary for the State Superintendent to resort to court action, as the statute says, "the State Superintendent shall, in lieu of such state aid * * * require the board to provide for the transportation of the pupils", and by denying a district state aid for failure to transport the pupils, would be a means of compelling compliance with his demand.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

SCHOOLS - TRANSPORTATION: Approval of various statements concerning transportation problem

July 19, 1935

FILED 49

Hon. Lloyd W. King
State Superintendent of Public Schools
Jefferson City, Missouri

Dear Mr. King:

This is to acknowledge your letter dated July 18, 1935, as follows:

> "This department is preparing a transportation bulletin for publication which will be used as a guidance for school officials.
>
> We have prepared the attached material concerning three phases of transportation, namely: 1. Types of Organized Transportation. 2. State Transportation Aid or Reimbursement. 3. Legalizing Transportation. Does the plan submitted in this material meet with your approval as to a statement of facts for interpretation of the statutes concerning transportation? "

The material attached to your letter relating to the three phases of transportation was the outgrowth of numerous conferences between your department and this department concerning the subject matter. It is practically a rescript of our discussions. Further, we call your attention to the fact that the transportation problem was before the last General Assembly (58th General Assembly), with the result that a new section was enacted known as

Section 16a, found in House Bill No. 319 approved by the Governor on June 10, 1935 without an emergency clause, so that said act will go into effect August 27, 1935. The State Teachers' Association of Missouri was interested in House Bill 319 and we understand had a considerable part in drafting said section, so that the plan submitted by you is practically the same as that submitted by the State Teachers' Association. Many sections pertain and are inter-related to the transportation of pupils, namely, Sections* 9354, 9195, 9217, 9197, 9358 R. S. Missouri 1929, Section 13 Laws of Missouri 1931, page 340, Section 20 Laws of Missouri 1931, page 346, Section 16a House Bill 319, Laws of Missouri 1935. House Bill 319, Section 16a, is not found, as yet, in the Laws of Missouri 1935 because said laws have not been printed. Consequently, we will set said section out in full, as follows:

> "When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state superintendent of schools the amount paid for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending, and the method of transporting is approved by the state superintendent of schools, the amount paid for transporting such pupils, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the state apportionment to such district for the ensuing year, if no part of the minimum guarantee of such district has been used to pay any part of the cost of

*As amended Laws of 1933, page 388.

> transporting such pupils. When the board of directors of a district that admits non-resident pupils to its high school makes provision for transporting such pupils to such high school, and the method of transporting and the transportation routes are approved by the state superintendent of schools before the transportation is begun, the amount spent for transporting such pupils, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the state apportionment to such district for the ensuing year, if no money apportioned to such district from any public fund or funds has been used to pay any part of the cost of transporting such pupils, except money apportioned to such district to pay the cost of transporting such pupils."

The other sections of the statutes are found in the Revised Statutes and Session Acts and we will not quote them. One thought we desire you to keep in mind is that the method of transporting pupils must be approved by the State Superintendent of Schools. In Section 16a, supra, you will note that said statement is found three times therein, so that a district desiring to transport pupils must have the approval of the State Superintendent as to the method. Hence, we deem it unnecessary to write a lengthy opinion on the subject you inquire, because the matter has been gone over fully orally and we herewith submit a concise statement concerning the three phases of transportation, which, in our opinion, may be printed in your bulletin and such meets with our approval as a statement of facts interpreting statutes concerning transportation. This statement being as follows:

I. TYPES OF ORGANIZED TRANSPORTATION

A. Types of Transportation for which special state aid may be apportioned.

1. General transportation of pupils within a consolidated or other enlarged school district that receives its regular apportionment under the equalization quota plan.

2. Transportation of high school pupils across district lines as follows:

   a. By rural or other districts - pupils who attend high school and whose tuition they are obligated to pay.

   b. By high school districts - pupils from rural or other districts who are admitted to the high school. Section 16a H.B.319, Laws of Missouri, 1935.

3. Transportation of elementary pupils of any elementary school within a consolidated district when the average daily attendance falls below ten pupils. Section 9354, R. S. 1929, as amended Laws of 1933, page 388.

B. Other Types of Transportation for which special state aid cannot be apportioned. (Districts that provide the following types of transportation receive state aid apportioned only on the basis of a fractional or full teaching unit or aid under Section 9358.)

1. Transportation of elementary pupils to other schools when the average daily attendance of any rural district is less than 15 pupils. Section 20, p.346, Laws of Missouri, 1931.

2. Transportation of elementary pupils to other schools when the enumeration of any rural district is fewer than 25 children. Section 9195, R. S. 1929.

3. Transportation of colored elementary children when school is not maintained within any district in which colored pupils reside. Section 9217, R. S. 1929.

4. Consolidated districts that transport pupils within the district and receive the state apportionment under Section 9358, R.S.1929 cannot qualify for the transportation reimbursement, since they receive more money under the law for consolidation. (Section 13, Laws of Missouri 1931,p.340. and Section 16a House Bill 319.)

II. STATE TRANSPORTATION AID OR REIMBURSEMENT

A. The amount of state apportionment for transportation shall not exceed $3.00 per month (15¢ per day) for each pupil transported a distance of 2 miles or more.

B. The apportionment of state aid for transportation shall be determined as follows:

1. The state transportation guarantee not to exceed $3.00 per month, for general transportation of pupils within a consolidated or other enlarged school district that receives its regular apportionment under the equalization quota plan, shall be a part of the minimum guarantee for calculating the equalization quota for said district.

2. The state transportation guarantee, not to exceed $3.00 per month, for transportation of elementary pupils of any elementary school within a consolidated district when the average daily attendance falls below 10 pupils, shall be a part of the minimum guarantee for calculating the qqualization quota unless said consolidated district receives state aid under Section 9358, R. S. 1929. If state aid is granted under Section 9358, nothing is provided for state transportation reimbursement.

3. The state transportation guarantee, not to exceed $3.00 per month, for transporting high school pupils across district lines, by either rural, consolidated, or high school districts, shall be a part of the

state apportionment. The amount approved for transportation would be added to any other state apportionment made to the district.

4. Special state transportation aid cannot be apportioned for any other types of transportation.

III. LEGALIZING TRANSPORTATION

A. Transportation within the district

1. General transportation of all pupils living more than one-half mile from the school house in any school district may be authorized by a two-thirds vote of the qualified voters at an annual or special meeting. School boards are not authorized at their option to use district school funds and carry on general transportation of pupils within the district except as provided by law. Section 16a.H.B.319,Laws of Missouri, 1935 and Section 9197,R.S.1929.

2. The school board may without any action of the voters transport pupils living in an elementary school within a consolidated district when the average daily attendance falls below ten pupils. Only a majority vote is required for transporting seventh and eighth grade pupils to the central school. The law is silent relative to transportation of high school pupils within the district except as authorized under general transportation. Section 9354,R.S.1929.

B. Transportation across district lines:

1. The law authorizes the board of directors of any district (rural,etc.) to transport the high school pupils whose tuition it is obligated to pay. The cost of such transportation may be paid from the incidental

fund and state transportation reimbursement. None of the minimum guarantee for teaching units can be used to pay the cost of transportation. Only the local funds raised by a tax rate in excess of the required 20¢ may be used for such transportation. Section 16a,H.B. 319, Laws of Missouri, 1935.

2. The law authorizes the board of directors of a district (high school) that admits non-resident pupils to its high school to make provisions for transporting such pupils. The cost of such transportation may be paid from the incidental fund and the state transportation reimbursement. However, none of the district's money received from public funds can be used for paying transportation costs. Section 16a,H.B.319, Laws of Missouri, 1935.

3. The law governing the transportation of high school pupils across district lines has no provision which would prohibit school boards from requiring high school pupils to pay part of the cost of such transportation when such cost exceeds the amount of state transportation aid paid the district (occasioned because there is not sufficient funds to pay in full the amount stated in the statute, and such is, accordingly, pro rated,) or the amount the district receives from the state and available local school district incidental funds. Also, there is nothing in the law which would prohibit any rural district from arranging to transport the high school pupils whose tuition it is obligated to pay, by contracting with some high school district to provide the transportation. Similar action on the part of several adjacent rural districts may make it possible for larger unit bus

transportation which otherwise would not be possible in some communities.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JLH:LC

OFFICERS: Salary does not attach until legal office created.

4-22

July 20, 1935.

FILED
49

Hon. George Kitchen,
Marshal, Kansas City Court of Appeals,
Kansas City, Missouri.

Dear Sir:

We wish to acknowledge your request for an official opinion under date of July 6, 1935, wherein you state as follows:

> "In keeping with your advice of yesterday when Forrest Smith and I were in your office, I am writing you.
>
> "I will give you briefly in detail the contents of this letter. The Kansas City Court of Appeals has never had a real librarian, but has compelled the Marshal to perform the duties of librarian upon the salary of the marshal. The marshal as a matter of record has been acting or ex officio librarian.
>
> "The recent Legislature made an appropriation of $3,000 for a librarian covering the years of 1935 and 1936, and a librarian will be appointed within the next few days. However, he can only be paid out of this appropriation from the date of his appointment. I have consulted two of the judges and they have expressed their willingness to pay me out of this appropriation from the beginning of 1935 to the time that the librarian is appointed, if there be no legal bar in the way.
>
> "The requisition would be made as acting librarian. If this can be done, I will then be receiving about $100 per year for having performed the duties of librarian in addition to the work as marshal.

> "I have conferred with two or three lawyers, James P. Aylward, Jerome Walsh, and John C. Loos, who take the position that there would be nothing improper about it.
>
> "The Springfield Court of Appeals, with a smaller library, and handling only about 35 or 40 percent of the cases of this court has paid a librarian at the rate of $1200 to $1500 per year for a number of years and in addition has paid a marshal a statutory salary.
>
> "I believe I have covered about everything necessary to convey to you all the particulars of this proposition, and will add that I will be paid for the months of January, February, March, April, June, and a few days of July only, and will greatly appreciate an opinion from you as you suggested yesterday."

Section 13413, Laws of Missouri, 1931, page 261, authorizes the appointment of a librarian by the Supreme Court and provides in part that

> "The supreme court shall appoint a librarian of the state library * * *.

Section 1902, R. S. Mo. 1929, authorizes the appointment of officers and attendants by the Kansas City Court of Appeals and provides that

> "Said Kansas City court of appeals shall, so far as in its judgment may be necessary, have, unless otherwise provided by law, such officers and attendants as are provided for the supreme court, who shall possess the same qualifications, and perform like duties, and be subject to the same laws and regulations in all respects, so far as may be applicable, as those required of and imposed on like officials and attendants of the supreme court."

Clearly, then, the Kansas City Court of Appeals has the same authority to appoint a librarian as has the Supreme Court. However, such office is only created when in the judgment of the Kansas City Court of Appeals it "may be necessary." The Court at the time of the writing of your letter had not exercised its judgment, although, as you state, they contemplate doing so "within the next few days." You state that the Court never had a real librarian but that you as Marshal were compelled to perform the duties of librarian.

Section 5 of House Bill No. 167 as passed by the recent 58th General Assembly, appropriated a salary for a librarian of the Kansas City Court of Appeals

> "for the biennial period beginning on the first day of January, 1935, and ending on the thirty-first day of December, 1936."

The question then arises whether the office of librarian is created and becomes a legal office as of the first day of January, 1935, or at the date of the appointment by the Court of a person qualified to fill the position of librarian.

Our court in the case of State ex rel. Hueller v. Thompson, 289 S. W. (Sup. Ct. of Mo.) 338, l. c. 340, in holding that general legislation can not be injected into an appropriation act, said:

> "This provision has no other character than that of general legislation, and to inject general legislation of any sort into an appropriation act is repugnant to the Constitution (article 4, sec. 28, Constitution of Mo.), and the appropriation bill, as provided by the Constitution (article 4, sec. 28), may have a plurality of subjects, while a bill for general legislation may have but one.
>
> "An appropriation bill is just what the terminology imports, and no more. Its sole purpose is to set aside moneys for specified purposes, and the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations."

And again in the recent case of State v. Smith, 75 S. W. (2d) 828, l. c. 830, the Supreme Court of Missouri said:

> " * * * Besides, legislation of a general character can not be included in an appropriation bill."

To hold, therefore, that the office of librarian was created and became a legal office as of January 1, 1935, by virtue of Section 5 of the Appropriation Act (House Bill No. 167, 58th General Assembly, supra) would be clearly in violation of the principle hereinabove set out that legislation of a general character can not be included in an appropriation bill. The Kansas City Court of Appeals has been vested with the authority to create the office of librarian, and we are of the opinion that the office is not created until the Court has exercised its discretion or judgment in the matter.

This raises the question whether or not the person performing the duties of librarian from the first day of January, 1935, until the date of the Court's appointment is a de facto or de jure officer.

In the case of Ex Parte Babe Snyder, 64 Mo. 58, l. c. 62, the court said:

> "Numerous cases can be instanced from the books, where the acts of an incumbent of an office have been held valid, upon the ground that such incumbent was an officer de facto. But an officer of that description necessarily pre-supposes an office which the law recognizes. And a quite extensive research has failed to discover an instance where an incumbent has been held an officer de facto, unless there was a legal office to fill; * * * ."

And in State ex rel. Abington v. Reynolds, 218 S. W. 334, l. c. 337, the court said:

> " * * * and, there being no de jure office, there could be no de facto officer."

It may then be said that, there being no legal office to fill until the creation of same by the Kansas City Court of Appeals, the person holding it would not even be a de facto officer.

Which brings us to the ultimate question whether or not such person who holds office, not being de facto or de jure, is entitled to compensation.

In Cunio v. Franklin County, 285 S. W. 1007, l. c. 1008, the Supreme Court of Missouri, Division No. 1, in answering the above question said:

> "It is a well-established principle that a salary pertaining to an office is an incident of the office itself, and not to its occupation and exercise, or to the individual discharging the duties of the office."

And further:

> "On the other hand, it is equally well settled that, if a person exercising the functions of an office is not entitled to the office, he cannot maintain an action for his services."

From the above and foregoing it is our opinion that you would not be entitled to pay for performing the duties of librarian from January 1, 1935, until the date of appointment. It is only with the creation of the office that the salary as an incident of the office attaches.

Yours very truly,

James L. HornBostel,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JLH:

MW:HR

SCHOOLS: The 1931 Act provides the only basis for apportioning State school moneys.

10-9

October 8, 1935.

FILED
49

Hon. Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Attention: Hon. Geo. B. John

Dear Mr. John:

This is to acknowledge your letter dated October 2, 1935, as follows:

> "Please advise this department whether Section 9292, R. S., 1929, is still valid for apportioning state school money.
>
> "Does Section 9292, R. S., 1929, conflict with Sections 12, 13, 14, and 16 of the 1931 Act as these sections apply to the apportionment of state school money? If the foregoing sections conflict, does Section 21 of the 1931 Act invalidate Section 9292 as it applies to state aid?
>
> "Does the 1931 Law provide the only basis for apportioning the state school money?"

We answer your specific question, "Does the 1931 Law provide the only basis for apportioning the state school money?" in the affirmative, and such is our opinion.

We arrive at said conclusion in view of the case of State ex rel. School District of Kansas City v. Lee, 66 S. W. (2d) 521, wherein the Supreme Court of Missouri, en Banc, page 522, said the following:

> "In 1931 the Legislature made quite a change in the method of distributing the state school funds. Sections 13, 16, 19, Laws of Mo. 1931, pp. 340, 341, 342, 343, 344, 346 (Mo. St. Ann. secs. 9270n, 9270q, 9270u, pp. 7121, 7125, 7128). The change may be indicated by summarizing the old law and the new law as follows:

Old Law Previous to 1931	New Law Act of 1931
1. Rural Aid--section 9285 (Mo. St. Ann. sec. 9285, p. 7145).	1. Equalization Aid--section 13, Laws 1931 (Mo. St. Ann. Sec. 9270n. p. 7121).
2. Rural High School Aid -- section 9292 (Mo. St. Ann. Sec. 9292, p. 7150).	2. Teacher and Attendance--section 13, Laws 1931, and section 9257.
(Underscoring ours, and said section being the one in question.)	
3. High School Aid--sections 9399 and 9401 (Mo. St. Ann. secs. 9399, 9401, pp. 7223, 7225).	3. Defectives--section 13, Laws 1931, and section 9220.
4. Consolidated Aid--section 9358 (Mo. St. Ann. sec. 9358, p. 7207).	4. Opportunity Rooms--section 13, Laws 1931, and section 9223.

5. Defectives--section 9220 (Mo. St. ann. sec. 9220, p. 7089).	5. Orphans--section 13, Laws 1931, and section 9431.
6. Opportunity Rooms--section 9223 (Mo. St. Ann. sec. 9223, p. 7091).	6. Tuition--section 16, Laws 1931 (Mo. St. Ann. Sec. 9270q, p. 7125).
7. Orphans--section 9431 (Mo. St. Ann. sec. 9431, p. 7239).	7. Transportation--section 16, Laws 1931.
8. Teacher and Attendance quota to all districts--section 9257 (Mo. St. Ann. sec. 9257, p. 7104).	8. Buildings--section 19, Laws 1931 (Mo. St. Ann. Sec. 9270u, p. 7128).
	9. Consolidated--section 13, Laws 1931 and section 9358.

"Under the old law, the first seven were special aids, after the payment of which the balance of the fund was distributed to all the districts as teacher and attendance quota. No. 8, old law. Under said law there was no priority of payment as between the seven special aids. It will be noted that Nos. 1, 2, and 3 of the old law were abandoned in the new law as a method of distributing the fund. (Underscoring ours. Consequently, it is to be noted that Section 9292, R. S. 1929, has been abandoned as a method of distributing the fund.) The equalization and teacher and attendance aids in the new law were substituted for rural, rural high school, and high school aids in the old law. The new law continued a modified aid for consolidated districts. Nos. 6, 7, and 8 of the new law are additional aids.

> "The new law was enacted under a title which announced that it was an act providing for state support to public schools; providing conditions under which such support might be obtained; providing for the apportionment of the public school funds of the state and repealing all conflicting laws or parts of laws relating to state aids for schools and apportionments of state funds for the maintenance thereof. Laws of Mo. 1931, p. 334 (Mo. St. Ann. sec. 9270b et seq., p. 7114)."

As to conflicts between Section 9292, R. S. Mo., 1929, and Section 12, 13, 14 and 16 of the 1931 Act, we do not deem it necessary to comment on that fact, in view of the above case. It suffices to point out, however, that there are many conflicts and no doubt the Legislature, as pointed out by the Court in the above case, intended the 1931 Act to be the exclusive method of distributing State school funds. Section 21 of the 1931 Act, page 346, repealed all laws or parts of laws relating to State Aid for schools and apportionment of State funds inconsistent or in conflict with the provisions of said Act.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

MUNICIPAL OFFICERS: MARSHALS: Have no official power to apprehend offenders beyond the boundaries of their municipalities.

December 7, 1935. 12-10

FILED 49

Honorable Louis J. Kick,
Marshal of Beverly Hills,
St. Louis County, Missouri.

Dear Sir:

This department is in receipt of your letter of December 4 wherein you state as follows:

> "Will you please advise me whether it is legal for this office to issue tickets outside of the limits of Beverly Hills for traffic offenses committed in Beverly Hills in violation of our ordinances such as stop signs, speed and restricted parking.
>
> "We have only a small town and it is necessary if you are going to apprehend traffic violators to pursue them outside of the limits of the town in order to give them arrest notifications.
>
> "Recently it was pointed out me by Mr. Wilson the automobile club attorney that it was illegal for this office to give tickets outside of our limits for offenses that were committed within our limits. Will you kindly advise me on this question and oblige."

Section 7102, R. S. Mo. 1929, sets out the powers and duties of the constable or marshal in a village, as follows:

> "The constable or marshal appointed by the trustees of the inhabitants of such towns, giving bond and ample security for the performance of his duties,

> is hereby authorized to execute orders and process, arising under the ordinances of said town, and who, within the corporate limits of said town, shall have concurrent power with the constable of the municipal township in which said town is situated to execute all orders, notices, writs and other process and duties that may be executed by the constable of said township, with like effect, and shall receive the same fees therefor."

Section 7127, R. S. Mo. 1929, sets out the powers of a marshal in a village, as follows:

> "The town marshal shall be chief of police, and shall at all times have power to make or order all arrests, with proper process, for any offenses against the laws of the state, or of the town, by day or by night, and bring the offender to trial before the proper court, and he shall have power to arrest without process in all cases where any such offense shall be committed, or attempted to be committed, in his presence."

In the case of Rodgers v. Schroeder, 287 S. W. 86, l. c. 863, 220 Mo. App. 575, the court, relying on similar statutes dealing with the powers of marshals to apprehend offenders beyond the boundaries of their municipalities, said:

> "The court, at the instance of the plaintiff, gave to the jury an instruction advising them that the defendants had no right to make arrests outside of the limits of the city of Washington without being in possession of a warrant authorizing them so to do. The action of the court in giving this instruction is assigned as error here. The defendants insist that, under the provisions of sections 8239 and 8240, R. S. 1919, they had the power as marshal and assistant marshal of the city of Washington to make arrests without process in cases of offenses against the laws of the city committed in their

presence, and that they were also clothed with power to pursue the plaintiff beyond the limits of the city in order to effectuate his arrest. The sections of the statute relied on are as follows:

"'Sec. 8239. The marshal shall be chief of police, and shall have power at all times to make or order an arrest with proper process, for any offense against the laws of the city, and keep the offender in the city prison or other proper place to prevent his escape, until a trial can be had before the proper officer, unless such offender shall give a good and sufficient bond for his appearance for trial. The marshal shall also have power to make arrests without process in all cases in which any offense against the laws of the city shall be committed in his presence.'

"'Sec. 8240. There may be one assistant marshal, who shall serve for a term of one year, and shall perform the duties of the marshal at such times as the marshal may be absent, disqualified or unable to act. At other times, the assistant marshal shall render services as a regular member of the police force.'

"The provisions of section 8244 of the same statute are also pertinent, as follows:

"'The marshal, assistant marshal and policemen shall have power to serve and execute all warrants, subpoenas, writs, or other process, issued by the police judge of the city, at any place within the limits of the county within which the city is located. The marshal, assistant marshal and all policemen of the city shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city.'

"These sections occur in article 4 of chapter 72 of the statute, and relate to cities of the third class.

"It is generally held, in the absence of any statute conferring the power, that municipal officers, such as marshals and policemen, have no official power to apprehend offenders beyond the boundaries of their municipalities. Sossamon v. Cruse, 133 N. C. 470, loc. cit. 474, 45 S. E. 757; Martin v. Houck, 141 N. C. 317, 54 S. E. 291, 7 L. R. A. (N.S.) 576; Butolph v. Blust, 41 How. Prac. (N. Y.) 491; Lawson v. Buzines, 3 Har. (Del.) 416; Page v. Staples, 13 R. I. 306; Moak v. De Forrest, 5 Hill (N. Y.) 605; Sullivan v. Wentworth, 137 Mass. 233; Ressler v. Peats, 86 Ill. 275; Krug v. Ward, 77 Ill. 603; Kindred v. Stitt, 51 Ill. 401; McCaslin v. McCord, 116 Tenn. 690, 94 S. W. 79, 8 Ann. Cas. 245; State ex rel. McNamee v. Stobie, 194 Mo. 14, 92 S. W. 191. And statutes authorizing such officers to make arrests upon view and without process, being in derogation of liberty, are strictly construed. Low v. Evans, 16 Ind. 486. The power of such officers to arrest without process for mere quasi criminal offenses arising from the violation of ordinances is liable to serious abuses, and ought not to be enlarged by judicial construction beyond what is expressly granted or necessarily implied in the statute. It is clear that our statute does not expressly confer upon the marshal, assistant marshal, or policemen the power to make arrests without process beyond the limits of the city, and we see nothing in the statute from which such power may be implied. On the contrary, the provision of the statute expressly authorizing these officers to make arrests beyond the limits of the city upon process issued by the police judge appears to warrant the application of the maxim, 'expressio unius exclusio alterius.' State ex rel. McNamee v. Stobie, 194 Mo. 14, loc. cit. 57, 92 S. W. 191.

"In Sossamon v. Cruse, supra, which was an action to recover damages for an assault committed by a policeman of the town of

Concord, in attempting to arrest the plaintiff without process beyond the limits of the town, for an offense against the ordinances of the town committed in the presence of the officers, the Supreme Court of North Carolina, under a statute similar to our own, ruled as follows:

"'We do not think, therefore, that the defendant had a right to pursue the plaintiff beyond the town limits in order to arrest him after he had escaped. When the prisoner had escaped from the custody of the officer he certainly had no more power or authority to rearrest him than he had when the original arrest was made, and his power in the latter case could only be exercised within the town limits. State v. Sigman, 106 N. C. 728 (11 S. E. 520); State v. Stancill, 128 N. C. 606 (38 S. E. 926); Wright v. State, 44 Tex. 645. If he had failed in his first attempt to arrest the plaintiff and the latter had escaped beyond the town limits, the defendant could not have pursued him for the purpose of making the arrest, and it follows, therefore, that his pursuit of the prisoner beyond the limits after he has successfully resisted arrest and escaped was unlawful.'

"We conclude that the defendants were without authority to go beyond the limits of the city of Washington to effectuate the arrest of the plaintiff without process, and there was no error in the giving of the instruction complained of. We are not concerned here, of course, with the power of marshals, assistant marshals, and police officers of towns and cities to make arrests for felonies."

Sections 7102 and 7127, supra, do not expressly confer upon the marshal of a village the power to make arrests without process beyond the limits of the city, and we see

nothing in the statutes from which such power may be implied. In the absence of any statute conferring such power, we are of the opinion that your office has no official power to pursue traffic violators outside of the limits of Beverly Hills in order to give them arrest notifications.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

SCHOOLS: ELECTIONS: Five questions in regard to school elections answered.

FILED 51

April 3, 1935

Mr. Grover T. Laurance
Secretary Board of Education
Ritchey Consol. School Dist. No. 10
Ritchey, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date, requesting an opinion from this department, which reads as follows:

> "As secretary of our local board of education, I would be grateful for your opinion upon following points of school law.
>
> The law says that newly elected school directors must have paid a state and county tax within one year next preceding their election. Are persons qualified, with reference to tax payment, who have paid only one year's state and county tax within the prescribed time and who still have delinquent taxes assessed against them? Just what is meant by the law in this connection, when it speaks of the payment of 'a state and county tax within one year next preceding their election?' Does it mean that these taxes could have paid at any time within the one year period immediately preceding the day of the school election? The foregoing points apply to a consolidated school district.
>
> Is it lawful in the election of a consolidated school district to use two ballots,

one containing the names of the candidates for the office of county school superintendent and one for the names of the local director candidates, and the tax proposition for school purposes?

As a general procedure in our annual consolidated school district election, we have two poll books, one for the use of each of the two election clerks. But this year poll books will be sent us, I understand, from our county seat; on account of this being the year for the election of a county superintendent of schools. If this is true, should the election clerks use just the two poll books that are sent from our county seat? If so, does our local school Board keep one of them for its record and send the other to the county clerk? Kindly outline the proper procedure, if this is not correct.

Again assuring you of my appreciation for this information, I am."

We will answer your questions in the order in which you ask them.

1.

Section 9328 Revised Statutes Missouri 1929, provides what qualifications a school director shall have, and reads as follows:

"The qualified voters of the district shall, annually,on the first Tuesday of April, elect two directors, who are citizens of the United States resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding their election or appointment, and who shall have resided in this state

> for one year next preceding their election or appointment,and shall be at least thirty years of age, who shall hold their office for three years and until their successors are duly elected and qualified; and all vacancies in the board shall be filled for the unexpired term. "

The above section provides that a director shall have paid a state and county tax within one year next preceding their election or appointment. Said section does not provide that a director shall have paid all state and county taxes assessed against him, and to so hold would be writing something in the statute that is not there. In the case of State ex rel. Circuit Attorney v. Macklin 41 Mo. App. l. c. 342, in construing a similar statute, the court said:

> "Nor is there any force in the argument that the taxes must be paid within each calendar year. The law simply requires that it shall be paid for two consecutive years, and not that it shall also be paid within those years. There is no ambiguity in the terms used and we can not read them otherwise than they are written. Our duty is to declare,and not to make the law."

We therefore hold that a director who has paid a state and county tax within one year next preceding his election, although he may still owe other state and county taxes, has complied with the terms of the statute.

2.

You ask if the state and county tax could be paid at any time preceding the election. In State ex rel. Circuit Attorney v. Macklin, supra, at l. c. pages 343 and 4, the court said:

"Our conclusion is that the true construction of the phrase employed, 'who shall have paid a school tax within said city for two consecutive years immediately preceding his election,' is, 'who shall have paid, at any time preceding his election, a tax for the benefit of schools within said city for the two consecutive calendar years next preceding the year of his election, assessed on property in which he has an interest subject to taxation, at the date of assessment or date of payment.' "

In view of the above, it is our opinion that a director who pays a state and county tax, at any time within one year prior to his election, meets the requirements of the statute.

3.

Section 9341 Laws of Missouri 1933, page 381, provides the time and manner and rules of election of a consolidated school district. Said section reads, in part, as follows:

"The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at 7 o'clock a. m. and closing at 6 o'clock p. m. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof

> certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by order of said board, shall issue certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board; * * * *."

The above section provides that the qualified voters shall vote by ballot, upon all questions provided by law for submission at the annual school meetings, and that all propositions submitted may be voted for upon one and the same ballot and that the necessary poll books shall be furnished by the secretary of the board.

Section 9454 Revised Statutes Missouri 1929, provides in part:

> "There is hereby created the office of county superintendent of public schools in each and every county in the state; the qualified voters of the county shall elect said county superintendent at the annual district school meeting held on the first Tuesday in April, 1933, and every four years thereafter; * * * **

Section 9455 Revised Statutes Missouri 1929, specifies how the election of county superintendent of public schools shall be conducted and reads, in part as follows:

> "At least ten days before the annual school meeting in any year when a county superintendent of public schools is to be elected,the clerk of the county court shall mail by registered letter to the president or clerk of the board of school directors of the various districts of the county a tally sheet of sufficient size to contain the names of all the qualified voters, of such district, which tally sheets shall, so far as practical, conform to the form of poll books set out in section 10197,article 2, chapter 61, R.S.1929,relating to general elections,and in making the returns of such election, the tally sheets shall be certified by the chairman and secretary of such annual school meeting and attested by the members of the board of directors of the district, who may be present. The voting for county superintendent shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is counted for the person receiving the same, and it is hereby made the duty of the chairman of the annual school meeting, within two days after such meeting, to transmit the tally sheets and all ballots, in person or by registered letter, to the clerk of the county court; such ballots to be in a sealed package, separate and apart from such tally sheets, such package being properly designated.* * * * "

It will be noted that the above section makes it the duty of the county clerk to provide the various school districts tally sheets, to conform to the form of poll books for general elections. The voting for county superintendent is by ballot,and it is made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot is counted

for the person receiving the same, and it is made the duty of the chairman of the annual school meeting, within two days' time, to transmit the tally sheets and all ballots to the clerk of the county court.

Section 9341, supra, does not require that all propositions submitted at the annual school meeting shall be voted for upon one and the same ballot, but provides that they may be so voted upon. In our opinion this section does not apply to the election of a county superintendent of schools in any event.

Section 9455, supra, governs the election of a county superintendent, and makes it the duty of the board of directors and the chairman and secretary of the annual meeting to see that all ballots cast shall be counted for the person for whom cast. We are therefore of the opinion that it would be lawful to use one ballot for the purpose of voting for a county superintendent of schools, and another ballot for voting for the local directors and all other propositions submitted at the annual meeting, and in our opinion it would be the better practice.

4.

Section 9341, supra, makes it the duty of the secretary of the school board to make out and furnish the necessary poll books to be used in the annual school election.

Section 9455, supra, makes it the duty of the county clerk to furnish to the school districts tally sheets to conform to poll books used in general elections, when a county superintendent is to be elected.

It is, therefore, our opinion that the secretary of the school board should furnish the necessary poll books used in the annual school election, and that the tally sheets furnished by the county clerk should be used in the election of a county superintendent of schools.

5.

Section 9455, supra, makes it the duty of the chairman of the annual school meeting to transmit the tally sheets and all ballots cast in the election for county school superintendent, in person or by registered mail, to the clerk of the county court. No provision is made for the school board to retain one of the tally sheets.

It is, therefore, our opinion that the tally sheets used in the election of a county superintendent of schools must be transmitted to the county clerk, and the school board cannot retain either of them.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JET:LC

SCHOOLS: SCHOOL DIRECTORS: The paying of automobile license tax will not qualify a party as director of a school district.

April 9, 1935

FILED 51

Mr. J. E. Lavender
McKittrick
Missouri

Dear Sir:

This Department is in receipt of your letter of April 8, requesting an immediate opinion on the following question:

"I am writing you for a little information. I quote qualifications of school board member:

'He must be 21 years of age - shall have resided in this state one year next preceeding his election, must be a resident tax payer in the district and shall have paid a state and county tax within one year next preceeding his election.'

Does owning an automobile and paying the state for a license make one a tax payer and eligible to be a school board member? The tax or license fee paid the state for auto license goes to the road fund, and it appears to me that the meaning of the law is that to be eligible to serve on a school board he should pay a tax that helps to support the school. Am I right?

Kindly let me hear from you at once.

Thanking you for this information, I remain."

The section referred to in your letter is evidently Section 9287 R. S. Mo. 1929, and we will not again quote the same as you appear to be familiar with its provisions.

The outstanding decision in this state, in reference to the qualifications of a director as being a resident taxpayer, is that of State ex rel. Bellamy v. Menengali 307 Mo. l. c. 453, wherein the court said:

> "The single issue presented for our consideration is whether the respondent was qualified under Section 11213, Revised Statutes 1919, to hold the office of school director in District No. 80, to which she was elected at the April election in 1922. The above section so far as here pertinent, reads as follows:
>
> 'The government and control of the district shall be vested in a board of directors composed of three members, who shall be citizens of the United States, resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding his, her or their election, and who shall have resided in this State for one year next preceding his, her or their election or appointment, and shall be at least twenty-one years of age.'
>
> It was admitted at the trial that respondent possessed all the qualifications required by the above section, to fill the position of school director, except the disputed issue as to whether she was a taxpayer of said school district, and as to whether she had paid, or caused to be paid, a state and county tax within one year next preceding her election in April, 1922.
>
> In Webster's New International Dictionary, a taxpayer is defined as: 'One who pays a tax.' In Funk & Wagnall's New Standard

Dictionary, a taxpayer is defined as: 'One who pays any tax, or who is liable for the payment of any tax.' The evidence is clear and undisputed, that respondent on June 1, 1920, was the legal owner of the property heretofore described, and that it was not exempt from taxation.

Section 12756, Revised Statutes 1919, provides that:

'Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year.'

The undisputed evidence of both respondent and her husband, shows, that some of her personal property was included in the assessment list for 1920, and that she signed her husband's name thereto.

Section 12801 provides that: 'No assessment of property or charges for taxes thereon shall be considered illegal on account of any informality in making the assessment, or in the tax lists, or on account of the assessments not being made or completed within the time required by law.'

It was shown without contradiction and without objection, by respondent's husband, that he paid the taxes on his property and that of his wife, mentioned in the assessment list, on December 22, 1921; and that he paid said taxes for the benefit of himself and wife. It appears from the evidence without question, that the automobile mentioned in the list was assessed at $250.00; that respondent was the joint owner with her husband of the undivided one-half of same, and that the taxes were paid on this machine by respondent's husband for the benefit of both.

> Since the adoption of the Married Woman's Act of 1889, it cannot be presumed that personal property in possession of the wife or claimed by her, was paid for with the means of the husband. (Smelser v. Meier, 271 Mo. 178, 196 S. W. 22). Aside from the foregoing, the testimony of both respondent and her husband is clear to the effect that she was the owner of the personal property heretofore described in the assessment list.
>
> We are cited in the respective briefs of counsel to text-books, and decisions outside this State, which throw very little light on the merits of the case. It is clear to us that no citation of authority is needed to sustain the action of the lower court in holding that respondent was qualified to hold the office in question. If any authority were needed, the able and unanswerable opinion of Rombauer, J., in State ex rel. Circuit Attorney v. Macklin, 41 Mo. App. at page 339 and following, settles the question and expresses our views of the subject. It fully sustains the action of the lower court. On page 343, Judge Rombauer concisely states our theory of the law in a case of this character, as follows:
>
> 'If a person owns an interest in property, and pays a tax thereon, he pays his tax regardless of the fact to whom the property is assessed.' "

The term 'resident taxpayer' as contained in the section, evidently refers to property, either real or personal, on which a state and county tax must be paid within one year next preceding the election. The decision above quoted from contains the plain definitions of a taxpayer.

The license obtained by a person owning an automobile is more in the nature of a privilege tax not based on assessment of property, but a definite amount for the privilege

of using an automobile. No part of the license fee goes to the individual county or to the school district.

The question of a director attempting to qualify with a merchant's license tax, is discussed in the case of State ex rel. Walker v. Rebenack 135 Mo. 340, in the following language:

> "A candidate for the office of school director in the board of president and directors of the St.Louis public schools, who, to be eligible to the office under the statute, must have paid a school tax in the city for two consecutive years, immediately preceding his election, within a few days prior to the election obtained a state merchants' license for the two preceding years for a copartnership of which he was then a member, and paid the license tax thereon, although the firm had in fact been in existence for only a fraction of the last year, and he had no assessable property, subject to tax for the preceding year. Held, that such payment, not being of a lawful tax, was fraudulent, and did not render the candidate eligible to the office."

CONCLUSION

We are of the opinion,that in order for a person to qualify as school director he must have paid a state and county tax within one year next preceding his election, on real or personal property regularly assessed in his name or in the name of some other party, and in which he has an assessable interest, and that the mere owning of an automobile with a license, will not

qualify him as a resident taxpayer within the meaning of the statute.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

OWN:LC

CITIES: Cities shall not pass ordinances regulating control, manufacture or sale of intoxicating liquor inconsistent with provisions of Liquor Control Act. Cities may fix any reasonable qualifications not inconsistent with provisions of the Liquor Control Act.

518

May 15, 1935.

FILED
51

Mr. Philip A. Land
City Clerk
Marshall, Missouri

Dear Sir:

This will acknowledge your letter of recent date requesting an opinion from this department, which reads as follows:

> "Confirming our telephone conversation of even date.
>
> "Would it be possible for the City of Marshall Missouri a City of the third class to include in our liquor Ordinance a clause setting out in the qualifications of the applicant, that said applicant must be a resident of the City for a term of five years, and in your opinion would the same hold in the Courts. "

We direct your attention to applicable sections under the Liquor Control Act as recently amended by the Committee Substitute for Senate Bill No. 30 and as passed by the 58th General Assembly of the State of Missouri. Section 27 under the above mentioned act provides in part:

> "No person shall be granted a license hereunder unless such person is of good moral character and a qualified voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village; *****

Section 25 provides in part:

> "The Board of Aldermen, City Council or other proper authorities of incorporated cities, may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of such ordinances, where not inconsistent with the provisions of this act."

You will note from a careful reading of the above sections of the Act that a person must be of good moral character and a qualified legal voter and a taxpaying citizen of the city to be granted a license, also that the City Council or other proper authorities of incorporated cities may charge for licenses subject, however, to limitations of the Liquor Control Act. A city may make and enforce ordinances under the above mentioned provisions for the regulation and control of the sale of all intoxicating liquors providing such ordinances be not inconsistent with the provisions of the Liquor Control Act.

CONCLUSION.

In light of the foregoing, it is the opinion of this department that the City of Marshall, Missouri, or any other city may provide in their ordinances qualifications of applicants who obtain a license for the sale of intoxicating liquor, which qualifications shall not be inconsistent with the provisions of the Liquor Control Act.

We therefore rule that the City may make any requirements with reference to residence that are reasonable and

whether five years is reasonable is a judicial question, however, we could advise that one year in our opinion would be without question upheld by the courts.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

RCS/afj

INTOXICATING LIQUORS: CITIES:	Cities do not have the right to require places of business handling intoxicating liquors to close on Sundays and between the hours of 1:30 o'clock, a.m. and 6:00 o'clock, a.m.

8-26

August 23, 1935.

FILED 51

Mr. Marion E. Lamb
City Attorney
Moberly, Missouri

No. 51

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "Under the State law places that sell 5% beer have to stop the sale of the same at 1:30 in the morning. What to my mind, would be a good thing is that the City in which the same is sold would make such places not only stop the sale of beer at that hour, but would also make such places close their other business after that hour and on Sunday. There is some doubt in my mind that the City would have this power, I would appreciate very much your opinion as to whether or not the City has that power."

Provisions of the State law prohibiting the sale of intoxicating liquors on Sunday, election days and between the hours of 1:30 o'clock,a.m. and 6:00 o'clock, a.m. are found in Sections 15 and 15-a of the Liquor Control Act. Section 15 of said Act provides:

> "No person having a license under

> the provisions of this act shall sell, give away or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity on the first day of the week, commonly called Sunday, or upon the day of any general, special or primary election in this state, or upon any county, township, city, town or municipal election day. Provided, the sale of such intoxicating liquors may be resumed on any such election day, after the expiration of thirty minutes next following the hour, or time, fixed by law for the closing of the polls at any such election."

Section 15-a of the Act reads as follows:

> "No person having a license under the provisions of this act shall sell, give away, or otherwise dispose of or suffer the same to be done, upon or about his premises any intoxicating liquor in any quantity between the hours of 1:30 o'clock, a.m. and 6:00 o'clock,a.m., and any person violating any provision of this section shall be deemed guilty of a misdemeanor."

The above provisions of the Liquor Control Act do not require that a person holding a license to sell intoxicating liquor shall close his place of business on Sunday, election days, and between the hours of 1:30 o'clock, a.m. and 6:00 o'clock, a.m., but only prohibit the licensee from selling intoxicating liquor on his premises at such times.

The power of a city to regulate and control the sale of intoxicating liquor within its limits is found in Section 25 of the Liquor Control Act, which reads in part as follows:

> "**** The Board of Aldermen, City Council or other proper authorities of incorperated cities, may charge for licenses,issued to manufacturers, distillers, brewers, wholesalers and

> retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of such ordinances, where not inconsistent with the provisions of this act."

The power given cities in the above section is the right to regulate and control the sale of intoxicating liquors and not the right to regulate and control the business other than the sale of intoxicating liquor in which a licensee may be engaged. Said section also prohibits a city from passing any ordinance inconsistent with the provisions of the Liquor Control Act.

From a careful reading of the Liquor Control Act, it is apparent that the Legislature intended that intoxicating liquor should be handled as an incident to other businesses. They prohibited the handling of beer and other intoxicating liquors in saloons and provided that certain kinds of liquor should be handled by persons engaged in certain kinds of business, and finally they did not require that the vendors of liquor should close their places of business on Sundays and between the hours of 1:30 o'clock, a.m. and 6:00 o'clock, a.m., but only prohibited said vendors from selling said liquors at such times.

It is a recognized principle of law that when the Legislature provides a uniform system for the regulation, control and licensing of the liquor traffic, it has the effect to repeal all inconsistent provisions in municipal charters and the ordinances adopted under them. In other words, the only authority that a city has to regulate and control the sale of intoxicating liquor is found in Section 25 of the Liquor Control Act.

In the case of State ex rel. vs. McCammon, 111 Mo. App. loc. cit. 631 and 632, the Court said:

> "The statute, just cited, established a general state policy upon the subject of dramshop license by requiring

that in cities of over two thousand population, upon a proper application and petition, it became the duty of the county court to grant a license (Scarritt v. Jackson County, 89 Mo. App. 585), the performance of which could be compelled by mandamus. ****

"We are of the opinion that the charter powers relied upon do not confer authority upon the city to overturn the general law on the subject of dramshops. Indeed, the charter itself, as above quoted, shows that the city has no power to pass ordinances on ary subject which are repugnant to the laws of the State. So therefore when the State law says that a license shall be granted on the petition of two-thirds of the inhabitants of a block, the board of aldermen have not the authority to say that there shall be a petition of two-thirds of the entire city. Though the city is authorized to regulate a dramshop, it cannot regulate it in those particulars which would be inconsistent with the regulations made by the State. ****

"****The law is stated by Black on Intoxicating Liquors, section 223, in accord with these cases. He says:

"'The powers conferred upon a municipal corporation must be exercised in conformity to the general laws of the State, unless it is clear that the exclusive control of the subject is given to the municipality or that the general law is to be superseded or suspended by the charter. A statute granting authority to a city to pass ordinances in relation to the liquor traffic does not repeal the general laws on that subject. The rule is that the municipal ordinances cannot set aside, limit or enlarge the statute law of the State, unless its power to do so can be shown in express terms or by necessary implication.' And again at section 224 the same author says:

"'Whenever a change of policy takes place in the State on the subject of its liquor legislation, by the adoption of a different

system -- as when general prohibition, or prohibition for particular localities is enacted by a constitutional amendment of general statute, or when the Legislature provides a uniform and general system for the licensing of the traffic -- this has the effect to repeal all inconsistent provisions in municipal charters and the ordinances adopted under them.'"

CONCLUSION.

In view of the above, it is the opinion of this department that the only power a city has to regulate and control the sale of intoxicating liquor is found in Section 25 of the Liquor Control Act. It is our further opinion that Section 25 of said Act does not authorize a city to pass an ordinance requiring a place of business which handles beer or other intoxicating liquor to close on Sunday and between the hours of 1:30 o'clock, a.m., and 6:00 o'clock, a.m.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JET/afj

OLD AGE PENSIONS: All property, real and personal must be taken into consideration in determining qualifications for assistance.

November 15, 1935. 11-18

FILED 51

Mr. C. E. Larkins,
Member, Buchanan County Old Age Assistance Board,
County Court House,
St. Joseph, Missouri.

Dear Sir:

We wish to acknowledge your recent request for an opinion wherein you state as follows:

> "Section 7 of the Old Age Assistance Act provides that no one shall receive assistance if the value of his or her property exceeds fifteen hundred dollars. In checking applications for assistance, we find a number of people who have cash in the bank, stocks and bonds, and property other than real estate that often totals as much as twelve or fourteen hundred dollars. We would be pleased to have your opinion as to just what is meant by the term 'property' in this Act. Should this apply to real property alone, or should all property, personal and real, be considered?
>
> "It is our belief that a party having several hundred dollars in the bank is in no immediate need of assistance, but if this Act includes personal property, then, of course, it appears that the man with as much as fourteen hundred dollars in the bank might be eligible for assistance. However, we hardly believe that was the intention of the Act. On the other hand, a party might own

> fifteen hundred dollars in real estate and have no income, and of course might need assistance. Early ruling on this question will be appreciated, as we are desirous of getting through with our work here as quickly as possible."

Section 7 of the Old Age Assistance Act, found in the Laws of Missouri, 1935, page 310, reads as follows:

> "Old age assistance shall not be granted to a person if the value of his property or the value of his interest in property exceeds $1,500.00, or, if married and actually supporting a husband or wife, if the value of his or her property or the value of his or her interest in property together with that of such husband or wife exceeds $2,000.00, or if the claimant has deprived himself, directly or indirectly, of any property for the purpose of qualifying for old age relief. For the purpose of ascertaining the true value of property of persons applying for a pension under this act, it shall be the duty of the County Board to appraise such property at its true value."

We are asked to interpret the meaning of the word "property" as it appears in Section 7, supra.

In the case of Consolidated School District v. Hackmann, 258 S. W. 1011, 302 Mo. 558, l. c. 560, the court sets out the following rules of statutory construction:

> "The fundamental rule to be observed is to ascertain and give effect to the purpose of the Legislature. * * *
>
> "In construing a statute, the legislative intent is to be determined from a general view of the whole Act, with reference to the subject matter to

> which it applies and the particular topic under which the language in question is found. (36 Cyc. 1128)."

We are dealing with pensions and retirement funds providing for assistance for residents of the state over the age of seventy years under certain conditions and requirements.

We set out in part one of the conditions as same appears in Section 4 of the Act:

> "Subject to the provisions and under the restrictions contained in this Act, every aged person who has no income or an income inadequate to provide a reasonable subsistence compatible with decency and health, but in any event not exceeding * * * per month, shall, while residing in the State, be entitled to assistance in old age."

Again in Section 5 of the Act the following language is to be found:

> "The amount of assistance shall be fixed with due regard to the conditions in each case, but in no case shall it be an amount which, when added to the income of the applicant from all other sources, shall exceed a total of * * * * per month."

It is evident from the above sections of the Old Age Assistance Act that the Legislature was primarily interested in the income of each individual as indicative of his ability to maintain himself, and as income is derived from earnings of property, we must necessarily take all property into consideration in determining the person's ability to maintain himself compatible with decency and health.

In the case of Wire Co. v. Wollbrinck, 275 Mo. 339, l. c. 352, the court defines the term "property" in the following manner:

> "In law and in the broadest sense 'property' means 'a thing owned,'

> and is, therefore, applicable to whatever is the subject of legal ownership. It is divisible into different species of property, including physical things, such as lands, goods, money; intangible things, such as franchises, patent rights, copyrights, trade-marks, trade names, business goodwill, rights of action, etc. In short it embraces anything and everything which may belong to a man and in the ownership of which he has a right to be protected by law."

Again in the case of McAlister v. Pritchard, 287 Mo. 494, l. c. 498, the court said:

> "Property is nomen generalissimum, and extends to every species of valuable right and interest. (6 Words and Phrases (1 series), 5693.)"

Construing the above definitions of the term "property" with reference to the subject matter to which it applies and the particular topic under which the language is found, we are of the opinion that the term applies to all property, both real and personal.

It is true that a man might have personal property in the amount of $1400.00 in the bank and be eligible for assistance, and another have in excess of $1500.00 and be ineligible for assistance. However, the Legislature has set the latter figure as a condition precedent to the right to a pension, and we cannot go into the equities of the matter. That the Legislature has the power to enact such laws cannot be questioned, in view of the language of the court in the case of Stiles v. Pension Fund Commissioners, 281 Ill. 636, l. c. 641, 118 N. E. 202:

> "We have repeatedly held that pensions are in the nature of bounties of the government, which it has the right to give, withhold, distribute or recall, at its discretion; that the pensioner has no vested right in a pension, and the legislature has full power to enact such laws and direct how the fund shall be raised and direct to whom it shall be paid. (Eddy v.

> Morgan, 216 Ill. 437; Pecoy v. City of Chicago, 265 id. 78; Ryan v. Foreman, 262 id. 175.) The same rule was first announced and has been uniformly followed by the Federal courts. (Walton v. Cotton, 19 How. 355; United States v. Teller, 107 U. S. 64; Frisbie v. United States, 157 id. 106.) It was held in the case last above cited: 'Congress having the liberty to give or withhold pensions may prescribe who shall receive them and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension and no man has a legal right to interfere in the matter of obtaining pensions for himself or others. The whole control of that matter is within the domain of congressional power. United States v. Hall, 98 U. S. 343.'"

In conclusion, we wish to call attention to the fact that in addition to the property requirements, Section 5, supra, directs that the amount of assistance must be fixed with due regard to the conditions in each case.

Respectfully submitted,

J. E. TAYLOR,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

SCHOOL DISTRICTS:SCHOOL FUNDS:SCHOOL FUND ACCOUNTED:SCHOOL WARRANTS:TAXATION: Treasurer required to set up different funds and only those named in statute.Warrants must provide specific fund.Warrant payable only out of fund drawn on.Treasurer liable on bond for violation.School funds payable only on school warrant.Delinquent taxes to be credited to the particular fund for the particular year for which levied.School board required to issue warrants when delinquent taxes collected. Issued warrants to be paid out of delinquent taxes when collected. Delinquent taxes to be used only for purposes for which levied. Section 9555.Delinquent taxes not all to be credited to teachers' fund. School board can not authorize the setting up of any fund except those named in statutes.

1-14

January 11, 1935

FILED
52

Honorable Charles A. Lee
Superintendent of Schools
Jefferson City
Missouri

Dear Sir:

Receipt of your letter dated December 21,1934, respecting school fund accounting, is acknowledged.

It is somewhat difficult to determine wherein a large part of the matters about which you inquire come, in any way, within the scope of the discharge of your official duties. Waiving that, we will proceed to a consideration of the eleven questions asked by you in their order after making some preliminary observations and references to statutes and decisions.

Section 9214 Revised Statutes Missouri 1929, in part provides:

> "The board of directors of each district shall* * * forward to the county clerk an estimate of the amount of funds necessary to sustain the schools of their district for the term required by law* * * stating clearly the amount deemed necessary for each fund and the rate required to raise said amount."

In Pope v. Lockhart 299 Mo. 141,146, the Supreme Court of this State said:

> "The statute (Now sec.9214 R.S.1929) makes it the duty of the school board to make the estimate of the funds

necessary to sustain the school in its district and state the amount and the rate required to raise it."

Section 12 of Article X of the Constitution of Missouri provides that,

"No county, city, town, township, school district, or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition * * * *."

Section 9233 Revised Statutes Missouri 1929 provides:

"All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected; but the income from state, county and township funds shall be applied only to the payment of teachers' warrants, issued by order of the board to legally qualified teachers for services rendered according to law. No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such funds in accordance with section 9257,and no school warrant shall bear interest. "

Section 9311 Revised Statutes Missouri 1929, in part reads:

> "Upon the order of the board of directors, it shall be the duty of the district clerk to draw warrants on the county treasurer in favor of any party to whom the district has become legally indebted* * * * the said warrant to be paid out of any moneys in the appropriate funds in the hands of the said treasurer and belonging to the district. The species of indebtedness must be clearly stated and should be drawn on its appropriate fund; all moneys for teachers' wages on the teachers' fund; all moneys used in the purchase of a site, erection of building thereon, and furnishing the same, on building fund; and all other expenses to be paid out of the incidental fund* * *."

Section 9312 sets out the form of warrants to be used by the board of directors of the school district in drawing on each the teachdrs' fund, the incidental fund and the building fund, the respective warrants being limited in their payment to funds on hand for the payment of each particular fund and designated in the warrant. Further, the section provides:

> "The treasurer shall open an account for <u>each fund</u> specified in this section,and all moneys received from the state,county and township funds,and all moneys derived from the taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'teachers' fund;' the money derived from taxation for incidental expenses shall be credited to the 'incidental fund;' all money derived from taxation for building purposes,from the sale of school site,schoolhouse or school furniture, from insurance, from sale of bonds, from sinking fund and

> interest,shall be placed to the credit of the 'building fund;' and all moneys not herein specified that now belong to any school district,or that may hereafter be received by such school district, shall be placed to the credit of the 'teachers' fund' of such school district. No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; and each and every warrant shall be paid from its appropriate fund, and no partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant: Provided, that the board of directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property: Provided further, that in the event of a balance remaining in the building fund after the purpose for which said fund was levied is accomplished, the said board shall have the power to transfer such unexpended balance to the incidental fund: Provided further,that by a majority vote of the school board tuition fees may be used to liquidate indebtedness accrued in the building fund."

Section 9555 Revised Statutes Missouri 1929, having reference to school districts in cities of seventy-five thousand to five hundred thousand, provides:

> "The treasurer of the district shall open an account for each fund specified in this section, and all moneys derived from the state, county and township funds, all tuition fees and all back taxes,and such portion of the moneys derived from the levy of the tax for school purposes as shall be set apart to that fund by

> the board,shall be placed to the credit of the 'teachers fund;'the moneys derived from taxation under the provisions of section 9533,from the sale of real estate, schoolhouses,library buildings or other buildings of any kind and school furniture, from insurance,and from sale of bonds other than funding and refunding bonds,shall be placed to the credit of the 'building fund;' all moneys derived from the levy of the tax for sinking fund and from interest on the sinking fund shall be placed to the credit of the 'sinking fund;' all moneys derived from the levy of the tax for annual interest on outstanding bonds shall be placed to the credit of the 'interest fund;' and all other moneys and funds of the school district, from whatever sources derived, shall be placed to the credit of the 'incidental fund.' The treasurer shall not honor any warrant unless it be drawn upon the appropriate fund, and each and every warrant shall be paid from its appropriate fund. No interest shall be paid on any warrant. The board of directors shall have power, in its discretion, from time to time, to transfer from the 'incidental fund' to any other of said funds such amounts as it may deem proper."

In Jacquemin and Shenker v. Andrews 40 Mo. App. 507, the court had under consideration an action by a teacher employed by the board of directors of a school district, against such board of directors, on account of a warrant issued by the district to the teacher. At page 510 of the opinion the court made the following general observation:

> "We take it, that, while the board of directors were, by the implication of the statute, prohibited from drawing said warrant on the treasury, unless there was money on hand of that fund, out of which it could be paid, still this prohibition must not be construed so as to preclude the directors from

> anticipating this fund, if the amount of their warrant could subsequently be paid out of any money coming into the county treasury for that school year, from either or all of the three sources from which that fund, by law, is derived."

As to the effect of the constitutional provision above quoted from, in Kane and Company v. School District 48 Mo. App. 408, 413, and having under consideration an action on account of a school district warrant, the court at page 413 of the opinion said:

> "More that this, the so-called treasurer's warrant purports to bind the school district two years in the future, in that the treasurer is directed to pay the same about two years after its date. The evidence conclusively shows that there was no money on hand then to pay the same nor any provided for in that fiscal year. Hence, this order was an effort to pledge the future credit of the defendant, in clear violation of section 12, article 10, constitution of Missouri."

The case of School District v. Zion 195 Mo. App. 299, on the question of diversion of one school fund to another the court at page 304 of the opinion said:

> "Again, money collected by taxation for school purposes can not be diverted from one fund to another. Certainly money in the teachers' fund can not be transferred to and used in the incidental fund."

In Consolidated School District No. 6 v. Shawhan 273 S. W. 182, an action by the school district against the board of directors thereof to recover the sum of $802.36 belonging to a definite fund for payment of teachers' salaries, and which, it is alleged, was diverted from said fund and expended for other purposes for which the district was obligated. At page 183 of the opinion

it was stated and held:

> "It is not disputed that defendants,as directors of plaintiff district,did divert the funds for the payment of teachers' salaries to the payment of other obligations. The question then is as to whether defendants are personally liable to plaintiff therefor.
>
> Under our state law the government of a school district,as well as the handling of the finances thereof,is vested in a board of directors duly elected by vote. Their powers and duties are prescribed by statute. A trust is reposed in them,the execution of which is frequently attended with difficulty and embarrassment.By accepting such trust each director obligates himself to perform the duties as the law directs,and if there is a misapplication of the funds,or any part thereof, the question for determination is as to whether or not the directors are personally liable and may legally be required to respond in damages therefor."

After quoting Section 11159 Revised Statutes Missouri 1919, which is now Section 9233,above quoted, and referring to Section 11223 Revised Statutes Missouri 1919, which is now Section 9312 in part, above set out, the court further said, on page 184 of the opinion:

> "Section 11223 sets forth the form of warrant to be issued by school boards, a separate form for teachers' fund,for incidental fund, and for building fund, and provides that all money derived from the state,county, and township funds, and all money derived from taxation for teachers' salaries, and all tuition fees, shall be placed to the credit of the teachers' fund; that money for incidental purposes shall be kept in the incidental

> fund and all money for building purposes in the building fund. Further, this section prohibits the honoring of any warrant by any county treasurer unless such warrant be in proper form and drawn upon the proper fund; and provision is made that, in case of emergency, transfers back and forth of the incidental and building fund may be made by the board." The court held the defendants liable.

With the foregoing statutory provisions and decisions of the court before us, we proceed to a consideration of the questions propounded by you. We set your questions out in full.

> (1) Is it mandatory for a treasurer of a school board in this state to set up and open an account for each fund as named in the foregoing section?

Section 9312 provides that,

> "The treasurer shall open an account for each fund specified in this section* * * *."

Those funds are 'teachers' fund'; 'incidental fund'; 'building fund.'

Section 9233 provides that all moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected.

Section 9555, having to do with school districts in cities of seventy-five thousand to five hundred thousand, provides for the setting up by the treasurer of the district of five funds, viz: teachers' fund, building fund, sinking fund, interest fund and incidental fund. Laws of Missouri 1931, page 345, Section 15a, provides for the county treasurer placing certain moneys to the credit of the 'Free Text

Book Fund' of each school district. The treasurer of the school district or school board is a creature of the statute and it is mandatory for him to comply with his duties in respect to setting up the respective funds on his books.

(2) Is it legal for a school board to set up a fund for a purpose not named in any statute?

Since the statute has prescribed the funds which may be set up on the books of the district or its treasurer, it necessarily follows that the school board or treasurer thereof has no legal authority to set up a fund for a purpose not named in any statute.

(3) Can the treasurer of a school board legally honor the payment of any school warrant when not drawn chargeable to a specific and statutory school fund?

Under statutes and decisions above quoted a warrant issued by a school district should be drawn upon the fund out of which it is payable, and the treasurer of a school board has no authority to honor a warrant not drawn chargeable to a specific and statutory school fund.

(4) Can the treasurer of a school board pay any warrant if there is insufficient money on hand in the particular fund on which the warrant is drawn, while at the same time the "money on hand" in all funds be sufficient to pay such warrants? If not, is he liable on his bond for so doing?

The treasurer of a school board is only authorized to pay a warrant of the board out of the money in the particular fund on which the warrant is drawn. The fact

that there may be money on hand in other funds is immaterial. Undoubtedly the treasurer of a school board would be liable on his bond for the payment of a warrant drawn on one particular fund out of moneys in another fund not designated in the warrant.

(5) Can the school funds be paid out by any other method than by issuing a school warrant, as by payment by bank check, cash, etc? If not, is the treasurer paying other than by warrant, liable on his official bond for such conduct?

Section 9312 prescribes the form of the warrants to be used in drawing on teachers' fund, incidental fund and building fund, and the section provides that,

"No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund* * * *."

We take it that the proper form for a school district warrant to take is the form prescribed by the statute. Therefore, the payment out of school funds by means of bank checks, or cash, and without a warrant therefor, is not authorized. As to whether the treasurer would be liable on his official bond for paying out money on instruments other than a warrant or by cash, might, in some instances involve a question of fact and equity, such as the indebtedness of the district having been discharged by the payment of such instrument and therefore the district having received the benefit therefrom, so that we can not answer your question in general terms.

See, Sparks v. Jasper Co. 213 Mo. 218; Missouri Township et al. v. Farmers Bank of Forest Green 42 S.W.(2nd) 353.

(6) Is it mandatory that all delinquent tax collections for school districts (except cities of 75,000 population or over) be credited to the particular fund for the particular year for which

they were originally levied, as indicated in the estimate before the county clerk for that year?

Delinquent tax collections for school districts should be credited to the particular fund for the particular year for which they were originally levied.

(7) Is the school board of any district obligated to issue warrants for unpaid bills incurred during the particular school year when delinquent taxes collected for that particular year have been received by the treasurer, (limited, of course, to the extent of the delinquent taxes collected and credited to the respective funds)?

The school board of a district is obligated to issue warrants, for unpaid bills incurred during the particular school year, when delinquent taxes collected for that particular year have been received by the treasurer of the district. We are leaving out of mind any question of priority of rights between warrant holders.

(8) In cases where school boards have issued warrants within their estimated receipts for particular funds, but money is not immediately available, is the district treasurer obligated to honor these warrants when money becomes available from delinquent taxes, limited, of course, to the extent of the delinquent taxes collected and credited to the respective funds?

When a school board has issued warrants within its estimated receipts for particular funds and thereafter money becomes available from delinquent taxes in such particular funds, then such warrants are entitled to be honored

drawn on such respective particular funds. Again, we are not considering any question of priority as between warrants that may have been drawn on any fund.

(9) Has the school board in any district the legal right to use delinquent tax collections for current expenses when the district still has outstanding obligations for the previous year or years in which the taxes collected originally were levied?

Your question number (9) is a substantial repetition of your question number (6). Delinquent tax collections should be credited to the particular funds for which they were originally levied and can not lawfully be used for the payment of the current expenses of the district.

(10) Under the provisions of Section 9555 (which applies to cities of 75,000 population or over) is it mandatory that all delinquent taxes shall be credited to the teachers' funds in such districts, disregarding the fund for which the taxes were originally levied as indicated in the boards original estimate to the county clerk?

Section 9555 has heretofore been set out in full. Section 9233 provides that,

"All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected* * * * *."

Section 9214, applicable to all classes of schools, provides that,

> "The board of directors of each district * * * * *"
>
> shall "forward to the county clerk an estimate of the amount of funds necessary to sustain the school of their district for the time required by law* * * stating clearly the amount deemed necessary for each fund and the rate required to raise said amount."

We have heretofore noted the different funds that are to be set up on the books of a district. Section 9285, relating to schools of all classes, provides:

> "The collector shall, at the time of returning the land delinquent list for state and county taxes, return therewith all land school taxes herein provided for which shall remain unpaid, and when so returned, the same shall be a lien on such real estate, and be collected in the same manner that other delinquent taxes on land are collected; and when so collected shall be paid over to the county treasurer as other school taxes."

The last named section makes no distinction between delinquent and current taxes,so far as the duties of the collector are concerned, in making remittance to the respective treasurers.

Section 9950 Laws of Missouri 1933 page 427, authorizing county courts to compromise back taxes, contains the following proviso,

> "****** in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land

> or town lot, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot."

Taxes are to be collected and paid into the respective funds for the purposes for which such taxes were levied. The fact that the taxes are not paid when they become due does not mean that they lose their identity as taxes nor that the proceeds thereof, when paid, do not follow the channels provided for when such taxes were levied. While there is some confusion in the language of Section 9555 we are of the opinion that back taxes are to be collected and distributed to the particular funds for payment of which they were assessed and levied, and that taking the statutory law of the state as a whole, that is the meaning of Section 9555.

(11) In any event, can a school board authorize their treasurer to set aside money, from their regular current operating money into a fund which has no statutory recognition which they name "reserve" which is not intended to support any particular item or fund, when the result of such action on the part of the board operates to eliminate the payment of the salary of the teachers' contract and only tends to bring payment of salary under teachers' contract to a minimum, by reason of a stipulation in said contract

> that requires the teacher to take a reduced salary when operatin money for fiscal school year is depleted. In other words can a school board juggle current operating money into non-statutory funds so that said money loses its identity as operation money, and requires teachers to take their pay on the contract contingency that there is no balance in the operating fund.

A school board has no power to authorize its treasurer to set aside money into any fund other than the funds provided for by statute, whether such money comes from the regular current operating moneys or otherwise. We are not assuming that any school board has or will "juggle" any of the funds of the district. School boards perform a gratuitous service and often under difficult and embarrassing circumstances. The mistakes made ordinarily are honest mistakes, but even good faith will not excuse school boards from following the plain mandates of the statutes.

Very truly yours,

GILBERT LAMB
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC

CIRCUIT CLERK AND EX OFFICIO RECORDER OF DEEDS:)Circuit Clerk who is ex officio)recorder of deeds should use the seal of the Circuit Court in all cases in which a seal is required.

March 11, 1935.



Hon. J. Legerwood,
Deputy Circuit Clerk
Clinton County
Plattsburg, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 25, 1935, requesting an opinion of this office as follows:

> "We would like very much to have your opinion as to the seal we should use in the office of Recorder of Deeds. At the present time we are using the seal of the Circuit Court in both offices, and some question has come up in regard to whether or not that is the proper seal to use or whether we should have new seal made for the office of Recorder, showing the office as Ex Officio Recorder of Deeds.
>
> We should appreciate having your advice in this matter at the earliest possible date, for if we are using the wrong seal, we would like to correct it as soon as possible."

We believe that Section 11532 Revised Statutes of Missouri, 1929, answers your question. Said section reads as follows:

> "When the clerk of the circuit court is ex officio recorder of the county, he shall use the seal of said court in all cases in which his official seal is to be affixed."

The above section clearly requires a clerk of the Circuit Court who is ex officio recorder to use a seal of the Circuit Court in all cases in which his official seal is to be affixed.

It is therefore the opinion of this office that a Circuit Clerk who is also ex officio recorder of deeds should in all instances in which his official seal is required use the seal of the Circuit Court.

Yours very truly,

JAMES L. HORNBOSTEL,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JLH:JET/MM

GARNISHMENT - Officers of the United States having money in their hands to which certain individuals are entitled are not liable to the creditors of those individuals in the process of garnishment.

2-20

February 14, 1935.

FILED
54

Hon. W. L. Lindhorst,
Member House of Representatives,
State Capitol Building,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to whether or not officers of the United States having money in their hands to which certain individuals are entitled are liable to the creditors of those individuals in the process of garnishment.

In Vol. 12 R.C.L. at page 841 the following rule is stated with respect to this question:

> "Officers of the United States and of the different states, having money in their hands to which certain individuals are entitled, are not liable to the creditors of those individuals in the process of garnishment. This rule, as far as it is applicable to national and state officers, has never been seriously questioned, having been established at an early date in the history of our government, and having been sustained ever since by the adjudications of both the national and the state courts. One reason for the rule is that the process of garnishment is substantially the prosecution of an action by the defendant in the name of the plaintiff, against the garnishee; or, more accurately, the proceeding must be regarded as a civil suit, and not a process of execution to enforce a judgment. In this proceeding the parties have their day in court; an issue of fact may be tried by a jury, evidence adduced, judgment rendered, costs adjudged and

> execution issued on the judgment; and as a state is not liable, by virtue of its sovereignty, to be sued in its own courts, except by express authorization by the legislature, to subject its officers to garnishment would be to allow that to be accomplished indirectly that could not be attained in a direct suit. Another reason is the fact that moneys sought to be garnished, as long as they remain in the hands of the disbursing officers of the government, belong to the latter, although the defendant in garnishment may be entitled to a specific portion thereof; consequently it cannot, in a legal sense, be considered a portion of his effects, and, therefore, is not liable to garnishment, under process issued for the purpose of levying upon and subjecting such individual's property to the satisfaction of a judgment recovered against him."

This general rule on this proposition is stated in Vol. 28, C. J. at page 64:

> "In the absence of express provisions to the contrary, no sovereign government will be deemed to be included in the provisions of statutes prescribing who may be made garnishee. Accordingly, as a general rule, garnishment process can reach neither the federal government, nor a state, nor a territory. This exemption is sustained also by consideration of public policy."

In the case of Pruitt v. Armstrong, 56 Ala. 306, it was held that a public officer, who has public moneys in his custody for disbursement in satisfaction of demands of government, cannot be summoned as the garnishee of one having a legal right to demand and receive from him such moneys. Bricknell, C. J., speaking for the court, said:

> "The exemption does not rest only on the ground that the technical relation of debtor and creditor is not existing between the government and the person who may be entitled to receive the money, which relation is the foundation

> of the process of garnishment, or kindred legal process, for the subjection of choses in action to the payment of debts. It is founded on considerations of public policy--the embarrassments in the administration of government, which must result, if, by judicial process, the public moneys could be diverted from the specific purposes to which by law they are appropriated. Between the government and its officers and agents, or its creditors, if those having claims on it are thus termed, individuals cannot be permitted to intervene, suspending the disbursement of the public revenue and deferring the adjustment. **** of the accounts of public officers, until their judicial controversies may be terminated. The law determines the character of the voucher the disbursing officer must produce, to relieve himself from liability for the money committed to his custody. The officer cannot be compelled to receive any other, nor can the officer to whom, and with whom he must account, receive from him any other evidence of the proper and legal disbursement of the public money."

To the same effect, see Bull v. Zeigler, 54 S. W. (2d) 283.

This question was thoroughly settled by the Supreme Court of the United States in the case of Buchanan v. Alexander, 11 L. Ed. 857, wherein the Court said:

> "Six writs of attachment were issued by a justice of the peace of the above County of Norfolk, by boarding-house keepers, against certain seamen of the frigate Constitution, which had just returned from a cruise. The writs were laid on moneys in the hands of the purser, the plaintiff in error, due to the seamen for wages. The money was afterwards paid to the seamen by the purser, in disregard of the attachments, by order of the Secretary of the Navy.
>
> The purser admitted before the justice that the several sums attached were in his hands due to the seamen, but contended he was not amenable to the process. The justice entered judgments

against him on the attachments. The cases were appealed to the Superior Court of the county, which affirmed the judgments of the justice. And that being the highest court of the State which can exercise jurisdiction in the cases, and its judgments being against a right and authority set up under a law of the United States, may be revised in this court by a writ of error.

The important question is, whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service.

The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seamen.

It is not doubted that cases may have arisen in which the government, as a matter of policy or accommodation, may have aided a creditor of one who received money for public services; but this cannot have been under any supposed legal liability, as no such liability attaches to the government, or to its disbursing officers.

We think the question in this case is clear of doubt, and requires no further illustration.

The judgments are reversed at the costs of the defendants, and the causes are remanded to the State Court, with instructions to dismiss the attachments at the cost of the appellees in that court."

CONCLUSION

In view of the foregoing, it is the opinion of this department that officers of the United States having money in their hands to which certain individuals are entitled, are not liable to the creditors of those individuals in the process of garnishment.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

Approved:

ROY McKITTRICK,
Attorney General

JWH:AH



RECORDER OF DEEDS and CIRCUIT CLERKS

Recorder of deeds shall receive the sum of 50¢ for affixing seal and certificate in every instance. Copies of petitions furnished by the Circuit Clerk shall entitle said Circuit Clerk to his fees despite the fact copies are furnished by plaintiff.

11-15

November 15, 1935

FILED 54

Honorable A. H. Lock
Circuit Clerk and Recorder
Osage County
Linn, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"Kindly inform us of the proper charge for the Circuit Clerk and Recorder of Osage County, Missouri, to make for certified copies of appointment of Special Deputy Finance Commissioner, which appointment is recorded in the County, when 10 such certified copies are ordered at one time and are prepared by carbon copy with certificate and seal on each one, the clerk preparing the copies and executing the certificate and attaching seal.

"Also the proper charge for certified copies of petition in civil suits when the plaintiff at the time of filing the suit furnishes the clerk with a carbon copy of the petition and the clerk merely compares same, executes certificate and affixes seal.

"Also in cases where a sentence has been imposed in a criminal case and parole granted and later parole terminated and defendant sent to penitentiary, how should the clerk go about collecting the fees incident to the revoking of the parole and who is liable for the payment of such fees.

"Also when certified copies of pleading or judgment are requested by the State Auditor for use in checking fee bills, who should pay for these certified copies and how collected.

"These matters are before us at this time and we will appreciate your assistance as promptly as possible."

Your attention is directed to Section 11804, R. S. Mo. 1929, relating to fees of recorders, which provides in part as follows:

"***** For every certificate and seal..... .50."

From the wording of the above part of the statute the Recorder of Deeds shall receive for his services, the sum of fifty cents (50¢) for affixing certificate and seal in every instance.

In the instant case, the Circuit Clerk, when acting as Recorder of Deeds would receive Five Dollars ($5.00) for placing the certificate and seal upon ten copies of the appointment

Your further attention is directed to Section 11785, R. S. Mo. 1929, relating to fees of Clerks of Circuit Court, which provides in part as follows:

"***** For copies of records and papers, for every hundred words.. .10

"***** For certificate and seal... .50"

In light of the above section of the statute, it is our opinion that the Circuit Clerk is entitled to fees for copies of petitions with certificate and seal despite the fact the copies were furnished by plaintiff, as above set forth in Section 11785, supra, (State vs. Board of Police Commissioners, 108 Mo. App. 98).

In consideration of the third paragraph of your letter, you are directed to Section 11787, R. S. Mo. 1929, relating to fees of clerks of criminal courts. It provides in part as follows:

"***** For every order in a case not herein provided for..... .15

"No fee shall be charged by any clerk in any criminal case against the state or any county, unless it is expressly allowed in this section: *****"

In the case of State vs. Board, the Court, at page 104, said:

"***** an officer of the court claiming fees for services must be able to put his finger on some statute expressly allowing the fee he claims, and if he is unable to do so he is not entitled to the fees. ******"

In the case of State ex rel. v. Brown, 146 Mo. loc. cit. 406, the Court in discussing the matter of fees due a public officer said:

"The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it.

> When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services."

We are of the opinion that since the statute does not expressly provide any fee respecting your third inquiry, that you are limited to the amount provided in making an order showing a revocation of the parole wherein the defendant is committed to the penitentiary, namely fifteen cents (15¢).

We conclude, in answer to your fourth inquiry in light of the above, that inasmuch as there is no provision for the payments of fees to the Circuit Clerk by the State Auditor for furnishing certified copies of pleadings or judgments that the Circuit Clerk is not entitled to any fees.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

RCS:afj

OLD AGE PENSIONS: There is no legal duty on child to support parents under clause in Section 6 of Act "has no child or other person responsible under the law of this state and found by the state board or by the county board able to support him."

June 24, 1935.

FILED
56

Honorable Ray Mabee,
Senator 4th District,
Unionville, Missouri.

Dear Senator:

This department is in receipt of your letter of June 18 wherein you make an inquiry regarding a situation which has arisen under Senate Bill No. 7, same being the Old Age Assistance Act. Your letter is as follows:

> "You will note that on page 3 and 4 of C.S.S.B. 7, which is the Old Age Assistance Act of the 58th General Assembly, there appears the following language:
>
> > Lines 14, 15 and 16: 'and has no child or other person responsible under the law of this state, and found by the State Board or by the County Board able to support him.'
>
> "I am at loss to know just how to interpret these lines. I do not recall any law which compels a child to support a parent.
>
> "We have several cases here of an aged mother whose sole means of support has been a son who is on relief, and scarcely able to support himself. If the law contemplates the boy spending all his earnings keeping the parent, it appears that the law will fall short of accomplishing its aim. I have in mind a case of two very old people who have an unmarried son doing some work for the State Highway. If the burden of keeping

> the parents is to continue on this boy, it is apparent that he will never be able to get ahead and establish a home for himself.
>
> "It seems to me that if the interpretation of this language is to be left to these various county boards, we are going to run into difficulty; several deserving will go without, while several undeserving will be placed on the rolls. I would appreciate your thought about this, in order that I might advise our local board as well as county board."

Knowing that you are familiar with the provisions of the Act, we shall confine this opinion to the one question contained in your letter, i.e., the obligation of a child to support its parents.

Section 6 of the Old Age Assistance Act provides as follows:

> "Old age assistance may be granted only to an applicant who has attained the age of 70 years or upwards, is incapacitated from earning a livelihood and is without adequate means of support, is a citizen of the United States, has resided in the State for 5 years or more within the 9 years immediately preceding application for assistance and for the one year next preceding the date of application for assistance (absence in the service of the State or of the United States shall not be deemed to interrupt residence in the state if domicile be not acquired outside of the state), is not at the date of making application or of receiving aid an inmate of any prison, jail, insane asylum, or any other public reform or correctional institution, and has no child or other person responsible under the law of this state and found by the

> state board or by the county board able to support him."

Let us assume, for the sake of argument, that an applicant for an old age pension possesses all the qualifications entitling him to the same with the exception of "has no child or other person responsible under the law of this state and found by the state board or the county board able to support him." What, if any, legal effect does this have towards preventing such an applicant from receiving the pension?

We cannot discern what was in the minds of the legislators when this provision was placed in the Act unless it was that the Legislature was intending to invoke the moral law that children of aged parents who are without support, should, due to the love and affection justly due parents, support them rather than deny the moral responsibility and permit them to become more or less state charges. However, disregarding the moral feature, we are confronted with this question: Can a son or daughter be compelled legally to support his or her parents? And this is the interpretation we place on the words "no child or other person responsible under the law of this state".

In the case of McCullough v. Powell Lumber Company, 205 Mo. App. 15, the Court in passing on this question, said (l.c. 26-27):

> "Plaintiff alleges that the deceased for a long time prior to his death contributed his earning to his mother, father, brothers and sisters, and that such contribution was necessary for their support and maintenance. The test in view of the facts of the instant case is: Were the persons named in the petition as the beneficiaries, so far as concerns the question of damages, pecuniarily injured by the death of the deceased, or would they have pecuniarily benefited by the continuing life of deceased? If these beneficiaries were pecuniarily injured by the death of the deceased, then plaintiff may maintain this cause of action, otherwise he cannot. Recovery will not be sustained for the death of an adult where there is no evidence that the beneficiary was receiving any pecuniary benefits

from the deceased at the time of his death. Dependency as used in cases falling under our damage act means dependency in fact, and not necessarily a strict legal dependency making the deceased legally liable to furnish support. (6 Thompson on Negligence, sec. 7049; Bowerman v. Lackawanna Mining Company, 98 Mo. App. 308, 71 S.W. 1062). The fact of pecuniary benefit does not require definite and exact proof, but wherever there exists a reasonable probability of pecuniary benefit to one from the continuing life of another, however, arising, the untimely extinction of that life raises a presumption of pecuniary injury. (6 Thompson on Negligence, sec. 7050; McKay v. New England Dredging Company, 43 Atl. (Mo.) 29; Baltimore Railroad Company v. State, 63 Md. 135).

"It is held in Barth v. Railway Company, 142 Mo. l.c. 559, 44 S.W. 778, that the phrase 'necessary injury' in our statute is broad enough to include any damages which may be estimated according to a pecuniary standard whether present, prospective or proximate. We realize that the facts in the case at bar, relative to damages that plaintiff may recover, render uncertain and somewhat vague the measure by which to determine the amount of such recovery. This is not like a case where a parent is suing for the death of a minor child, or husband for wife, or the wife or the husband, where it is always possible to have some definite standard by which damages may be estimated. The deceased was under no legal obligation to support his father and mother, brothers and sisters, and therefore neither of them had any legal claim upon him for support, and his contribution to their support and maintenance was at the time of his death wholly voluntary. But the fact is, according to the record, that deceased had been contributing to their support and was

> so doing at the time of his death, and as held in Bowerman v. Lackawanna, supra, it is not necessary that there be a legal dependency making the deceased liable to furnish support for the beneficiaries in order to establish the pecuniary injury. In discussing the question of pecuniary injury or damages in a case under the damage act, Ellison, J., for the Kansas City Court of Appeals in Hickman v. Missouri Pacific Railway Company, 22 Mo. App. l.c. 350, says: 'If a child, over the age of twenty-one years at the time he may be killed by negligence, is actually, at that time, engaged in the service of his parents as a member of the family, a different question would be presented. It was said in North Pennsylvania Railway Company v. Kirk, 90 Pa. St. 15, that "if there be reasonable expectation of pecuniary advantage from a person bearing the family relation, the destruction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action." The son in that case was twenty-eight years old and was, at the time of his injury, engaged in the service of his father, without compensation. Such question, however, is not presented in the present case.'"

This question is again discussed in the case of Falls v. Jones, 107 Mo. App. 357, l.c. 361:

> "The common rule derivable from the authorities in general and recognized by the decisions of this State, may be stated to be that when a parent resides in the household or family of a child, the presumption prevails that no payment is expected for services rendered or support by such child. This, however, is not a conclusive inference, but may be overcome by evidence of an express agreement to pay,

> or by implication from such facts and circumstances as satisfactorily establish, that the parent expected to pay and the child to charge the reasonable value of such services or maintenance. In absence of such agreement, expressly had or reasonably implied from the attending facts and conditions, the legal inference arises that the services performed, or the maintenance afforded, were gratuitous and in natural response to the promptings of filial affection and duty. Lawrence v. Bailey, 84 Mo. App. 107; Earhart, Admr., v. Dietrick, 118 Mo. l.c. 431; Kostuba v. Mitler, 137 Mo. l.c. 175; Penter v. Roberts, 51 Mo. App. 222; Louder v. Hart, 52 Mo. App. 376. There was evidence, the weight of which was for the jury, from which an obligation to reimburse the claimant for the support of the deceased might be inferred, sufficient to sustain the verdict in that regard."

At common law a child was not bound to support its parents and no promise on the part of a child to support or maintain its parents was implied from the mere existence of the relation. This remains the law of every state except wherein statutes have been enacted imposing on children the duty to support indigent parents.

We are loathe to convict the Legislature of including in the Act a vain, useless and idle provision and one which would have no force or effect; therefore, we shall pursue the question bearing in mind that there may be exceptions to the general rule that children are not liable for the support of their parents.

Section 5 of the Act is as follows:

> "The amount of assistance shall be fixed with due regard to the conditions in each case, but in no case shall it be an amount which, when added to the income of the applicant from all other sources, shall exceed a total of $30.00 per month. In calculating the income of the applicant, earnings of the applicant which do not exceed $150.00 in any calendar year shall not be considered."

By the terms of Section 10 it is the duty of the County Board to make investigation of the facts surrounding each application. We are therefore of the opinion that the qualification or disqualification in question will be considered by the county board in making its recommendations.

We shall next consider what, if any, relation there is, insofar as support of parents is concerned, between minor children and their parents. Section 375, R.S. Mo. 1929 is as follows:

> "In all cases not otherwise provided for by law, the father and mother, with equal powers, rights and duties, while living, and in case of the death of either parent, the survivor, or when there shall be no lawful father, then the mother, if living, shall be the natural guardian and curator of their children, and have the custody and care of their persons, education and estates; and when such estate is not derived from the parents acting as guardian and curator, such parents shall give security and account as other guardians and curators, and if such parents shall refuse or neglect to give such bond the probate court, or judge in vacation, shall appoint some competent person as curator to take charge of and manage such property. The parents of such minor child or children acting as such natural guardian and curator shall be entitled to receive and collect the earnings of such minors, until they reach their majority, and be liable for their support to the extent of such earnings: Provided, that this law shall not be so construed as to exempt the father of such minors from liability for the support of his children."

Another section bearing on the earnings from services of minor children is Section 1362, R.S. Mo. 1929, which provides:

> "The father and mother living apart are entitled to an adjudication of the circuit court as to their powers, rights and duties in respect to the custody and control and the services and earnings and management of the property of their unmarried minor children without any preference as between the said father and mother, and neither the father nor the mother has any right paramount to that of the other in respect to the custody and control or the services and earnings or of the management of the property of their said unmarried minor children, pending such adjudication the father or mother who actually has the custody and control of said unmarried minor children shall have the sole right to the custody and control and to the services and earnings and to the management of the property of said unmarried minor children."

A further section relating to this question is Section 2993, R.S. Mo. 1929, which provides:

> "Such married women, during the period her husband shall fail to provide for her support, as stated in section 2989, shall be entitled to the proceeds of the earnings of her minor children; and the same shall be under her sole control and shall not be liable in any manner for his debts."

CONCLUSION

It is the opinion of this department that there is no legal obligation on a son or daughter over the age of twenty-one years to support his or her parents, there being no statute in Missouri which imposes such an obligation. However, a son or daughter may become obligated by contract or agreement to support his or her parents.

In the case of minor children supporting their parents, while the statutes referred to here entitle the parents to the earnings of minor children, yet it is not mandatory on parents to exercise their rights by claiming the earnings of their children.

The County Old Age Assistance Board appears to have discretionary powers in making recommendations for pensions. Therefore, we are of the opinion that where parents are entitled to the earnings of their minor children, or where parents are the natural guardians and curators of children who have property, and the parents derive their living from the property of their children, such elements may be taken into consideration by the County Old Age Assistance Board in determining whether or not old age persons may secure the benefits of the Act.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

CORPORATIONS - Stockholders may, by proxy, waive notice of meeting.

8-16

August 12, 1935

FILED
56

Honorable Russell Maloney
Corporation Commissioner
Secretary of State's Office
Jefferson City, Missouri

Dear Sir:

We have your request of August 8, 1935 for an opinion, which is as follows:

"Enclosed find amendment forwarded this office for the purpose of extending corporate existence and purporting to be drawn in accordance with the provisions of Section 1, page 297, Laws of Missouri, 1931, pertaining to the method of extending corporate existence.

"Section 1 provides in part as follows: 'In case such amendment in duplicate is signed, acknowledged and sworn to by all the stockholders, the notice of such meeting may be waived.'

"The within amendment purports to be signed by seven of the stock holders and one W. Palmer Clarkson, a stockholder, purporting to be a proxy representative of the remaining shareholders.

"Query: Does the acknowledgement and affidavit of the proxy holder

comply with reference to the above quoted provision of Section 1?

"The opinion of your department in the above will be greatly appreciated."

The sole and only question raised by this request is whether stockholders can waive the notice of a meeting at which they were represented by proxy. The use of proxies for absent stockholders has long been recognized as a proper means of stockholders voting at any meeting of a corporation. Stockholders who so participate at a meeting by proxy would be estopped to later challenge the validity of that meeting. Such doctrine has been specifically laid down in this state. In Re: Mathiason Mfg. Co. (1907) 122 Mo. App. 437, l.c. 444, in the following language:

> "The section further provides that 'at least two weeks' notice of the election shall be published in some newspaper printed at least once a week, in the city or county where the corporation is located,' etc. No such notice was published of the election. But as all the stockholders were present at the meeting, in person or by proxy, they are in no position to take advantage of the irregularity in failing to publish the notice of the meeting. (Jones v. Milton, and Rushville Turnpike Co., 7 Ind. l.c. 548; Columbia Nat. Bank v. Mathews, 85 Fed. l.c. 941; Kenton Furnace Railroad & Mfg. Co. v. McAlpin, 5 Fed. 737; State ex rel. v. Cook, 178 Mo. 189, 77 S. W. 559.)"

It will thus appear that if each of the stockholders had actual notice of the meeting and

were present, they would be estopped to raise any question as to the failure to give the statutory notice prior to the convening of the corporation stockholders. In this case, stockholders in person and by proxy at the meeting would have the same authority to waive a notice of meeting.

It is, therefore, the opinion of this office that all the stockholders present in person and by proxy at a meeting may waive the notice of such meeting.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

NON-PROFIT ASSOCIATION: Entitled to purchase or manufacture and furnish electric current on non-profit cooperative plan.

10-29

October 28, 1935.

FILED
56

Honorable Russell Maloney,
Corporation Commissioner,
Capitol Building,
Jefferson City, Missouri.

Dear Sir:

We are in receipt of your letter of October 10th, together with Articles of Association, wherein you state as follows:

> "We have inquiry as to whether or not a corporation organized under Article 24, Chapter 87, Revised Statutes of Missouri, 1929, can incorporate to use electricity for lighting and power for the homes and farms of its members and as a result take advantage of The Federal Electrification Program.
>
> "We herewith submit one of the proposals submitted to this department. You will notice that the seventh clause of the Articles submitted follows the Statute, Section 12678, with the addition of 'Farming' in the first line, of Sub-section (a), and adding 'or in manufacturing, buying and furnishing electric energy for power and light to operate the activities, machinery and equipment of its members' after the word 'equipment' in the seventh line of said Sub-section (a), and by adding the words 'including the building, owning and operating electric power lines for its members or itself. The purchase or manufacture of electric current, distribution of electric current to and for its members, for furnishing power and

light for the purpose of operating their farm machinery and equipment, lighting their farm houses and homes and for all other necessary activities and conveniences in the operation of a farm and farm home in a modern, scientific and up to date manner' after the word 'members' in the fifth line of Sub-section (f) of said Section 12678.

"The proponents of the proposed organization argue that they always have had, by implication, under the present law and all former Statutes the right to use the ox and the horse for power and the pine knot and the tallow dip for lights, and later the gasoline and oils for power and the coal oil for lights. They claim now that under the present law, by implication, they are entitled to the use of all incidental means of power and light that is necessary to conduct a modern and up to date farm, especially when the article of association specifically mention such powers and rights.

"All of this, especially in the view of the provisions of Sub-section (f) of said Section 12678 which provides 'and in addition to exercise and possess all powers, rights and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged or any other rights, powers and privileges granted by the laws of this state to the ordinary corporations, except such as are inconsistent with the express provisions of this article', which seems to take care of all implied and incidental powers and purposes.

"We are cited to the case of State v. Long-Bell Lumber Co., 12 S.W. (2) 64 as a precedent and sample of the holding of the courts of this state in their liberal construction of incidental and implied powers.

"We respectfully submit these articles and ask that, if and when they are properly executed the corporation will be entitled to engage in all of the activities therein provided and especially those of purchasing or manufacturing and furnishing electric current for its use and the use of its members on the non-profit cooperative plan."

Sub-sections (a) and (f) of Section 12678, R. S. Mo. 1929:	Proposed Non-profit Association under Section 12678, R. S. Mo. 1929:
"(a) To engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any agricultural products produced or delivered to it by its members; or the manufacturing or marketing of the by-products thereof; or any activity in connection with the purchase, hiring or use by its members of supplies, machinery or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No association, however, shall handle the agricultural products of any non-member.	"(a) To engage in <u>farming</u> and in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any agricultural products produced or delivered to it by its members; or the manufacturing or marketing of the by-products thereof; or in any activity in connection with the purchase, hiring or use by its members of supplies, machinery or equipment; <u>or in manufacturing, buying and furnishing electric energy for power and light to operate the activities, machinery and equipment of its members</u>; or in the financing of any such activities; or in any one or more of the activities herein specified.
"(f) To do each and everything necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated;	"(f) To do each and every thing necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated;

or conducive to or expedient for the interest or benefit of the association; to contract accordingly; and in addition to exercise and possess all powers rights and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged or any other rights, powers and privileges granted by the laws of this state to ordinary corporations, except such as are inconsistent with the express provisions of this article."

or conducive to or expedient for the interest or benefit of the association or its members including the building, owning and operating electric power lines for its members or itself, the purchase or manufacture of electric current, distribution of electric current to and for its members for furnishing power and light for the purpose of operating their farm machinery and equipment, lighting their farm houses and homes and for all other necessary activities and conveniences in the operation of a farm and farm home in a modern, scientific and up to date manner; to contract accordingly, and in addition to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which this association is organized or to the activities in which it is engaged, or in any other rights, powers and privileges granted by the laws of this state to ordinary corporations."

The question presented is whether a non-profit cooperative association organized under Article 24, Chapter 87, of the Revised Statutes of Missouri, 1929, and having the powers granted it by Section 12678, supra, is entitled to purchase or manufacture and furnish electric current for its use and the use of its members.

In the case of Steinway v. Steinway & Sons, 40 N. Y. S. 718, l. c. 720, the court in holding that it was not ultra vires for a manufacturing corporation to purchase a large tract of land for the purpose of erecting thereon factories and residences for its employees, and to contribute towards the establishment there of a church, a school, a free library, and a free bath for its employees, said:

> "If that act is one which is lawful in itself, and not otherwise prohibited, is done for the purpose of serving corporate ends, and is reasonably tributary to the promotion of those ends, in a substantial, and not in a remote and fanciful, sense, it may be fairly considered within charter powers. The field of corporate action in respect to the exercise of incidental powers is thus, I think, an expanding one. As industrial conditions change, business methods must change with them, and acts become permissible which at an earlier period would not have been considered to be within corporate power."

The use of electricity for lighting and power for the homes and farms of members of the association is serving and promoting corporate ends and cannot by any stretch of the imagination be said to be remote and fanciful. Electricity is just as essential today in the operation of a modern farm as the ox and the horse were in a former day.

In the case of People v. Orange County Farmers' and Merchants' Association, 204 Pac. 873, l. c. 874, a non-profit association was organized for the purposes, as stated in its articles of association, "to establish a farmers', fruit growers', merchants', and business men's improvement, information, and publicity bureau and society for the benefit and mutual improvement of the members of the association, and to facilitate the exchange of information, advices, ideas, crops, weather and financial reports, and other communication among its members." The court in holding that a telephone system for the convenience of its members only was a mere incident to the carrying into effect of the purposes of the association, and that it did not itself become a telephone corporation, said:

> "As a mere incident to the carrying into effect of such purposes the defendant has undertaken to install a telephone service for the use of its members only and not for general public use or service * * *. It could not be said that by the installation of such a system as an incident to the diversified

> business, the owners of the establishment, whether corporate or not, had gone into the telephone business. * * *."

The Missouri Supreme Court in the case of State ex inf. Gentry v. Long-Bell Lumber Co., 12 S. W. (2d) 64, held that a corporation created for the business of lumber manufacturing under the statute providing for the organization of manufacturing and business corporations, had the implied power, among other things, to purchase and develop a town site and provide living facilities suitable for the needs of its employees by building and selling or renting homes, to build and operate a hotel near the site of operations, to spend money in advertising, and to publish a newspaper. The court in discussing the implied powers of a corporation states as follows:

> "'It is also well at this point to consider the rule applicable to implied powers. Little difficulty will be encountered in ascertaining whether a given activity is within the express charter powers, once the language of the charter is known, but a much more difficult problem is presented when it becomes necessary to determine whether a given activity is within the implied corporate powers. The applicable rule appears to be well settled and was tersely and accurately stated by Walker, J., speaking for the court in banc in the case of State ex inf. v. Missouri Athletic Club et al., 261 Mo. 576, loc. cit. 599, 170 S. W. 904, 909 (L.R.A. 1915C, 876, Ann. Cas. 1916D, 951), as follows:
>
> "'"(Implied powers) are defined to be those possessed by a corporation not indispensably necessary to carry into effect others expressly granted, and comprise all that are appropriate, convenient and suitable for that purpose, including as an incidental right, a reasonable choice of the means to be employed in putting into practical effect this class of powers."'
>
> "'The same was again stated in the fairly recent case of State ex rel. v. Bank, 297 Mo. 397, 249 S. W. 619, loc. cit. 622,

30 A. L. R. 918:

"'Stated another way, "a power is implied when reasonably necessary to enable the corporation to accomplish the objects of its creation," provided always, of course, that those objects are such as are recognized and permitted by the charter granting power. Furthermore, any particular act, to be justified under implied power, must be "directly and immediately appropriate to the execution of the specific powers granted by the charter and not bear a slight or remote relation to them." 2 Fletcher Cyc. Corp. pp. 1768 and 1770, pars. 793 and 795.

"'While, as above stated, little difficulty is met in ascertaining the rule, a difficult problem often presents itself in applying the rule. In this behalf it has been very appropriately said: "The rules laid down above as to implied powers are well settled and are, at the present day, not even questioned by courts or writers. The difficulty comes in applying the rules. It is easy to say that a power is implied if it is 'reasonably necessary' to the exercise of express powers, but there is no test to decide whether a particular act, done by a particular corporation, under particular circumstances, is 'reasonably necessary.' Of course, many acts are clearly on one side of the line or the other. But there are many close to the dividing line, which occasions more or less confusion in the decisions. The result is the rule that whether an act comes within the implied powers of a corporation 'must be determined in each case from all its facts and circumstances.' In an early Massachusetts case Chief Justice Shaw said: 'The extent and limits of these implied duties and powers, in the absence of positive provision in the legislative act by which the power is granted, can only be determined by considering what is reasonable in each case.'

'The authority of a corporation to perform a particular act is always dependent to a very considerable extent upon the facts and circumstances existing at the time when it is proposed to perform the act.'
'Exceptional circumstances or extraordinary conditions may make it necessary to the proper prosecution of the business of a corporation that it shall be accorded implied power to perform acts beyond its express power, and which, except for the prevailing conditions, would be wholly unwarranted.'"
2 Fletcher Cyc. Corp. 1778, par. 802, and many cases therein cited.'"

The Long-Bell Lumber Company case, supra, is in line with the courts of other jurisdictions which are in fair agreement as to the general nature and extent of the implied or incidental powers of a corporation. They all indorse the proposition that a corporation has authority to do what will legitimately tend to effectuate its express purposes and objects; that it may ordinarily do all the things that are convenient, suitable, or necessary to enable it to fully perform the undertaking designated in its charter and which generally and customarily attend the business for which it was granted.

In view of the liberal position taken by the courts as to the general nature and extent of implied and incidental powers of a corporation, and the general recognition of the widespread use of electricity as an absolute necessity to the scientific conduct of modern business and industry, in which farms may be included, together with the broad authority of sub-section (f) of Section 12678, supra, conferring all implied and incidental powers to the purposes for which the association is organized and the activities in which it is engaged, we are of the opinion that if and when the enclosed articles are properly executed, the corporation will be entitled to engage in all of the activities therein provided,

and especially those of purchasing or manufacturing and furnishing electric current for its use and the use of its members on the non-profit cooperative plan.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

WOS:

MW:HR

STATE UNIVERSITY: Professor may not enter into contract in violation of Section 9654, R. S.1929.

11-26

November 26, 1935

FILED 56

Mr. Clair V. Mann
Professor of Engineering Drawing
School of Mines
Rolla, Missouri

Dear Sir:

This Department is in receipt of your letter of November 25, requesting an opinion as to the following state of facts:

> "Please read Section 9654 of Article 20, Chapter 57, of the Revised Statutes for 1929 and advise me whether I, as Professor of Engineering Drawing at Missouri School of Mines, a division of the University of Missouri, can agree to act as supervising and designing engineer, with status like that of Architect, on contract work covering the drilling of a deep well and the repair of certain buildings on the campus of the School of Mines at Rolla."

Section 9654 Revised Statutes Missouri 1929, provides as follows:

> "If any member of the board of curators, president, professor, teacher or other officer or employe of the state university shall be directly or indirectly interested in any contract for furnishing supplies for said university or any of the departments thereof, or in any work to be done upon any of the buildings of said university or repairing of the same, or ornamenting the

> grounds thereof or fencing the same, or if said curators, or any one of them, or the president or any professor, teacher or other officer or employe shall keep for sale or be interested in, directly or indirectly, the sale of any school furniture or apparatus, books, maps, charts or stationery used in said university or any department thereof, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction be fined not less than two hundred dollars or imprisoned in the county jail where said offense is committed not less than three months, or by both such fine and imprisonment."

CONCLUSION

It is clear that it was the intention of the General Assembly of the State of Missouri that no member of the Board of Curators, president, professor, teacher or other officer or employee of the State University should be involved, directly or indirectly, in any contract involving the repairing of the buildings of said university, etc.

In view of this section of our statutes, it is our opinion therefore that you, as Professor of Engineering Drawing of the Missouri School of Mines, may not enter into any contract in the capacity of an architect, or otherwise, relating to the drilling of wells and the

repairing of certain buildings on the campus of said School of Mines.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

COUNTY DEPOSITORY. (1) Amount of bond to be fixed by County Court by method set out in statute - Section 12187, R. S. 1929.
(2) Depository agreement submitted, not approved.

February 26, 1935.

FILED
57

Hon. C. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

This is to acknowledge receipt of your letter of recent date with request for an opinion on matters contained therein; which letter is as follows:

"Morgan County has had disastrous results with County Depository Bonds signed by the directors of Banks, for County Funds. When the bank fails the directors are broke and the Depository Bond is not much good.

Section 12187 provides that instead of personal sureties on bonds the County may take U. S. or State of Missouri bonds. This plan is to be tried now.

The banks that share the County funds as county depositories wants to put up bonds. The only bone of contention is how much worth of bonds, and how shall the bonds be put up as security. The amount of deposit with the different banks varies from time to time. The banks may start out with $15,000.00 then the amounts in time reduced to $2,000.00. When the bank has only $2,000.00 on deposit, the bank does not want to have up as security more than $2,000.00 worth of government bonds.

"Herein is a contract that has been submitted by one of the banks. The bonds that are put up as security are coupon bonds. They are to be held by a correspondent bank in St. Louis, and the county to hold a depository receipt to show that bonds have been pledged to a bailee for the use and benefit of the county. When the deposit shrinks with the depository, then the government bonds are to be reduced proportionately. The county depository will keep the county funds on deposit with correspondent bank. The coupon bonds belong to the county depository but are pledged for the benefit of Morgan County. The interest on the bonds belongs to the county depository.

Section 12187 allows the county court to accept U. S. government bonds, and says the bonds may be '<u>deposited as the county court may direct.</u>'

Is this contract legal, and is the county amply protected by its terms?"

I.

The questions asked in your letter call for the construction of Section 12187, R. S. Mo. 1929, of the County Depository Statutes, and particularly the underscored portion thereof, said section is as follows:

"Within ten days after the selection of depositaries, it shall be the duty of each successful bidder to execute a bond payable to the county, to be approved by the county court and filed in the office of the clerk thereof, with not less than five solvent sureties, who shall own unencumbered real estate in this state of as great value as the amount of said bond, or with a surety or trust company

"authorized by the laws of this state to execute bonds as surety: Provided, that the court may accept in lieu of real estate as security bonds of the United States or of the state of Missouri, which said bonds shall be deposited as the court may direct; the penalty of each depositary's bond to be not less than such proportion of the total annual revenue of said county for the years for which such bond is given as the sum of the part or parts of the funds awarded to such bidder selected respectively bears to the whole number of said parts the amount of the bond to be fixed by the court, and said bond shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon said depositary and for the payment upon presentation of all checks drawn upon said depositary by the proper officers of said county or any township whenever any funds shall be in said depositary, and that all interest will be paid promptly, and that all said funds shall be faithfully kept and accounted for according to law; and for a breach of said bond the county or any school district or township of said county or any person injured may maintain an action in the name of the county, to the use of the complainant."

Your question is, in the event that the designated depositary pledges bonds of the United States instead of real estate security or corporate surety as provided in said section, "how much worth of bonds, and how shall the bonds be put up as security?"

The above proviso of Section 12187 has been construed by the Supreme Court in the case of Huntsville Trust Co. et al., v. Noel et al., 321 Mo. 749, 12 S. W. (2d) 751, and the court held in that case that this section authorized a bank which has been selected as a county depository to give, and the county

court to accept, bonds of the United States, under a pledge agreement conditioned for the faithful performance by the depository of all of its duties and obligations as such; and such selection having been made and such bonds having been deposited, that it constituted a valid pledge and was binding on the bank and the county was authorized to foreclose on the pledge for the breach of the conditions therein contained.

As to the question of the amount of the bonds to be put up as security, we think that the question is answered by the statute itself, which says(Section 12187, supra):

> "The penalty of each depositary's bond to be not less than such proportion of the total annual revenue of said county for the years for which such bond is given as the sum of the part or parts of the funds awarded to such bidder selected respectively bears to the whole number of said parts the amount of the bond to be fixed by the court, *"

And this portion of the section of the statute applies as well where bonds of the United States or of the State of Missouri are deposited as well as where the depository bond is signed by solvent sureties or signed by surety or trust companies authorized to execute bonds as surety, and it provides the method as a guide to the county court to ascertain the amount of the bond to be fixed by the court. The court could not arbitrarily fix the amount of the bonds to be deposited as security but must be governed by the statute giving it the right to fix the amount of the bond. We do not think that the clause "deposited as the court may direct" refers to the amount of the bond, but refers to the conditions and terms of the pledge agreement.

In our opinion the court has the right to enter into a depository pledge agreement whereby the bonds may be deposited in escrow with some disinterested bank or trust company.

II.

We have examined the depository bond contract which you have submitted with your letter and it is our opinion that it does not comply with the provisions of Section 12187, supra, because we think that said depository pledge agreement should have the terms and conditions therein the same as the depository bond, that is, that it "shall be conditioned for the faithful performance of all of the duties and obligations devolving by law upon said depository, and for the payment upon presentation of all checks drawn upon said depository by the proper officers of said county etc."

The depository bond contract submitted permits the foreclosure on the bonds only in the event of failure or closing of the bank and for no other breach of the bond, and it further provides that said bonds shall remain at all times the property of the first party.

For these and other reasons the pledge agreement, in our opinion, does not comply with the provisions of the statute and, therefore, should not be approved by you.

If there is anything further relative to this matter we shall be glad to cooperate with you and render such service as we are able to rander, looking to the preservation and security of the county funds.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

TAXATION: Owner of land sold for taxes entitled to exercise privilege of ownership until deed issues--Senate Bill 94.

5-3

April 8, 1935.

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

Acknowledgment is herewith made of your request for an opinion of this office on the following proposition:

> The facts are these: Mr. R. in November bought 40 acres of land at a delinquent tax sale from the collector under the new tax law. He received a certificate of purchase. The land is an unenclosed uninhabitated 40 acres, with good standing timber on it. Mr. X, the owner does not live on the land, but lives on a farm in Pettis County.
>
> Since the sale Mr. X. proceeds to come over to Morgan County on that 40 acres, and cut off the standing timber at a furious rate. If the timber is cut and removed the 40 acres has no value for anything. The purchaser at the tax sale bought the 40 acres for the timber thereon. The owner of the land who is cutting the timber, states that he is cutting the timber and selling the same, in order to redeem the land from the purchaser at the tax sale.
>
> Now does section 9954a keep the purchaser of the tax sale out of such possession that the real owner of the land can come in for

one year and cut away all the timber and render the land useless, or can the holder of the certificate of purchase stop this waste?"

The proceeding referred to in the foregoing inquiry is authorized by the provisions of Senate Bill 94, page 425, Laws of Missouri 1933. This act consisting of some fifty sections established a new mode of procedure for the collection of delinquent real estate taxes in this state. Section 9953d of that Act provides for the issuance of a certificate of purchase as follows:

"After payment shall have been made the county collector shall give the purchaser a certificate in writing, to be designated as a certificate of purchase, which shall carry a numerical number and which shall describe the land so purchased, each tract or lot separately stated, the total amount of the tax, with penalty, interest and costs, and the yearor years of delinquency for which said lands or lots were sold, separately stated, and the aggregate of all such taxes, penalty, interest and costs, and the sum bid on each tract. If the purchaser bid for any tract or lot of land a sum in excess of the delinquent tax, penalty, interest and costs for which said tract or lot of land was sold, such excess sum shall also be noted in the certificate of purchase, in a separate column to be provided therefor. Such certificate of purchase shall also recite the name and address of the owner or reputed owner if known, and if unknown then the party or parties to whom each tract or lot of land was assessed, together with the address of such party, if known, and shall also have incorporated therein the name and address of the purchaser. Such certificate of purchase shall also contain the true date of the sale and the time when the purchaser will be entitled to a deed for said land, if not redeemed as in this act provided, and the rate of interest that such certificate of purchase shall bear, which rate of interest shall not exceed the sum of ten per cent per annum. Such certificate shall be authenticated by the county collector, who shall record the same in a permanent record book in his office before delivery to the purchaser."

Section 9956a provides for the redemption of property during the two years next ensuing the sale.

Section 9957 provides in part as follows:

> "If no person shall redeem the lands sold for taxes within two years from the sale, at the expiration thereof, and on production of certificate of purchase, and in case the certificate covers only a part of a tract or lot of land, then accompanied with a survey or description of such part, made by the county surveyor, the collector of the county in which the sale of such lands took place shall execute to the purchaser, his heirs or assigns, in the name of the state, a conveyance of the real estate so sold, which shall vest in the grantee an absolute estate in fee simple, subject, however to all claims thereon for unpaid taxes except such unpaid taxes existing at time of the purchase of said lands and the lien for which taxes was inferior to the lien for taxes for which said tract or lot of land was sold." * * *

The purchasers at delinquent tax sales held under the provisions of this act receive what is called a "certificate of purchase." This certificate describes the land purchased, the total amount of the tax, penalties, interest and costs, the total amount of the bid and the rate at which it bears interest. In practical effect this constitutes evidence of having advanced the sums therestated to the State of Missouri, or the governmental subdivision involved, with the understanding that if the sums so advanced are not repaid within two years following the date of advancement the holder of the certificate will be entitled to receive a deed conveying the fee simple title to the land involved in consideration of the payment of the amount set forth in the certificate. Although several sections of this act refer to "the sale" of lands and lots to discharge of the lien of the delinquent and unpaid taxes, yet it is apparent that it is the deed which conveys the title to the purchaser and not the certificate of purchase.

Section 9954a refers specifically to the conditions under which a purchaser may take possession of the land prior to the issuance of a deed. This section reads in part as follows:

> "The purchaser of any tract or lot of land at sale for delinquent taxes, homesteads excepted, shall at any time after one year from the date of sale be entitled to the immediate possession of the premises so purchased during the redemption period provided for in this act, unless sooner redeemed: Provided however, any owner or occupant of any tract or lot of land purchased may retain possession of said premises by making a written assignment of, or agreement to pay, rent certain or estimated to accrue during such redemption period or so much thereof as shall be sufficient to discharge the bid of the purchaser with interest thereon as provided in the certificate of purchase. The purchaser, his heirs or assigns, may enforce his rights under said written assignment or agreement in any manner now authorized or hereafter authorized by law for the collection of delinquent and unpaid rent; * * *"

After the expiration of one year the purchaser of the certificate may, under certain circumstances, take possession of the lands, but possession may be retained by the owner even during the second year if the purchaser of the certificate is assured the payment of the rental value of the land. The purchaser must of course credit any such sums received on the certificate of purchase as this section further provides:

> "Any rent collected by the purchaser, his heirs or assigns, shall operate as a payment upon the amount due the holder of such certificate of purchase, and such amount or amounts, together with the date paid and by whom shall be endorsed as a credit upon said certificate, and which said sums shall be taken into consideration in the redemption of such land, as provided for in this act." * * *

This provision for the possession of the land prior to the date of the obtaining of the fee is but additional security to insure that the holder of the certificate of purchase will receive the sum represented by the certificate with interest. This is not to be taken as any evidence of title as such a construction would be contrary to the requirement that the amount received as rent be credited on the certificate. The Courts of this state have heretofore had similar tax laws before them for consideration. In the case of Kohle vs. Hobson, 215 Mo. 213, the Court considered a certificate of purchase issued by the City of Kansas City under a city tax law provision somewhat similar to the state tax law under consideration. In respect to the nature of the certificate of purchase the Court stated, l. c. 220:

> "The certificate of purchase did not, of course, pass the title, but only entitled the purchaser, or the defendant as his assignee, to a deed passing the title at the expiration of two years from the time of the tax sale, during which time any of the cotenants had the right to redeem the land; and defendant's purchase of the certificate of purchase, as before stated, amounted to nothing more than a redemption from that sale, and inured to the benefit of his wife and her cotenants.* * * **"

Although much older, the case of Donohoe vs. Veal, 19 Mo. 351, is particularly applicable. In considering this case it should be remembered that the present tax law is patterned after the ancient tax laws of this state and modified somewhat by provisions adopted from the tax laws of other states. In 1847 and 1849 the State of Missouri collected taxes by virtue of a tax law very similar to the one now effective. Section 9 of the law of 1845 provides for the issuance of a certificate of purchase to the highest bidder at the annual sale for taxes. The Law of 1847 which was amendatory to the Law of 1845 contained innumerable features similar to the present tax law. The following anaylsis show the similarity.

LAW OF 1847

Sec. 8. Said lands and town lots may be redeemed at any time****** by the party paying to the collector the full amount of taxes, costs, and interest,* * * *"

Sec. 5. On the first Monday of June annually* * *the Register of Lands shall cause all the lands and town lots remaining unredeemed in his office* * *to be advertised in some newspaper published in the City of Jefferson, to be sold on the first Monday in October next thereafter, at the place of holding courts in the respective counties, and shall immediately transmit four copies thereof to the collectors of each county* * * *"

Sec. 10. All the lands and town lots remaining unredeemed on the first Monday in October, annually shall be publicly exposed to sale by the collectors, for the taxes interest and costs due thereon, * * *the sales to be continued from day to day,* *until all the lands and town lots are offered, and if no person will pay the taxes, interest, and costs, due* * * * the collector shall report said land or town lot 'unsold', to be disposed of as hereinafter provided."

LAW OF 1933

Section 9952a. provided however, delinquent taxes, with penalty, interest and costs, may bepaid to the county collector at any time before the property is sold therefor.* * *"

Section 9952b. The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. * * * * *"

Section 9952a. All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge* * * on the first Monday of November of each year* * *"

Section 9952c. On the day mentioned in the notice, the county collector shall commence the sale of such lands, and shall continue the same from day to day until so much of each parcel assessed or belonging to each person assessed, shall be sold as will pay the taxes, interest and charges thereon, * * * * *"

LAW OF 1847	LAW OF 1933
	Section 9953. If at the first offering of sale of any tract of land or lot* * *no person shall bid therefor a sum equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact in his record of sale and the county collector shall note a recital thereof in his record containing the list of delinquent lands and lots,* * *"
Sec. 11. The several collectors shall* * *file in the office of the Clerk of the County Court* * *the certified list*** with a remark opposite to each tract of land or town lot setting forth the disposition made of it, if sold, to whom, and the amount paid by the purchaser, or if not sold, the amount for which it was offered for sale,* * * *"	Sec. 9955. The clerk of the county court shall attend,**** as the clerk of the sale****** and shall enter the same on a sufficient record book giving a description of the proper tract or lot, showing how much of each was sold, to whom, and the price, or whether the same remains unsold.* * *"
Sec. 23. Any land or town lots which may be sold under the provisions of this act, for taxes, interest and costs due thereon, may be redeemed at any time within two years from the date of such sale by the claimant,* * * *paying * * * *for the use of the purchaser double the amount of taxes, interest and costs, for which the same may have been sold.* * * *"	Sec. 9956a. The owner or occupant of any land or lot sold for taxes,* * *may redeem the same at any time during the two years next ensuing* * *By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate,* * * *"
Sec. 23. Lands or lots belonging * * *to minors, may be redeemed at any time before the expiration of one year from the time the youngest of said minors shall become of full age."	Sec. 9956b. Infants, idiots, insane persons and persons in confinement may redeem any lands * * *within two years after the expiration of such disability, * * *"

LAW OF 1847

Sec. 29. Where lands and town lots have been sold* * *and shall not be redeemed in two years from the time of such sale, the Register of Lands shall, upon application, execute good and sufficient deeds of conveyance* * *conveying the lands or town lots in such deed,* * * *"

Sec. 30. Such deeds* * *shall * * *be received as evidence in all courts in which the title to any land or town lot* * *shall be brought in question, and such deed shall be prima facie evidence of title in fee simple, in the purchaser.* * *"

LAW OF 1933

Sec. 9957. If no person shall redeem the lands sold for taxes within two years from the sale, * * *the collector of the county in which the sale of such lands took place shall execute to the purchaser,* * *a conveyance of the real estate sold, which shall vest in the grantee an absolute estate in fee simple.* * * *"

Sec. 9957a. Such deed shall be prima facie evidence that the property conveyed was subject to taxation at the time assessed, that the taxes were delinquent and unpaid at the time of sale, of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, that said land or lot had not been redeemed and that the period therefor had elapsed, and prima facie evidence of a good and valid title in fee simple in the grantee of said deed,* * *"

Other and additional similarities in these laws could be pointed out. The Act of 1847 in fifteen out of the thirty-nine sections refers to the proceeding in words importing "a sale of delinquent lands and lots", just as in the present law words importing such a "sale" are used frequently. Except for a few differences in the manner of administration, the proceedings are almost identical and the object attained is the same. The relative rights of the various

parties to the proceeding are also very very similar. In the Donohoe case heretofore referred to, the Plaintiff had bought a certificate of purchase to the land involved in October of 1848. February 10, 1851, he received a deed from the Register of Lands, pursuant to law as no redemption had been made within the two years provided. The evidence in the case proved that the Defendant who was the title owner to the property at the time of sale for taxes had cut trees from the land after the date of sale for taxes, to-wit, October of 1848, but before the date of the execution of the deed by the Register, to-wit, February 10, 1851. The trees cut by the Defendant owner were of considerable value and Plaintiff felt that he had not received what he had purchased because of the removal of the timber by the Defendant. Plaintiff instituted this action to recover the value of the trees removed, but could only rely on his certifieate of purchase to show his interest in the land at the time of the removal of the trees. The Court in considering this issue held that the Plaintiff to establish any right in the land could only do so by virtue of the deed and not by the certificate of purchase. In holding that the title under the deed did not relate back to the date of sale so as to give Plaintiff an interest in the land during such period, the Court stated, l. c. 335:

> "It is to be observed that, in neither of these acts is there any imtimation that the deed is to afford any evidence of title in the purchaser, prior to its date. In the absence of any such provision, the deed can have no such effect, unless the previous proceedings contemplated the passing of the title to the purchaser before the time appointed for making the deed. If the law did not propose to give the purchaser the title to the land, until two years should elapse from the time of the purchase, then it did mean that the title should remain in the ownerfor that period, and the right of the purchaser was, to receive his money, with a high penal interest, during the delay of redemption. It appears very clearly to be the design of these two acts, that the title of property sold for taxes shall remain undisturbed, until the deed is actually executed by the register; and that, until that act is performed, the title is in the former owner.

> Such being the design of the acts, the doctrine of relation cannot be applied to such deed, to give it an effect and operation contrary to the meaning of the law, by allowing the persons claiming under it, to maintain, not only actions of trespass for injuries done after the sale, and before the conveyance by the register, but actions for rents, issues and profits accruing during that period. The whole scheme of these acts very plainly shows that such a construction, or applying the fiction of relation to such a case, would be contrary to the intention of the Legislature."

This case has been referred to approvingly in later decisions of our Supreme Court. In 1874 and 1875 a proceeding somewhat similar was in effect for the collection of State and County taxes. In the case of Hilton vs. Smith, 134 Mo. 449, 33 S. W. 464, the Court had for decision the interest of a holder of a certificate of purchase in the lands covered by the certificate, and what, if any ownership such certificate evidenced prior to the giving of a deed, in the event the property was not redeemed during the redemption period. The Court stated, l. c. 465:

> "At the time the back-tax suit was commenced, interpleader Smith held certificates of the purchase of the land at collector's sales for taxes levied for the years 1874 and 1875. The time allowed by the law (2 Wag. St. p. 1202, Sec. 208), in which the owner could redeem, had expired, and he was, and for some time had been, entitled to a deed. What title to, interest in, or lien upon land, a certificate of purchase secures to the holder is a question upon which there is a difference of opinion. It may be said, generally, that the right is no larger than the statute gives. The law of 1872 only gives the right to the redemption money in case the land is redeemed, and to a deed when the time of redemption has expired. In the absence of provisions of law defining the rights of the holder of a certificate of purchase, the generally accepted rule is that until the delivery of a deed he takes no

title to the land, either legal or equitable. Black, Tax Titles, Sec. 322; Burroughs, Tax'n 321. The rule is announced by this court in Donohoe vs. Veal, 19 Mo. 336, as follows: 'If the law did not propose to give the purchaser title to the land until two years should elapse from the time of the purchase, then it did mean that the title should remain in the owner for that period; and the right of the purchaser was to receive his money, with high penal interest, during the delay of redemption. It appears very clearly the design of the two acts that the title to the property sold for taxes shall remain undisturbed until the deed is actually executed by the register, and that until that act is performed the title is in the former owner.' It was further held in that case that the doctrine of relation did not apply to such sales, and the title acquired under the deed did not relate back to any prior act or proceeding. The law of 1857 made the certificate prima facie evidence of title, yet the court held that it never intended to confer title, but was mere evidence of title, authorizing the purchaser to take possession of the premises for a limited period. Clarkson v. Creely, 40 Mo. 114. In Parsons v. Viets, 96 Mo. 413, 9 S. W, 908, this court, in considering the rights of one holding a certificate acquired under a sale made pursuant to the laws of 1872, held that he acquired thereunder no right to the possession of the premises, and in taking possession he was a trespasser and disseisor. After the period allowed for redemption has expired, as was the case here, the holder of the certificate has a mere naked right to demand and receive a deed from the collector. The law thereafter gives him no lien upon the land for any sum, except, in case his title fails, he may secure a lien under 2 Wag. St. p. 1206, Sec. 219. Pitkin v. Reibel, 104 Mo. 511, 16 S. W. 244.

Our Courts have frequently pointed out the distinction between the status of a purchaser at an execution sale and at a tax sale. This is concisely put in the case of Boyd vs. Ellis, 107 Mo. 394, 401:

> "The title did not pass to the purchaser at the tax sale, until the execution of the deed, to him as his assignee. But the law is well settled that a sheriff's deed relates back to the sale as against the defendant in the execution, those in privity with him, and strangers with notice."

From the foregoing citations of our own Appellate Courts it is certain that purchasers at tax sales have been considered as having but limited and restricted rights; that the bona fide title owner of the land is to be given every consideration as against the purchaser of the land at a sale sale.

Considering the tax law now effective in this State, we believe that the new tax law does not give the purchaser at the tax sale any greater interest in or title to the land purchased than did these previous tax laws. While it is true that under the provisions of Section 9954a, possession of the land may be taken from the title owner by the purchaser, it is clear that this possession is not given so that the purchaser may exercise any rights as owner, nor is it given to prevent the owner from committing waste on the property, but is simply given as additional security to the purchaser to insure the payment of the amount of the tax certificate at an earlier date than would otherwise be possible. In our opinion this conditional right of possession prior to the expiration of the redemption period is not to be construed as evidencing an intention to vest any kind of title to the land in the purchaser of the certificate, nor does it increase his interest in the land during the first year of the redemption period. It seems clear that under the present law the right of the purchaser is but to receive his money with interest at the rate specified and that it is a bear right which the courts will not extend when the rights of the actual title owner of the property would by such extension be restricted.

We are not unmindful of the decisions of other States in respect to this proposition. Without question authorities in many states will be found where the holder of the certificate was permitted both to enjoin the cutting, and after the expiration of the redemption period, to sue for the value of the timber removed. Generally speaking these decisions are based upon the provisions of the particular law involved. In Maryland and South Dakota, the title passes at the date of sale and the title obtained by the purchaser is construed to be as a new grant from the sovereignty. In Michigan the owner of the land after sale only has a right to a re-conveyance of the property, 154 N. W. 572. In Wisconsin there is a special statutory provision allowing an injunction proceeding against the owner for waste, 69 Wis.,326; 34 N. W. 80. The same is true as to the State of Minnesota. In Florida the tax certificate is in itself evidence of title and becomes a vested right at the expiration of the redemption period with the execution of a deed. Thus the title of the purchaser relates back to the date of purchase, 131 So. 136. The same is true in Mississippi, 110 So. 780. Because of the particular statutory provisions involved, and the policy of the Appellate courts of these states in construing the tax laws, we do not feel that the decisions in these states are persuasive as to the issue involved herein.

CONCLUSION.

It is accordingly the opinion of this Department that the purchaser of a certificate of purchase at a tax sale held under Senate Bill 94, page 425, Laws of Missouri, 1933, receives no title to the land involved until the execution of the deed contemplated by that law, and that under the circumstances described in your request, to-wit, that the timber is being removed by the owner for the purpose of raising funds to redeem the land from the tax sale, the holder of the certificate of purchase is without remedy at law to prevent the owner from severing and removing the timber from the land involved.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

SCHOOL DIRECTORS: Quo Warranto is proper proceeding to oust a school director who does not have the necessary qualifications.

6-12

June 11, 1935.

FILED 57

Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "Section 9287 provides in detail the qualifications for a common school director. Yet there are registered complaint after complaint with the county school superintendent and the prosecuting attorney about directors who are elected and who do not have the necessary qualifications. Yet the surviving members of the board, hold a meeting, and invest the newly elected candidate for director to the board, and the oath of qualification is administered, and subscribed in the minutes of the board of directors of the district.
>
> "The county superintendent of school has found no law, but in the past if a man is elected and has not qualified by taking the oath and subscribing thereto, has ordered the elected director not to qualify unless he has the qualification. In most of the cases the residence is not long enough, but the most common complaint that the newly elected director has not paid a state and a county tax, the year preceding his or her election.
>
> "Suppose a man has attempted to qualify and has made the oath and comes to the meetings to transact business, how is the best way for the unqualified director to be ousted?

> The School superintendent informs me that after the newly elected director has qualified, he has no authority whatever to oust an unqualified director. Is that true.
>
> "It would seem from the law, that a quo warranto proceedings would be the legal way to contest the right of such a director to such an office, when he has been seated and attempted to qualify. Now that means is too slow and too cumbersome, to institute such a proceedings in the circuit court. The Cost would be excessive. Is there another way to oust the member who does not belong on the board? Has the school superintendent any right to oust an unqualified member either before they have attempted to qualify, or after they have attempted to qualify?"

We are enclosing a copy of an opinion given to Honorable Wallace Cooper, Prosecuting Attorney, Warrensburg, Missouri, under date of May 9, 1935, in regard to the qualifications of a school director, same having been written by J. E. Taylor, Assistant Attorney-General, and approved by Attorney-General Roy McKittrick.

If we understand your questions correctly, you desire to know how an unqualified member of a board of directors of a school district may be ousted from office; and if the county superintendent of schools has the authority to oust such a director. A search of the statutes fails to show any authority in the county superintendent of schools to oust a member of the board of directors of a school district who does not have the necessary qualifications. The only method provided by statute for ousting such a school director is Section 1618, R. S. Mo. 1929, which provides in part as follows:

> "In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney-general of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same; and when such information has been filed and

> proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney. ****"

51 Corpus Juris, Section 8, page 313, provides:

> "Except where the facts are undisputed, or, by virtue of the express wording, or construction placed upon, statutes, quo warranto and statutory remedies are cumulative, quo warranto proceedings are the only proper remedy in cases in which they are available. Thus, subject to the foregoing limitations, quo warranto, or a proceeding in the nature thereof, is the sole and exclusive remedy and method by which the right and title to a public or corporate office may be tried and determined, ****. In the absence of a valid statute conferring equitable jurisdiction, there is no concurrent remedy in equity when quo warranto is available and affords an adequate remedy."

In the case of Arthaud v. Grand River Drainage District, 232 S. W. loc. cit. 268, the Court said:

> "(6) It is contended that, if Schmitz is secretary by the provisions of section 25 of the act, he is likewise treasurer, and that Eicher is unlawfully acting as treasurer. Plaintiffs in this proceeding cannot have Eicher restrained from acting as treasurer of the district, for that could only be done by quo warranto. State ex rel. v. May, 106 Mo. 488, 509, 17 S. W. 660; State ex rel. v. Gordon, 236 Mo. 142, 159, 139 S. W. 403. ****"

In State v. Waldo, 5 S. W. (2d) loc. cit. 658, the Court said:

> "It is clear that in any event the title to the office is involved, which may not be determined in a proceeding by mandamus, such as this, but can only be determined by a proceeding in quo warranto."

In view of the above, it is the opinion of this department that a proceeding in quo warranto is the proper and exclusive method for ousting a member of a board of directors of a school district who does not have the necessary legal qualifications.

Very truly yours,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JET/afj

ROADS AND BRIDGES: Commissioners of special road districts cannot act as road overseers and draw pay for the same in a special road district.

6-19

FILED
57

June 18, 1935

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This Department is in receipt of your letter of June 8, wherein you make a request for interpretations of certain sections of the Revised Statutes of 1929. Your letter is as follows:

> "Under section 8024 of the 1929, we have a road district organized. In that special road district there are several work relief, federal projects in operation. Several of the road commissioners are supervising the work in person, and are charging out of the allotted funds of the district, so much per day as road overseer for the supervision. This constitutes a considerable drain on the available funds for actual work. It would seem that for this day to day labor the commissioners of the special district would not be entitled to this kind of compensation.
>
> Please send me as soon as possible an interpretation of section 8031 of the 1929 statutes, as to whether the commissioners can supervise the actual building of roads and draw pay thereon as road overseers?"

The commissioners of a special road district are appointed and must possess certain qualifications under Section 8026 Revised Statutes Missouri 1929, which is as follows:

> "The mayor and members of the city council of any city or town within any special road district thus organized, together with the members of the county court of the county in which said district is located, at a meeting to be held in the county court room, at which meeting the presiding judge of the county court shall preside and the county clerk shall act as clerk, within two weeks after the voters within the territory of such proposed district shall adopt the provisions of this article, shall, by order of record to be kept by the county clerk, appoint a board of commissioners composed of three persons, designating one to serve for three years, one for two years and one for one year, and in February every year thereafter one commissioner shall be appointed as above specified, to serve for three years; all such commissioners shall be resident taxpayers of the district, and shall serve until their successors are appointed and qualified, vacancies to be filled as original appointments are made. Resignations shall be to the county clerk. Removal from the district shall create a vacancy. Such commissioners, before entering upon the discharge of their duties, shall take oath of office, to be administered by the clerk of the county court: Provided, that where the city is located a greater distance than ten miles from the meeting place of the county court, the mayor and city council of the city or town, within the road district for which commissioners are to be appointed, may make a written certificate of their choice of the commissioner or commissioners to be

> appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger and the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided, that such certificate shall be given over the signature of the mayor or acting mayor attested by the seal of the city and signature of the city clerk."

Under Section 8031 Revised Statutes Missouri 1929 the commissioners receive no per diem compensation, but necessary expenses,

> "Said board shall serve without compensation, but actual, necessary expenses, actually paid, shall be repaid to them."

We shall next discuss the question of road commissioners acting as overseers and supervising construction of the road in the special district, and determine whether or not there is any prohibition against said commissioners drawing a sum per diem.

Section 4091 Revised Statutes Missouri 1929 refers to members of commissions embezzling money. The pertinent part is as follows:

> "If any member of any town or city council, or of any county court or commission or body charged with the administration or management of the affairs of any county, or any executive officer or member of any executive department of any city, town or county in this state, or any member of any board or commission

> charged with the administration or management of any charity or fund of a public nature, by whatever name the same may be called,shall knowingly and without authority of law vote for the appropriation, disposition or disbursement of any money or property belonging to any such city, town, county, charity or fund, or any subdivision of any such city, town or county, to any use or purpose other than the specific use or purpose for which the same was devised, appropriated and collected, or authorized to be collected by law, or shall knowingly aid, advise or promote the appropriation, disbursement or disposition of any such money or property, for any purpose not directed and warranted by law, and such illegal appropriation, disbursement or disposition be in fact effected, every person so offending against the provisions of this section shall be deemed and taken to have feloniously embezzled and converted to his own use such money or property;* * *"

It cannot be said that the commissioners in the instant case are guilty of unlawfully embezzling any funds, but we quote the section for the purpose of differentiating between the terms of said section and Section 8076 Revised Statutes Missouri 1929, which is as follows:

> "Whenever an order for improvement is made, the commissioners of the district shall,in the name of the district, enter into a written contract with the lowest and best bidder for making such improvement in compliance with such order. Such contract shall require that the work be completed within a certain time, and shall provide a penalty for each day beyond said time said work remains uncompleted,and said commissioners shall require said contractor to enter into a bond, to be approved by the commissioners, for the full performance of said contract, and payment for

all labor and material used or employed in the performance of such contract. Said commissioners may advertise for bids for such contract in any manner they may choose; and the contract shall in no case be let to any commissioner, nor shall any commissioner, directly or indirectly, have any pecuniary interest therein other than the performance of his official duties as herein required.* * * *"

Having the terms of the two sections in mind the Supreme Court of Missouri, in the case of State v. Holder 72 S. W. (2nd) l. c. 490, said:

"The purpose of the statute section 4091 seems to us to be plain. By it the Legislature has made it a felony for any officer, coming within its provisions, to appropriate, dispose of, or disburse funds for any use or purpose other than the specific use or purpose for which the same was devised, etc. The information in this case specifically charges that respondent was a commissioner of a special road district; that he aided and promoted the payment of $51.50 to himself for work and labor he had performed in repair and construction work on the roads of the district of which he (respondent) was a commissioner. It was not charged that respondent did not perform the labor for which the claim was allowed or that the district did not receive full value therefor. The primary purpose for which money of a special road district is to be expended is for the up-keep of the roads of the district. The money was, therefore, appropriated and expended for the specific use intended by the law. In other words, the facts alleged in the information disclose, without doubt, that the funds were not diverted from their proper channel. The diversion of funds was the evil sought to be remedied by the section in question.

Sections 8031 and 8079, R. S. Mo. 1929 (Mo. St.Ann.Secs.8031,8079,pp.6839,6873), pro-

vide that commissioners of road districts must serve without compensation. These sections have reference to the duties of road commissioners in their official capacity and do not refer to labor performed in repairing the roads of the district. Section 8076, R.S.1929 (Mo.St.Ann.Sec.8076,p.6872), provides that contracts let for road work 'shall in no case be let to any commissioner, nor shall any commissioner, directly or indirectly, have any pecuniary interest therein other than the performance of his official duties as herein required.'

The information does not allege under what article of the statute the special road district mentioned was organized. But, if we assume for the sake of argument that it was organized under article 10,chapter 42, which article contains section 8076,and if we further assume that respondent violated the provision quoted, he would not be guilty of violating section 4091,supra. The latter section does not in plain terms, or even by implication,declare the acts charged by the information to constitute a felony. It is the disbursement of money or property belonging to the district 'to any use or purpose other than the specific use or purpose for which the same was devised' that is made a criminal offense. As said before, the facts alleged in the information disclose that the money was disbursed for the specific use for which it was collected. The payment of the money, if it was unlawful, was not unlawful because it was disbursed for a purpose other than that for which it was intended, but because respondent was a commissioner of the district and could not contract with himself. The section in question does not cover that situation, and therefore the trial court was right in sustaining the demurrer to the first three counts of the information.* * * * *"

The above decision, it will be noted, was based upon a prosecution under Section 4091, and the court sustained the demurrer thereto holding that if the defendant

was guilty of any crime and the facts in the above decision are almost identical with the facts you present in your letter he was guilty of violating the terms of Section 8076, quoted supra.

CONCLUSION

We are of the opinion that, under Section 8076 and the decision above, the commissioners cannot legally draw per diem wages for supervising or overseeing the building of roads in special road districts. Their compensation is fixed by Section 8031, quoted supra, and they are entitled only to the actual necessary expenses.

Respectfully submitted,

OLLIVER W. NOLAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

OWN:LC

TAXATION: (
(Protested county warrants not exempt
COUNTY WARRANTS: (from taxation.

June 27, 1935.

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

This is to acknowledge receipt of your letter of June 25, 1935, with request for an opinion, which letter is as follows:

> "Since the county budget law, has been in operation, county warrants, protested, are selling at par on a ready market. This use to be unusual. Protested warrants bring six percent. Now the county assessor has announced the policy that holders of county warrants must turn the same in on their assessment lists in order to pay a tax on these county warrants.
>
> "Of course, county warrants have been considered like municipal bonds, exempt from state and county taxation. Protested warrants pay 6% from date of protest, but are redeemed under the budget law, before they get to be one year old. The tax rate for a property tax in the country, here is about 3%, and the tax rate in Versailles on property is 4%. It seems apparent that taxation of county warrants, will not make their sale very ready, and probably always below par.
>
> "Are county, protested warrants, liable for assessment for taxation purposes under the Missouri Constitution and the Missouri law? Do these county warrants enjoy the same immunity as school district bonds, or municipal bonds?"

Your first question is - Are county warrants which have been protested liable for assessment for taxation purposes under the Missouri Constitution and Missouri statutes?

In answering your question we must look to the Missouri Constitution which contains the fundamental and basic law for all tax exemption, and Section 6, Article X, designates what property is exempt under the Missouri laws, and is as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies; Provided, That such exemptions shall be only by general law."

And Section 7, of Article X, reads as follows:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

In accordance with the constitutional provisions, the Legislature has enacted certain statutes relating to taxation and Section 9742, R. S. Mo. 1929, provides what property shall be taxable, and is as follows:

> "For the support of the government of the state, the payment of the public debt,

> and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9745, R. S. Mo. 1929, provides what property shall be exempt by law from taxation.

Property is exempt from taxation (1) by the self-enforcing provisions of the State Constitution; (2) by state laws under the authority of the State Constitution; (3) by Federal laws; and (4) by failure of the Legislature to subject property to taxation.

In the case of State ex rel. Union Electric Light & Power Co., v. Baker et al., 293 S. W. 401, it is stated by the Supreme Court as follows:

> "It is the well-settled policy of our law that taxes shall be levied and collected for public purposes on all property within the territorial jurisdiction of the state, except that expressly enumerated as exempt. Sections 1, 2, 3, 6, and 7 of article 10, Constitution of Missouri; section 12752, 12753, 12754, and 12756, R. S. 1919. It is equally well settled, however, that before property may be taxed it must by law be subjected to taxation. Valle v. Ziegler, 84 Mo. 219; Leavell v. Blades, 237 Mo. 695, loc. cit. 700, 141 S. W. 893; State ex rel. Am. Central Ins. Co. v. Gehner (Mo. Sup.) 280 S. W. 416, loc. cit. 419; State ex rel. Koeln v. Lesser, 237 Mo. 310, loc. cit. 318, 141 S. W. 888."

In the case of State ex rel. St. Louis Y. M. C. A. v. Gehner, 11 S. W. (2d) 30 l. c. 34, it is also stated:

> "'In the construction of laws exempting property from taxation it is a cardinal principle that they must be strictly construed. As a rule all property is

liable to taxation, exemption, the exception, and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt. It is in no case to be assumed that the law intends to release any particular property from this obligation; and no such exemption can be allowed, except upon clear and unequivocal proof that such release is required by the terms of the statute. If any doubt arises as to the exemption claimed, it must operate most strongly against the party claiming the exemption.' Fitterer v. Crawford, 157 Mo. loc. cit. 58 S. W. 533, 50 L. R. A. 191.

'As the burden of taxation ordinarily should fall upon all persons alike, when one claims an exemption therefrom he must be able to point to the law granting such immunity and it must be clear and unambiguous.' Kansas Exposition Driving Park v. Kansas City, 174 Mo. loc. cit. 433, 74 S. W. 981.

'Such statute and constitutional provisions are construed with strictness and most strongly against those claiming the exemption.' Beach on Public Corp. par. 1443; Dillon on Munic. Corp. (3d Ed.) par. 776, and cases cited; 1 Burroughs on Taxation, Sec. 70; 1 Desty on Taxation, p 108; Cooley on Taxation, pp. 204, 205.

"And very recently this court, by Walker, J., said: 'The policy of our law, constitutional and statutory, is that no property than that enumerated shall be exempt from taxation.' State ex rel. Globe-Democrat Publ. Co. v. Gehner, 316 Mo. 696, 294 S. W. loc. cit. 1018.

"A grant of exemption from taxation is never presumed; on the contrary, in all cases of doubt as to the legislative intention, or as to the inclusion of particular

property within the terms of the statute, the presumption is in favor of the taxing power, and the burden is on the claimant to establish clearly his right to exemption.' 37 Cyc. of Law, p. 891; Galloway v. Memphis, 116 Tenn. loc. cit. 736, 94 S. W. 75; Willard v. Pike, 59 Vt. 218, 9 A. 907."

The rule as announced by these cases, which might be supplemented by numerous other authorities, is that no property is exempt from taxation except such as may be specifically exempted by law and the further cardinal rule of construction is that all tax exemption laws are to be strictly construed.

We do not find that protested county warrants are exempted from taxation either by the Missouri Constitution or by laws enacted in conformity therewith.

It is, therefore, our opinion that such warrants are taxable in the same manner as other personal property and should be assessed at their true value.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

CRH:EG

COUNTY DEPOSITORY: Deposits made by a county in non-compliance of County Depository Law, Section 12184-85-86-87, creates preferred claim in favor of county in case of failure of bank.

July 6, 1935.

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

This is to acknowledge receipt of your letter of July 2, 1935, with request for the opinion of this Department on the questions therein submitted; which letter is as follows:

> "The bi-annual period for the selection of county depositories will expire July 9th, 1935. In conformity with section 12184-1929, the county court through the county clerk, advertised for bids. The three remaining banks in the county did not submit any bids for any of the county funds. The county treasurer deposits the county funds, just like he always does. The banks accept the money, proportionate the amounts by instructions to the county treasurer as they did in 1933, and they are paying 1½% on the daily balance as usual. My understanding is that they will so continue to do after the 65 days for selection a new depository July 9th, 1935.
>
> By some kind of an agreement, the banks did not make bids for the funds as county depositories because, they reason that the county will keep the money on deposit, and the county will then become a general depositor, because the plain relationship of a debtor and creditor will arise. They will enjoy the use of the money, without having to put up a bond.

"My question is, if one of these banks does become insolvent, and does close its doors, does the County of Morgan have a right to a preference against the assets of any of these institutions that might close? The county depository law as set in sections 12184-12198 of the statutes have not been complied with in any way.

"If 51 S. W. (2) 1025, is the law of Missouri and does apply to counties, then Morgan County is entitled to a preference. Please get me out an opinion as soon as possible, so that the County Court can have some information."

The question is, as we interpret your letter: In the event that no selection of a county depository is made by the county court in the manner provided by law and the county's money is deposited in banks, not in the statutory manner, will the county, in the event of the failure of such bank or banks, have a preferred claim against the bank?

Under the provisions of Sections 12184, 12185, 12186 and 12187 of Article 9, Chapter 85, Revised Statutes of Missouri, 1929, a definite scheme and plan for the selection of county depositories is set forth, and under the provisions of these sections it is made the mandatory duty of the county court to select the depository or depositories in which the funds of the county shall be deposited.

Section 12184 makes it the duty of the county court of each county in this State, at the May Term thereof, in the year 1909, and each two years thereafter, to advertise for bids and receive proposals from banking corporations, associations, or individual bankers in such county as may desire to be selected as the depository of the funds of said county.

Section 12185 provides the procedure to be taken by the bidders for the county funds.

Section 12186 relates to the opening of bids and makes it the duty of the county court "to select as the depositaries of all the public funds of every kind and description going into the hands of the county treasurer, and also all the public funds of every kind and description going into the hands of the ex officio collector in counties under township organization, the deposit of which is not otherwise provided for by law, * * *."

Section 12187 provides the kind and character of bonds to be given by the selected county depository and provides for the approval of same by the county court.

Section 12188 of said article and chapter sets forth specifically the manner in which the county funds shall be transferred to the selected county depositories.

Under the provisions of Section 12189, if for any reason the banking corporations, associations, or individual bankers in any county shall fail or refuse to submit proposals to act as county depositories as provided in Section 12185, then, in that case, the county court shall have the power to deposit the funds of the county with any one or more of the banking corporations, associations, or individual bankers in the county or adjoining counties, and said section further provides the manner for the selection of same and the minimum rate of interest to be charged therefor, and the kind and character of bond or bonds to be given by said selected depositories.

So, it will be seen that the statutes have set forth in detail and with particularity the manner of the selection of a county depository and provide a definite way in which the county funds are to be protected and safeguarded.

If for any reason the county court has not followed the statutory method in the selection of the depository or the depository has failed to execute bonds in the manner provided by the statute and the money is deposited in a bank without meeting these statutory requirements, the depository is not the lawful custodian of the funds. And, in that event, the relationship of debtor and creditor does not arise and the funds are considered trust funds and in the event of the failure of the depository the county has a preferred claim against

the bank. This rule is so firmly fixed in Missouri that we deem it necessary to quote from one case only on the subject, to-wit, Ralls County v. Commissioner of Finance, 66 S. W. (2d) 115, l. c. 116:

> "A county has no lawful right to deposit county funds except in a county depositary. It is the settled law of this state that, where county funds are deposited in a bank which has not been selected and qualified as a depositary of county funds in accordance with the provisions of article 9, c. 85, R. S. Mo. 1929, to which we have called attention, the title to the fund so deposited does not pass to the bank, but such fund in the hands of the bank is a trust fund, and, in event of subsequent failure of the bank, the county would be entitled to a preference. Huntsville Trust Company v. Noel, 321 Mo. 749, 12 S. W. (2d) 751; White v. Greenlee, 330 Mo. 135, 49 S. W. (2d) 132; School District of Cameron v. Cameron Trust Company, 330 Mo. 1070, 51 S. W. (2d) 1025."

As was stated in this case, many other cases to the same effect could be cited sustaining this rule of law.

County courts should make every effort to follow strictly the statutes in the selection of depositories and require the selected depositories to comply with the statutes relative to the giving of bond or bonds to safeguard the county's funds.

Coming now to the question asked in your letter, and based on the assumption as stated therein, that "the county depository law as set out in Sections 12184-12198 of the 1929 statutes have not been complied with in any way," such being the case, it is our opinion, based on the rulings of our Supreme

Court, that, if the county funds are deposited in a depository and there has been a non-compliance with the statute in the selection thereof, the county would have a preference for such deposits in the event of the failure of the depository.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

CRH:EG

INTOXICATING LIQUORS: County Courts and Cities may charge lesser fees for licenses than is required to be paid under the Liquor Control Act. Cities cannot pass ordinances lessening the inhibited distance as provided in the Liquor Control Act.

7-24

July 19, 1935

FILED
57

Mr. Benjamin H. Marbury
Assistant Prosecuting Attorney
Farmington, Missouri

Dear Sir:

This will acknowledge your request for an opinion which reads as follows:

> "The questions that I propose to ask you have come up before the County Court of this County, as well as the City of Farmington, which questions are as follows:
>
> May the County Court or the Board of Aldermen of the City of Farmington, under Section 44-a-14 as found on page 37 of the liquor law, which prohibits the sale of intoxicating liquors within 100 feet of any school, church or place where religious worship is had, be by the County Court or the City reduced below 100 feet, and further may the County Court of the City charge for a license either for malt liquors or 3.2% beer, less than is required by Section 22, page 18 of the liquor law, or must the County Court and the City charge as a minimum license fee the fee required paid to the State. In other words,is it required by the State Liquor Law that the County Court and the City must

charge the minimum fee for license both for malt liquor and 3.2% liquor, or may they go lower than the fee fixed for said sale in said County and City. I am aware that they may go one and one-half times the fee required by the State, but I am in doubt about whether or not they can go below the fee charged by the State; and as I understand it that the provisions of the liquor law both as to malt liquor and as to non-intoxicating liquor of 3.2%, that the State law governs and determines the fee to be fixed both by the County and the City.

These matters are coming up right away and I will appreciate a very prompt answer to this letter."

We are inclosing herewith copy of an opinion dated June 21, 1935, signed by the writer as Assistant Attorney General and approved by John W. Hoffman, Jr., Acting Attorney General. You will find that this opinion points out the general law and the statutes respecting what cities may do toward enacting ordinances not inconsistent with the general laws of the State.

We point to statutes which are applicable to the questions you have set forth in your letter.

Section 44a14 of the Liquor Control Act, provides as follows:

"No license shall be granted for the sale of intoxicating liquor, as defined in this act, within one hundred (100) feet of any school, church or other building regularly used as a place of religious worship, without the applicant for such license shall first obtain the consent in writing of the majority of the Board of Directors of such school, or the consent in writing of the majority of the managing board of such church or place of worship. The Board of Aldermen, City Council or other proper authorities, of any incorporated City,

> town or village, may by ordinance, prohibit the granting of a license for the sale of Intoxicating liquor within a distance as great as three hundred (300) feet. In such cases, and where such ordinance has been lawfully enacted, no license of any character shall issue in conflict with such ordinance while such ordinance is in effect."

You will note that the above section of the statute very clearly points out that no license shall be granted for the sale of intoxicating liquors within one hundred feet of any school, church or other building regularly used as a place of religious worship, without the applicant for such license having obtained the consent, in writing, of a majority of the board of directors of such school or managing board of such church or place of worship.

It is our opinion this inhibition would prohibit a city or county court from lessening the required distance as hereinabove set forth in Section 44a14, supra. You will further note that cities, or other proper authorities, may, by ordinance, prohibit the granting of a license for the sale of intoxicating liquor within a distance as great as three hundred feet.

Your attention is directed to the case of State ex rel. v. McCammon 111 M. A. 1. c. 631 et seq., wherein the court said

> "The powers conferred upon a municipal corporation must be exercised in conformity to the general laws of the State, unless it is clear that the exclusive control of the subject is given to the municipality, or that the general law is to be superseded or suspended by charter. A statute granting authority to a city to pass ordinances in relation to the liquor traffic, does not repeal the general laws on the subject. The rule is that the municipal ordinances cannot

set aside, limit or enlarge the statute law of the State, unless its power to do so can be shown in express terms or by necessary implication."

Section 25 of the Liquor Control Act provides as follows:

"In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized by this act shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located, or in case such premises are located in the City of St.Louis, to the collector of revenue of said city, a fee in such sum (not in excess of the amount by this act required to be paid into the state treasury for such state permit or license) as to the county court, or the corresponding authority in the City of St.Louis, as the case may be, shall by order of record determine,and shall pay into the treasury of the municipal corporation,wherein said premises are located, a license fee in such sum, (not exceeding one and one-half times the amount by this act required to be paid into the state treasury for such state permit or license), as the law-making body of s ch municipality, including the City of St.Louis may by ordinance determine. The Board of Aldermen, City Council or other proper authorities of incorporated cities, may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of

such ordinances, where not inconsistent with the provisions of this act."

It is evident, from a careful reading of the above section of the act, that the county court and proper authorities of incorporated cities, towns or villages may charge for licenses. The county court is restricted in the charge they may make for a license to a sum not in excess of the amount required to be paid into the state treasury. The city has been given the right to charge a fee in such sum not exceeding one and one-half times required by the act to be paid into the state treasury.

It is the opinion of this department, that the county court may charge a lesser amount than that which is required for the issuance of a license under the provisions of Section 22 of the act, which they shall, by order of record determine, but that it shall not exceed the amount that is required to be paid into the state treasury. We further rule that Boards of Aldermen, City Councils or other proper authorities of incorporated cities may charge for licenses and fix the amount to be charged for such licenses, which charge may be less than the amount which is required under the provisions of Section 22, supra, but that such fee shall not be in excess of one and one-half times required to be paid into the state treasury for such state permit or license.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

RCS:LC

SLOT MACHINES - Proper method of procedure;
SEARCH AND SEIZURE of gambling devices.

(Memorandum cancelled - 7-2-54)

August 20, 1935 8-21

FILED
57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We have your request of August 12, 1935 for an opinion, which is as follows:

> "Since I have been prosecuting attorney and Austin S. Ball has been sheriff, there has been a strict ban on slot machines in Morgan County, Mo. Hon. Barney Reed is now prosecuting attorney of Camden County. He has declared and enforced a ban on slot machines in Camden County. The operators of slot machines in Camden County have been slipping across the line into Morgan County and putting these machines up in the restaurants and resorts along the lake in Morgan County.
>
> "It has been the practice of the sheriff and I to seize any slot machine in any public place in display, and destroy the machine without any further legal action. That seems to be the swiftest way to combat these gambling devices. If there is any money in the machine, the same is used to pay the officer for his trip and the mileage. Since this method is so effective, I am asking your office if there is any legal consequences in this method?"

#2 - Honorable G. Logan Marr

We find that the operation of a slot machine is made a felony by Section 4287, R. S. Mo. 1929.

The procedure for the suppression of gambling devices may be briefly summarized as follows:

(1) Upon a complaint being made, as provided for in Section 3783, R. S. Mo. 1929, a search warrant may be issued for the seizure of any gaming table or gambling device prohibited by law.

The enclosed complaint for search warrant meets the requirement of the statute.

(2) The search warrant shall describe the place and articles to be seized. Section 3784, R. S. Mo. 1929. It shall be directed to the sheriff or any constable, and may be served in the daytime or nighttime. Sections 3770,3771, R. S. Mo. 1929.

A form of search warrant which may be issued by a justice of the peace is also attached hereto.

(3) If the officer executing the search warrant seizes any slot machine or other gambling device, the same shall be taken before the justice of the peace who issued the search warrant. It shall be the duty of the justice, under Section 3785, R. S. Mo. 1929, to set a date for hearing not less than five days nor more than twenty days after such seizure for the purpose of

determining whether the property seized under the search warrant is a gambling device. Written notice of the date and place of such hearing shall be given by posting a copy of such notice in a conspicuous place upon the premises upon which such property is seized, and by delivering a copy of such notice to any person claiming an interest in such property whose name may be known to the person making the complaint or to the officer issuing or serving such warrant. Section 3785, R. S. Mo. 1929.

(4) At the hearing, if the justice determines that such property is a gambling device and is not needed as evidence in the trial of a criminal case, he shall enter an order finding that such device is a gambling device and order the same to be publicly destroyed. Sections 3786, 3787, R. S. Mo. 1929.

(5) In the event a gambling device is ordered destroyed which contains coin of the realm, the same should be removed before destruction of the gambling device, and applied upon the payment of the costs of the search and seizure and a hearing before the justice, and the balance, if any, should be paid into the school fund under the provisions of Section 9712 as money forwarded to such fund. Money taken from prisoners has always been applicable to the fines and payments of costs. Section 3773, R. S. Mo. 1929.

It is, therefore, the opinion of this office that the above and foregoing method of procedure against slot machines is the proper procedure for their seizure and destruction.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
ttorney General

FER:FE

CONCEALED WEAPONS - Carrying weapon exposed to bank.

9-29

August 26, 1935

FILED 57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We have your request of August 22, 1935, for an opinion, which is as follows:

> "Are these situations crimes under this section, and punishable as such:
>
> "1- Can a merchant take a hand full of money in one hand, and a pistol or revolver in the other hand, and proceed down the street, from his store to the bank, in the daytime, and not be guilty of violating section 4029 - 1929?
>
> "2- Can an individual of good reputation, whose life has been threatened, carry a pistol or revolver strapped around his waist, where the gun is on the outside of his clothes, and in plain view, so that the weapon is not concealed, and when he does not go into any of the public assemblages excepted to in the section? This individual would not be concealing a weapon, and so long as he was sober, and did not rudely exhibit his weapon tottwo or more persons, would any part of the statute apply to this act?"

#2 - Honorable G. Logan Marr

The gist of the offense under Section 4029, R. S. Mo. 1929 is the concealment of a dangerous and deadly weapon insofar as carrying it on the street is concerned. Concealment in any prosecution, under facts stated in paragraph one of your request, is an element which the State must prove. State v. Hale, 70 Mo. App. 143.

It is, therefore, the opinion of this office that a merchant may carry a pistol or revolver, not concealed, in his hand on trips to the bank to deposit money.

With reference to your second inquiry, we call your attention to the fact that no one has a right to carry a pistol because his life had been threatened a short time before. State v. Davis, 225 S. W. 707. The carrying of a deadly weapon exposed about the person is permitted under certain conditions, such as taking the weapon to court for the purpose of producing it at a trial, State v. Pollack, 49 Mo. App. 445; for the purpose of delivering it to owner, State v. Roberts, 39 Mo. App. 47.

You will note under Section 4029, R. S. Mo. 1929 that a person is not allowed to carry a pistol, even when exposed, to church, into a school room, political meeting, literary or social meetings, to any election precinct, or into a courtroom during court or into any other public assemblage of persons meeting for any lawful purpose other than military drill. Under this section, it is virtually impossible for a person to carry generally about them, exposed, a pistol without violating Section 4029.

It is, therefore, the opinion of this office that a person may not generally carry a pistol or revolver exposed about his person, except on special missions, such as are heretofore mentioned in this opinion.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, JR.
(Acting) Attorney General

FER:EE

INTOXICATING LIQUORS: Licensees, under the provisions of the Liquor Control Act, may be prosecuted for failure to pay into the county treasury the fee as provided under Section 25 of the Act.

August 28, 1935. 8-28

FILED 57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "There are about 26 places in Morgan County, Mo. that sell beer. Only about 10 of the places have bought county beer licenses.
>
> "Several of the lawyers around here have raised the question as to whether the county can prosecute any beer seller for not having a county license. The argument has been made that since the county takes a bond for the license like a merchants license, the county is relagated to a suit on the bond, and not entitled to a criminal prosecution.
>
> "The argument has been made that under the Liquor Control Act, sec. 25, that it is not mandatory on the county to put a license tax on beer sellers. Therefore, the matter being optional, then an order of the court is for revenue only, and with a bond for collection. The argument is made that the county court is not a legislative body, and not authorized under the constitution and the laws to pass measures that provide for a criminal punishment. Therefore there is no criminal consequence if beer seller

> does not buy any beer license in the county.
>
> "Therefore, can a beer seller without a beer license sold by the county, be prosecuted and punished as a criminal for not having bought a county beer license?"

We direct your attention to Section 25 of the Liquor Control Act relating to the amount of fees that shall be paid into the county treasury by a holder of a permit under the act. It reads in part as follows:

> "In addition to the permit fees and license fees and inspection fees by this act required to be paid into the state treasury, every holder of a permit or license authorized by this act shall pay into the county treasury of the county wherein the premises described and covered by such permit or license are located ****, a fee in such sum (not in excess of the amount by this act required to be paid into the state treasury for such state permit or license) as the county court, ****, shall by order of record determine, ****."

From a careful reading of the above section, it is evident that,if a person holds a permit under the Act, such person shall pay into the county treasury of the county, wherein the premises are located, a fee in such sum (not in excess of the amount required to be paid to the State) as the county court may by order of record determine. This section of the statutes makes it obligatory upon the licensee to make the payment into the county treasury.

It is noted from your inquiry that the only recourse the county may have is limited to recovery on bond given by the licensee. There is no provision under the Act that empowers the county court to require of a licensee to give a bond to the county, as the bond mentioned under the provisions of the Liquor Control Act is only given to the State and approved by the Supervisor of Liquor Control.

The only power the county has, under Section 25 supra, is to determine by order of record the amount of the fees to be paid into the county treasury of the county wherein the premises described and covered by such permit are located.

Your attention is directed to the case of Ray County, to the use of the Common School Fund, v. Bentley, et al., 49 Mo. loc. cit. 242, wherein the Supreme Court, in speaking of the powers of the county court, said:

> "***** The county court does not derive its powers from the county, and it can exercise only such powers as the Legislature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. It acts directly in obedience to State laws, independently of the county. Where it acts for and binds the county, it exercises its authority by virtue of power derived from the State government, and it obtains authority from no other source. (Reardon v. St. Louis County, 36 Mo. 555.)
>
> "The principle is well settled that a corporation can exercise only such powers and employ such agencies as its charter may permit. But counties have not the powers of corporations in general. They are merely quasi corporations, political divisions of the State, and they act in subordination to and as auxiliary to the State government. (Hann. & St. Jo. R.R. Co. v. Marion County, 36 Mo. 303; State v. St. Louis County Court, 34 Mo. 546; Barton County v. Walser, 47 Mo. 189.) ****"

Since it is the duty of every person holding a permit under the Act to pay into the county treasury a fee in such sum, not exceeding the State fee, any failure to pay said fee would subject one to prosecution.

We direct your attention to Section 43 of the Liquor

Control Act which reads as follows:

> "Any person violating any of the provisions of this Act, except where some penalty is otherwise provided, shall upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine of not less than Fifty ($50.00) Dollars, nor more than One Thousand ($1,000.00) Dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence."

Your attention is further directed to Section 2-a. relating to the enforcing of the provisions of the Liquor Control Act. The pertinent part of said section reads as follows:

> "For the purpose of enforcing the provisions of this act and acts amendatory thereto, the prosecuting attorneys of the respective counties **** shall investigate and prosecute all violations of any provision of this act; **** Whenever any tax, fee or other charge, as authorized by this act, shall be due, suit may be instituted in any court of competent jurisdiction by the Prosecuting Attorney of the County, ****."

In light of the foregoing, it is our opinion that, should a person fail to pay into the county treasury the fee as the county court may by order of record determine, such person may be prosecuted for failure to comply with the provisions of the Act.

Yours very truly,

APPROVED:

RUSSELL C. STONE
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

EVIDENCE--WITNESS--CRIMINAL PROCEDURE: Evidence of former testimony of a witness given at a prior trial and preserved in Bill of Exceptions is admissible against a defendant at a subsequent trial where the presence of the witness cannot be obtained for statutory reasons.

September 20, 1935. 9-20

FILED 57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We acknowledge your request of September 7, 1935, for an opinion, which reads as follows:

> "There was a former trial of a state case which resulted in a mistrial and the case is up for hearing again. One of the important state witnesses has been confined in the state sanitorium at Mt. Vernon for Tuberculosis, apparently he will be physically unable to attend court. Is it possible to use his evidence given in the former trial? If you have any recent authorities, I would appreciate very much if you would send them to me."

Section 1780 R. S. Mo. 1929, provides:

> "Examinations or dispositions taken and returned in conformity to the provisions of this article may be read and used as evidence in the cause in which they shall have been taken, as if the witnesses were present and examined in open court on the trial thereof. The facts which would authorize the reading of the deposition may be established by the testimony of the deposing witness or the certificate of the officer taking the same: First, if the witness resides or is gone out of the state; second, if he be dead; third, if by reason of age, sickness or bodily infirmity he be unable to or cannot safely attend court; fourth, if he reside in a county other than that in which the trial is held, or if he be

> gone to a greater distance than forty miles from the place of t rial without the consent, connivance or collusion of the party requiring his testimony; fifth, if he be a judge of a court of record, a practicing attorney or physician, and engaged in the discharge of his official or professional duty at the time of the trial."

Section 1714 R. S. Mo. 1929, provides:

> "Whenever any competent evidence shall have been preserved in any bill of exceptions in a cause, the same may be thereafter used in the same manner and with like effect as if such testimony had been preserved in a deposition in said cause, but the party against whom such testimony of any witness may be used shall be permitted to prove any matters contradictory thereof as though such witness were present and testifying in person."

Article II, Section 22, Missouri Constitution provides:

> "In criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy, public trial by an impartial jury of the county."

In the case of State v. Harp, 6 S. W. (2d), 562, the Supreme Court in Banc passed favorably on the right of the State to use testimony of a witness taken at a former trial and preserved in a Bill of Exeeptions, and quoted approvingly at l. c. 564 from 8, R. C. L. 88, as follows:

> " 'The admission of evidence given on a former trial or in a prior state of the same proceeding, where the issues are the same in both instances--another

> exception to the rule against hearsay--was at one time though in some jurisdictions to be an infringement of the defendant's constitutional right; but this is not the view usually taken at the present time. The confrontation of the witness at the former trial, if the defendant had the opportunity to cross-examine, is sufficient compliance with the constitutional requirement and the testimony thus given may be used at the trial, provided the witness is not legally available. * * * Among the circumstances in which the rules of evidence allow this testimony is the absence from the jurisdiction of the witness who previously testified, and this is true although the prosecution may have neglected an opportunity to subpoena him before he left the jurisdiction.' "

CONCLUSION.

We are of the opinion that testimony of a witness taken at a former trial of a criminal cause, and preserved in a Bill of Exceptions, can be used by the State upon a preliminary showing in the record that said witness is confined at the Tubercular Hospital at Mount Vernon, suffering from tuberculosis, and physically unable to attend Court by reason of said sickness.

In the Happ case the testimony at a former trial was allowed, and read in evidence, when it was shown that the witness was absent the jurisdiction of the Court in another state at the time of the subsequent trial. In that case the prosecutor resorted to the first reason set out in Section 1780, supra, for using the testimony at a former trial. In the case at bar you desire to resort to the third reason set out in the Statute, namely, that your witness cannot safely attend Court because of sickness and bodily infirmities. In both instances a statutory reason is apparent and we believe that to all intentions and purposes, a witness suffering with active tuberculosis, this witnesseés presence at the subsequent trial is just as unattainable as if the witness be dead. The defendant was

confronted with the witness at the former trial where the witness was subject to cross-examination, If the evidence was admissible in the one case there is no good reason why it is not admissible in a subsequent trial against the same defendant for the same offense where a statutory reason be given for admitting said evidence.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

PENAL INSTITUTIONS-CONVICTIONS-JUDGMENTS: An ante-dated mittimus in the hands of the Warden is interpreted that sentence is to commence from date of judgment, unless sentence is stayed to a future date in someway provided by law. Allowing jail time by ante-dating sentence is illegal.

November 20, 1935. 11-20

FILED
57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We acknowledge your request for an opinion dated November 1, 1935, which is as follows:

> "Harry 'Dutch' McCoy was convicted and sentenced to two years in the State Pen, on June 13th, 1935, and was committed to the State Penitentiary. On another charge pending in June, 1935, Harry McCoy was returned to the same Court by a writ of habeas corpus ad prosequendum and he pleaded guilty and was sentenced to another two years on the 1st day of November 1935. The Court in its sentence and judgment dated the second sentence of Nov. 1st, 1935 to begin as of June 13th, 1935, and ordered the sentences to run concurrently. This new sentence and judgment of the court on Nov. 1st, 1935, was at a new and different term of the circuit court.
>
> "Now will the two convictions, under the sentences run concurrently from the 13th day of June 1935, or will the second conviction of Nov. 1st, 1935, start to run, after the culmination of the first two year sentence of June 13th, 1935?
>
> "The defendant Harry 'Dutch' McCoy was recommitted to the State Penitentiary under the sentence and judgment of November 1st, 1935."

Section 3715 R. S. Mo. 1929 is the Circuit Court's authority to make an entry of judgment of record after conviction in a criminal cause, and reads:

> "Whenever a judgment upon a conviction shall be rendered in any court, the clerk of such court shall enter such judgment fully on the minutes, stating briefly the offense for which such conviction shall have been had, and the court shall inspect such entries and conform them to the facts; but the omission of this duty, either by the clerk or judge, shall in nowise affect or impair the validity of the judgment."

According to the provisions of Section 3717 and 8413 R. S. Mo. 1929, the Warden's Warrant of Mittimus authorizing him to incarcerate a prisoner is nothing more than a certified copy of the judgment and sentence of the Court rendered under the provisions of Section 3715, supra. Thus, under the provisions of Section 3715, supra, we see that the Legislature did not provide specifically that the time when imprisonment is to commence is to be a necessary part of the Warden's Warrant of Mittimus appearing of record, in the Trial Court, while in capital cases the Legislature expressly saw fit to make the day on which punishment is to be inflicted a necessary part of the sheriff's Warrant of Execution, and Section 3719 R. S. Mo. 1929 provides:

> "Whenever any convict shall be sentenced to the punishment of death, the court shall cause to be made out, sealed and delivered to the sheriff of the county, a warrant stating such conviction and sentence, and appointing a day on which such sentence shall be executed, which shall be not less than four nor more than eight weeks from the time of the sentence."

In the case of Ex parte Turner, 45 Mo. 331, our Supreme Court said at l. c. 332:

> "The prisoner, Turner, now claims that inasmuch as the judgments under which

> he is and has been confined do not specify the time when the imprisonment should commence, each term should be held to begin at the same time, and consequently that he has served his full period. But the statute does not require it, and it is not the practice for each sentence to specify the day of the commencement of the imprisonment. He is sentenced, and the time of imprisonment is designated according to the assessment by the jury, and the law decides when the term shall commence; and when he is convicted and sentenced for two offenses, the law also expressly decides when the second term shall begin, and it is wholly unnecessary for the court to decide it. The court can not do so with any certainty, for the prisoner may be discharged by pardon or otherwise from his confinement under the first conviction, and in that case the second term should at once begin."

The Supreme Court said in State v. Hedrick, 296 S. W. 152, at l. c. 154:

> "It is said that the verdict of the jury is illegal, because it fixed the date of the punishment. The verdict is as follows:
>
> > 'We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment at ninety days in the county jail beginning April 25, 1925.'
>
> "This is a general verdict, notwithstanding the fixing of the date of punishment. Pursuant to the trial, the jury returned the verdict, and, after allocution, the court pronounced judgment, and sentenced defendant to

> serve three months in the county jail from this date, all of which occurred on April 25, 1925. Section 4111, Revised Statutes 1919, provides, in substance, that no judgment shall be reversed or set aside by an appellate court because it was erroneous as to time or place of imprisonment; but in such case it shall be the duty of the court or officer hearing the case to sentence such person to the proper place of confinement and for the correct length of time from and after the date of the original sentence. We treat the words in the verdict beginning 'April 25, 1925,' as surplusage; thus rendering the verdict in effect regular, and without error.
>
> "Finding no error in the record, we affirm the judgment."

In the case of Perkins v. State, 63 Southern 692, the Supreme Court of Alabama, where the criminal procedure is similar to criminal procedure in Missouri, said:

> "At the end of an appropriate sentence there was added the provision that 'said sentence begins January 22, 1913, and expires December 10, 1913.' This clause was surplusage, and, the defendant by his appeal having procured a suspension of the sentence, the judgment appealed from is corrected here by striking from it the words quoted, and, as thus corrected, the judgment is affirmed."

CONCLUSION.

This department is of the opinion that, where one is sentenced to the State Penitentiary, imprisonment is to commence to run from the date of sentence, unless execution is stayed for the time being in some way provided by law, such as where execution is stayed by pardon, by parole, or by order of a superior court, by taking an appeal, or

where the facts of the case fall within the provisions of Section 4456 or 12969 R. S. Mo. 1929. Where execution of sentence is legally stayed, then the Warden of the Penitentiary is to compute imprisonment from the time the prisoner is actually incarcerated.

This department is of the opinion that any part of a judgment of record which shows that sentence is to start at a day prior to the date of sentence is but surplusage, being no legal part of the formal judgment and sentence proper rendered by the Court. Since our Courts have held that such is surplusage in the jury's verdict in State v. Hedrick, supra, they will also hold same to be surplusage when appearing as a part of judgment of record. We believe the Missouri Appellate Courts will follow the Alabama case, supra, should the question ever be presented to them.

This surplusage usually appears in a judgment as an overture to allow time spent in a jail awaiting trial. If time spent in jail awaiting trial is to be considered in measuring punishment for crime, the Trial Court can use the direct method of diminishing the term of punishment from and after the date of judgment. For instance, a prisoner who would ordinarily be sentenced to three years incarceration for his crime should be sentenced to two years, explaining to the prisoner that one year having been spent in jail, the time of incarceration is reduced by that one year. There is no good reason for a Court to ever indicate in a judgment that incarceration is to be computed from a date prior to sentence, and there is much reason why the Court should not have such power. A felon loses his civil rights when incarcerated for a felony, and by ante-dating the judgment to a fictitious incarceration date, we can conceive of cases where a felon may be defeated from some civil right, or may avoid otherwise binding contracts, were it not for the fictitious date in the judgment entry. We can conceive of cases where rights of innocent third parties have been defeated by such fiction, as where a public officer convicted of a felony has had official dealings with the general public up to the date of his judgment and sentence, while, if by fiction his conviction can be legally ante-dated, the right of third parties have been jeopardized. As was said in the Turner case, supra, it is not proper practice for a judgment to specify the date of commencement of imprisonment, the law itself deciding

when the term shall commence. It is for the Warden to follow the law when imposing sentences on those committed to his custody.

If in those cases where the mittimus in the hands of the Warden shows a judgment specifying a date from which sentence is to be computed, on one committed to the penitentiary, is to be given any legal significance, it would be possible for the Trial Court to completely defeat punishment for crime while rendering judgment in a criminal cause by merely stipulating the date sentence is to start at a time in the past so that no term of punishment remains to be served. If the Legislature intended such procedure while providing incarceration in the penitentiary for crime, they would have said so in Section 3715, supra, for they did specifically provide that in capital cases the judgment day is a necessary part of the sheriff's Warrant of Execution. (See Section 3719, supra.)

The practice of ante-dating, in a judgment, the time that incarceration be computed is confusing both to society and to the culprit. The general public is lead to believe that the criminal code is being enforced with long sentences, while the culprit is lead to believe that he has a legal claim for time, by the arbitrary date of incarceration appearing in the judgment and the date that judgment was actually rendered.

From the facts of your letter it is our opinion that prisoner 'Dutch' McCoy, by the judgments rendered in his cases, is to serve his sentence in the penitentiary from the date of judgment in both cases, and insofar as the terms overlap the incarceration is to be concurrent and not consecutive.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMAN Jr.
(Acting) Attorney General.

WOS:H

SCHOOLS--INCIDENTAL EXPENSE: Repairs and replacements to building should be paid out of building fund, and if there is not enough money in the building fund the same may be transferred out of the incidental fund. However, in arriving at the rate of tuition moneys transferred or that will be transferred out of the incidental fund to the building fund should not be included.

February 7, 1935.

3-16

FILED
58

Mr. J. M. Mathews, Secretary
Kearney Public Schools
Kearney, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

> "Would your office please give us an opinion what constitutes incidental expense. For instance, a school may run a building levy each year for repairs etc., and they have repairs each year, as most schools do. Should those items of expense be counted in getting the cost, per pupil?
>
> "We must set the rate of tuition in our school from year to year and cannot go beyond the cost.
>
> "We would greatly appreciate your opinion and help."

I.

INCIDENTAL EXPENSE.

The Statutes of Missouri do not define incidental expenses, however, Section 9312 R.S. Mo. 1929, provides among other things for an incidental fund. In State ex rel. Marlow v. Himmelberger-Harrison Lumber Co. et al. 58 S. W. (2d) 750, the Supreme Court of Missouri said the following at page 753:

> "We find that section 9312, R. S. 1929 (Mo. St. Ann. Sec. 9312), provides for dividing school revenues into three funds, designated as teachers' fund, incidental fund,

and building fund, and that 'all money derived from taxation for building purposes, from the sale of school site, schoolhouse or school furniture, from insurance, from sale of bonds, from sinking fund and interest, shall be placed to the credit of the "building fund."' The incidental fund is derived wholly from taxes levied for incidental expenses, except that it is provided by said section 'that the board of directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property.'"

Section 9214 R. S. Mo. 1929 provides as follows:

"The board of directors of each district shall, on or before the fifteenth day of May of each year, forward to the county clerk an estimate of the amount of funds necessary to sustain the schools of their district for the time required by law, or, when a longer term has been ordered by the annual meeting, for the time thus decided upon, together with such other amount for purchasing site, erecting buildings or meeting bonded indebtedness, and interest on same, as may have been legally ordered in such estimate, stating clearly the amount deemed necessary for each fund, and the rate required to raise said amount."

Section 9226 R. S. Mo. 1929 provides as follows:

"The board of education or directors

> of any school district in this state shall, whenever in their judgment it becomes necessary, or they be requested, by a petition of ten taxpayers of any such school district, to increase the annual rate of taxation for the purpose of paying for school building sites, whether the same have been purchased or condemned, for buying or erecting school buildings in such districts, or repairing or furnishing such buildings, * * * *determine the rate of taxation necessary to be levied within the maximum rates prescribed by the constitution, and as therein limited for such purposes, and shall submit to the voters of such school district,* * * *."

From the above it is to be noted that the incidental fund is derived wholly from taxes levied for incidental expense, and that the Board of Directors have the power to transfer from the incidental fund to the building fund sums of money as may be necessary for the ordinary repairs of school property, thus it would seem logical that repairs and replacements should be made from the current building fund, and if repairs and replacements are to be made, the money should be transferred out of the incidental fund (if there is not enough in the building fund), and the money placed in the building fund.

We define incidental expenses then to mean expenses necessary to give instruction to the pupils -- a few of such expenses being wages of janitors, engineers, caretakers, etc., fuel, lights, power, janitors' supplies and repairs and replacements for instructional apparatus. Repairs and replacements to the building such as roofing and painting etc. should be paid from the building fund, and if there is not enough money in the building fund the amount necessary to do the work should be withdrawn from the incidental fund and placed over in the building fund.

From the above and foregoing it is our opinion that repairs and replacements(other than replacements for instructional apparatus) should be made from the current building fund, and that in figuring the per-pupil cost for the rate of tuition in your school you should not include repairs and replacements that are to be paid from the building fund, or from moneys taken from the incidental fund and placed in the building fund. The amount, if any, that will be transferred from the incidental fund to the building fund should not be included when you arrive at the rate of tuition. Section 16, Laws of Missouri 1931, page 343 provides amended laws of 1933, page 393 in part provides?

> "* * * *but the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended* * * *and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental expenses."

Yours very truly

James L. HornBostel
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

JLH:H

SCHOOLS: Board of directors have no power to repair roads in front of school buildings, out of incidental fund.

2-20

February 12, 1935.

FILED
58

Mr. J. S. Maxwell
County Superintendent
Johnson County Public Schools
Warrensburg, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"Will you kindly advise me regarding the following:

1. Can a school board legally spend money from the incidental fund to help repair a public road on which the school property is located, and which the children of the district travel to and from school?

2. Should money be spent in the above manner, can any recourse be taken against said board."

Section 9311, R. S. Mo. 1929, in part provides:

"Upon the order of the board of directors, it shall be the duty of the district clerk to draw warrants on the county treasurer in favor of any party to whom the district has become legally indebted, either for services as teacher, for material purchased for the use of the school, or material or labor in the erection of a schoolhouse for said district--

> "the said warrant to be paid out of any moneys in the appropriate funds in the hands of the said treasurer and belonging to the district. The species of indebtedness must be clearly stated and should be drawn on its appropriate fund; all moneys for teachers' wages on the teachers' fund; all moneys used in the purchase of a site, erection of building thereon, and furnishing the same, on building fund; and all other expenses to be paid out of the incidental fund:"

Section 9312, R. S. Mo. 1929, provides in part as follows:

> "The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from the taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'teachers' fund;' the money derived from taxation for incidental expenses shall be credited to the 'incidental fund;' * * *. No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; * * *."

In State ex rel. Marlowe v. Himmelberger-Harrison Lumber Co., et al, 58 S. W. (2d) 750, l. c. 753, the Supreme Court of Missouri said:

> "* * * we find that section 9312, R. S. 1929 (Mo. St. Ann. Sec. 9312), provides for dividing school revenues into three funds, designated as teachers' fund, incidental fund, and building fund, * * The incidental fund is derived wholly from taxes levied for incidental expenses, except that it is provided by said section 'that the board of directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property.'"

Section 9226, R. S. Mo. 1929, provides in part as follows:

> "The board of education or directors of any school district in this state shall, whenever in their judgment it becomes necessary, or they be requested, by a petition of ten taxpayers of any such school district, to increase the annual rate of taxation for the purpose of paying for school building sites, whether the same have been purchased or condemned, for buying or erecting school buildings in such districts, or repairing or furnishing such buildings, (or for building, repairing and maintaining foot bridges over running streams) determine the rate of taxation necessary to be levied within the maximum rates prescribed by the Constitution, and as therein limited for such purposes, * * *."

The board of directors are trustees of school funds and their powers are limited to those expressed in the statute. The duty of the board of directors primarily is to provide for educational instruction to pupils. You state that moneys were taken from the incidental fund in order to repair a public road, and we assume that it was located in front of the school house. We do not find any statute or authority, expressed or implied, that would permit a school board to spend money out of the incidental fund in repairing a public road. Upon complying with Section 9226, supra, they may build and maintain foot bridges over running streams. However, we do not believe that that section could be given as authority to repair a road out of the incidental fund. Facts might present themselves in a given case where it would be necessary for ingress and egress to the school property, that a pathway or roadway be constructed, and, if such was done, it would be lawful, yet payment for the work would not come out of the incidental fund.

We understand the facts as stated in your letter that the school board merely improved the public road running alongside of the school house, out of the incidental fund, and if such is true, in our opinion, there has been a misapplication of funds on the part of the board of directors.

In Consolidated School District No. 6 v. Shawhan et al, 273 S. W. 182, the Kansas City Court of Appeals, page 184, said:

> "Under our state law the government of a school district, as well as the handling of the finances thereof, is vested in a board of directors duly elected by vote. Their powers and duties are prescribed by statute. A trust is reposed in them, the execution of which is frequently attended with difficulty and embarrassment. By accepting such trust each director obligates himself to perform the duties as the law directs, and if there is a misapplication of the funds, or any part thereof, the question for determination is as to whether or not the directors are personally liable and may legally be required to respond in damages therefor."

And further,

> "The law as stated in the section last mentioned is reflected in the opinion of this court in Cleveland Village School District v. Zion, 195 Mo. App. 299, 304, 190 S. W. 955, 957, where it is held that:
>
> '* * * Money collected by taxation for school purposes cannot be diverted from one fund to another. Certainly money in the teacher's fund cannot be transferred to and used in the incidental fund.'
>
> It is likewise true, and for the same reason, that money in the teachers' fund may not be used in the building fund. That this was done in the case at bar stands admitted. Defendants contend they

"are not liable therefor. We think the Supreme Court settled this point against defendants' contention in Knox County v. Hunolt et al., 110 Mo. 67, 19 S. W. 628, where it is said:

'Now while the county court and the judges thereof have vested in them discretionary powers as to the management of this county school fund for school purposes, they have no discretion whatever as to the uses to which it can be applied. The use of the fund for the payment of ordinary county debts was an act in direct violation of the constitution and laws creating that fund, and was, therefore, nothing short of malfeasance. That the judges would be liable in a private suit to persons especially injured for such a violation of law is clear, and we can see no reason why they are not liable to the county. * * * The county court and the judges thereof were the agents of the county, but they were agents appointed by and under the general laws. Their authority is limited and defined by law. As the defendants have misapplied this fund, and that, too, without any authority of law whatever, they must be held accountable to the county as trustee of the fund for such unlawful act. As they had no discretion by which they could apply the fund to the payment of ordinary county debts, it can make no difference that the act was not corrupt or a willful violation of the law, and so the trial court ruled. This fund should be replaced by those who diverted it.'"

In answer to your second question, it is our opinion that recourse to be taken against said board to recover the money would be an action at law.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

CORONER: (1) Shall use reason in determining his statutory jurisdiction to hold an inquest.
(2) Who shall pay inquest fees.

March 25, 1935.

3-27 FILED 58

Dr. T. M. Mathews
Coroner of Pike County
Bowling Green, Missouri

Dear Sir:

Your request for an opinion, dated March 21, 1935, is as follows:

> "Mr. Guy Meek, who has an estate, was found dead with a bullet hole through his head. The circumstances indicated suicide.
>
> "1st. Who is the judge as to the propriety or necessity of holding an inquest?
>
> "2nd. Who should pay the Statutory fees of the inquest?"

As to your first question:

Before the burial of dead bodies, whose death occurred in this State, the law requires a complete and satisfactory certificate of death to be filed with the officers of the State Board of Health, and Laws of 1933, page 270, Section 9044, amending Revised Statutes 1929, provides in part as follows:

> "And no such burial or removal permit shall be issued by any registrar until a complete and satisfactory certificate of death has been filed with him as hereinafter provided:"

The Legislature provides for said certificates in separate sections, and Section 9047 R.S. Mo. 1929, provides:

"In case of any death occurring without medical attendance, it shall be the duty of the undertaker to notify the registrar of such death, and when so notified, the registrar shall inform the local health officer and refer the case to him for immediate investigation and certification, prior to issuing the permit: Provided, that when the local health officer is not a qualified physician, or when there is no such official, and in such cases only, the registrar is authorized to make the certificate and return from the statement of relatives or other persons having adequate knowledge of the facts: Provided further, that if the circumstances of the case render it probable that the death was caused by unlawful or suspicious means, the registrar shall then refer the case to the coroner for his investigation and certification. And any coroner whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall state in his certificate the name of the disease causing death, or the means of death; causes or violence, and whether (probably) accidental, suicidal, or homicidal, as determined by the inquest; and shall, in either case, furnish such information as may be required by the state registrar properly to classify the death."

Again in Section 9070, R. S. Mo. 1929, the Legislature provided:

"When a transit permit is desired for the shipment of a dead human

> body, the physician attending the deceased in the last illness shall furnish a certificate showing the name of the deceased, the age, the time and place of death, the cause of death, and whether of a contagious or infectious disease. If there was no attending physician, the coroner of the county in which the death occurred shall make the certificate.

Thus we see that the "certificate of death", which is required by law before removal or burial of dead bodies, can be legally made out by the attending physician, but where there be no attending physician then it becomes the coroner's duty to make out the required certificate

The coroner is not privileged at all events to make a "certificate of death" necessary to a burial permit. On the other hand he has the duty to take inquests of all violent and casual deaths occuring in the county, and Section 11608 R. S. Mo. 1929, provides as follows:

> "A coroner shall be a consevator of the peace throughout his county, and shall take inquests of violent and casual deaths happening in the same, or where the body of any person coming to his death shall be discovered in his county, and shall be exempt from serving on juries and working on roads."

The purpose of an inquest is to have a jury to view any dead body and inquire whether death came by violence or casualty, and how and by wyom he came to his death, and Section 11612 R. S. Mo. 1929, provides:

> "Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to his death by violence or casualty,

> being found within his county, shall make out his warrant, directed to the constable of the township where the dead body is found, requiring him forthwith to summon a jury of six good and lawful men, householders of the same township, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

The coroner's jury is required, after being charged on oath, to declare whether the death of the person be by his own act and the manner and means thereof, and the circumstances relating thereto, and Section 11617 R. S. Mo. 1929, provides:

> "As soon as the jury shall be sworn, the coroner shall give them a charge, upon their oaths, to declare of the death of the person, whether he died by felony or accident; and if of felony, who where the principals and who were accessories, and all the material circumstances relating thereto; and if by accident, whether by the act of man, and the manner thereof, and who was present, and who was the finder of the body, and whether he was killed in the same place where the body was found, and, if elsewhere, by whom, and how the body was brought there, and all other circumstances relating to the death; and if he died of his own act, then the manner and means thereof, and the circumstances relating thereto. "

In order that we may understand the object of a coroner's inquest, we look to Houts v. McCluney 102 Mo. 13, 14 S.W. 766, where the Supreme Court said:

"The object of the coroner's inquest is to ascertain whether the person died by felony or accident; and, if by felony, to discover the guilty person or persons.* * * *"

CONCLUSION AS TO FIRST QUESTION.

It is the opinion of this office that it is within the sound discretion of the coroner, and he alone, as to the propriety or necessity of calling a coroner's jury and holding an inquest over a dead body discovered in his county, where the circumstances indicate a death by violence or casualty.

His duty to take inquests is a duty independent of his duty to make out death certificates, which must be exercised with sound discretion and with an object of serving the people in those statutory matters, on which he is bound to charge the jury to determine. Ulterior purposes, other than the statutory purposes of a coroner's inquest, would not justify the coroner in holding an inquest but an inquest made in good faith over a dead body is the statutory duty of one holding the office of coroner.

It is the opinion of this office that, where circumstances reasonably indicate a death by "violence and casualty" it is up to the coroner to hold an inquest. The object of such an inquest is to determine the cause of death. The sovereign has lost a subject; the question arises, was the death by accident or natural causes or was a life taken by felony (which is without due process of law)? If by felony, to discover the guilty person or persons, there is good reason to hold statutory inquests, even though it may work embarrassment on the immediate family of deceased. The state has a vital interest in knowing how people come to their death when all indications are that death was by "violence or casualty."

The statute provides that even in case of suicide the coroner's jury are to determine the manner and means, and circumstances relating thereto. The Legislature intended suicide to be inquired into as a death by "violence or casualty" or they would not have made it a subject of inquiry.

As to your second question:

The following sections show that in some instances the county, and in other instances interested parties, are liable for the statutory fees incurred during an inquest.

Section 11630 R. S. Mo. 1929 provides:

"If an inquest be held over the body of a minor, the parent, guardian or master of the same shall be liable for the costs and expenses, if there be any such person able to pay the same. If the person over whose body an inquest shall be held shall have any estate, the cost and expenses of inquest and burial shall be paid out of his estate; but where there is no person liable and able to pay such expenses, they shall be allowed by the county court out of the county treasury."

Section 11632 R.S. Mo. 1929 provides:

"The coroner or other officer holding an inquest, as provided for by this chapter, shall present to the county court a certified statement of all the costs and expenses of said inquest, including his own fees, the fees of jurors, witnesses, constables and others entitled to fees for which the county is liable; and the county court shall audit and allow the same, and shall make a certified copy of the same, without delay, and deliver such copy to the county treasurer, which copy shall be deemed a sufficient warrant or order on the treasurer for the payment of the fees therein specified to each person entitled to such fees. The county treasurer shall pay to each person on demand, or to his legal representatives, the fees to which he is thus entitled, and shall take the

proper receipt therefor, and produce the same in his settlements with the county court as vouchers for the money so paid out by him."

Section 11634 R. S. Mo. 1929 provides:

"Whenever any known person shall have died from any cause other than violence or casualty, and a certificate of the cause of death is necessary for the burial of the body of such person, the coroner shall, at the request of the relatives or friends of such person, hold a view or inquest on the body, and the person making such request shall pay all costs, fees and expenses of such inquest or view, nor shall the county be liable for any of them unless it shall appear to the county court that in such a view or inquest there appeared reasonable cause to suspect that said dead person came to his death by violence or casualty, in which case the costs, fees and expenses of such view or inquest shall be paid as in ordinary cases; and although such person may have died from disease or natural cause, where, under this section, the county is not liable for the fees, costs and expenses of a view or inquest, and the same cannot be made out of the person requesting the same, or out of the estate of the deceased, the county court may, in its discretion, allow and pay the fees of necessary witnesses at the view or inquest; but all services of the coroner, constable and other officers in or about the same shall be rendered gratuitously, as in the case of a suit by a plaintiff permitted to sue as a poor person."

Section 11635 R. S. Mo. 1929 provides:

"Any coroner who shall knowingly charge to any person, or present to the county court for allowance, any items of fees, costs and expenses not authorized by law, or for any service not actually performed,

> shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall forthwith be removed from office. Such removal shall be declared in the judgment for such misdemeanor, and thereupon the office of such coroner shall be declared vacant, and his successor appointed according to law."

Our SupremeCourt, in construing Section 11632, supra, said, in the case of Carmack v. County 127 Mo. 527, 30 S. W. 162:

> "By section 2462, Revised Statutes,1889, it is made the duty of the officer holding the inquest to present to the county court of the county in which the inquest is held a certified statement of all the costs and expenses of said inquest, including his own fees, the fees of jurors, witnesses,constables and others entitled to fees for which the county is liable. The certificate of the coroner in this case was in evidence, was prima facie evidence that the services were rendered for which fees were charged as therein stated, and in the absence of proof to the contrary, was all that was necessary to justify the finding and judgment of the court. The judgment is affirmed."

Our Supreme Court construed together sections 11802 and 11632, supra, in the case of Houts v. McCluney 102 Mo. 13, 14 S. W. 766, and said:

> "In the first place, no costs are allowed by the common law. They are, with us, creatures of the statute. They must be paid in the amounts and in the manner specified in the statute, Sections 5156 and 5613 are clear and unambiguous. They make the county liable for the fees allowed the coroner, jurors, witnesses and the constable in all inquests

> where the coroner has reasonable cause to believe that the person, over whose body the inquest is held, came to his death by violence or casualty."

Section 11633 R. S. Mo. 1929 provides that in certain instances the coroner's fees are not to be allowed by the county court as a charge upon the county; said section reads:

> "No costs or fees to the coroner shall be allowed by the county court, in any case of the view of or inquest on a dead body,unless it appears to the court that the coroner,either before or during the view or inquest,had reasonable cause to believe that such body was that of a person who had come to his death by violence or casualty,or who, being unknown, was found dead within such county; but where any such inquest or view has been held by the coroner, on a notification by some person, without reasonable cause to suppose that such dead body was that of a person unknown, or who had come to his death by violence or casualty,the person giving such notification, without reasonable cause, as aforesaid, shall be liable to pay all the costs, fees and expenses of such view or inquest."

CONCLUSION AS TO SECOND QUESTION.

Fees for performing duties of a public office were not allowable by common law and if they be allowable in this day it is because the Legislature has so provided.

The Legislature has provided for coroner's fees in the statutes set out supra, but his right to same depends entirely on the construction of the statutes allowing same. The Supreme Court in the Houts case construed the above sections to mean that the county is liable for legitimate coroner's fees "where the coroner has reasonable cause to believe that the person, over whose body the inquest is

held, came to his death by violence or casualty."

It is the opinion of this office that the liability of the county has not changed since the holding in the Houts case. The above question states the law as it relates to a county's liability.

On the other hand, the general liability of the county is not without exception. Where an inquest be held on notification of a person without reasonable cause to suppose a death by violence or casualty, the person so notifying is then liable, and not the county. Section 11633, supra, so provides.

There is another exception to county liability. Where an inquest is held under the provisions of Section 11634, supra, the county is liable under the general rule above laid down, but the general rule, by the very terms of said section, does not apply in cases of death by "disease or natural" causes. By the terms of said section it is possible for the coroner to be called upon to make out a "certificate of death" and it becomes his duty to view the body and look to the person who requested his assistance for his fees. In such a case the necessary witness fees may be paid at the discretion of the county court, but the fees of the coroner, constable and other officers, by the very terms of the statute, are gratuitous.

When the coroner is called in under the provisions of this statute to perform his duty, the Legislature did not intend to deny to the coroner the general power which they had vested in him to reasonably hold inquests when the occasion demands. They recognized in him his right to perform his duty, even when called in originally by relatives only for the purpose of making a"certificate of death," when, after answering such a call and under his view he sees a dead body which, from all appearances came to its death by "casualty and violence." That is why the Legislature said in said section that he shall "hold a view or inquest," whichever the occasion reasonably demands. If it turns out that he held an inquest when in all reason a "view" would have sufficed to have shown death from disease or other causes, then the county is not liable for costs and fees under the provisions of this section.

Since, under the statutes, liability for coroner's

fees depends upon the facts of each case, it is impossible for this office to go beyond stating the general rule of liability set out in the statutes and cases, and the statutory exceptions thereto.

Recapitulating our conclusion to your second question: Where an inquest is reasonably held, the county is liable for coroner's inquest fees. Where inquest be unreasonably held, the county is not liable but service fees are to be paid by the informant (except for witness fees which county court may allow) or are gratuitous.

In the final analysis, legal liability, for fees in an inquest held by a coroner, depends on the facts of each case and must prevail or fail on its own particular facts.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General

WOS:H

INTOXICATING LIQUOR - Information for sale without license.

July 5, 1935.

FILED
58

Honorable Thomas A. Mathews
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

We have your request of July 3, 1935 for an opinion, which is in part as follows:

> "On May 17, 1935, Mr. J. C. Henderson, who represents the Supervisor of Liquor Control, purchased from Thomas Baker and Marion Jones, in this county, a certain one-half pint of whiskey bearing the Federal stamp and also the Five Cent stamp issued by the Supervisor of Liquor Control. Thereafter I prepared an application for search warrant upon the information given me as a result of the purchase made by Mr. J. C. Henderson, and following the information given me and the application made on my part for a search warrant, the warrant was issued and the Sheriff then executed the warrant by searching the premises and finding 150 half pints of whiskey; 100 pints of whiskey and 33 quarts of whiskey, each bottle bearing the Federal stamp and the stamp issued by the Supervisor of Liquor Control of this State. However, he had no permit or license from the Supervisor of liquor control to sell same."

#2 - Honorable Thomas A. Mathews

It is the opinion of this office that the sellers, Thomas Baker and Marion Jones, can be prosecuted for violation of Section 18 of the Liquor Control Act on two separate charges: (1) The sale of intoxicating liquor by a person not holding a license; (2) Exposing for sale intoxicating liquor by a person without a license. The first is a felony and the punishment is prescribed in Section 21-A1, Subdivision (G). The second is a misdemeanor punishable under Section 30. To charge the first offense of selling, the following is suggested as a sufficient information:

> "Comes now _____, Prosecuting Attorney within and for _____County, Missouri, and upon his official oath informs the court that Thomas Baker and Marion Jones, at and in the County of _____, and State of Missouri, on or about the 17th day of May, 1935, did then and there unlawfully and feloniously sell intoxicating liquor without having first applied for and received a license from the Supervisor of Liquor Control authorizing the sale of intoxicating liquor; against the peace and dignity of the State."

The name of the buyer of the intoxicating liquor is not an element of the offense and need not be pleaded. State v. Leonard, 195 Mo. App. 283; State v. Brooks, 18 S. W. (2d) 16.

It is sufficient to charge a violation of the Liquor law on or about a certain day. State v. Pigg, 312 Mo. 214.

In charging the second offense in the information, which would be a misdemeanor, it will be sufficient to use the above information, leaving out the word "feloniously", and substituting "exposed for sale" for the term "sell".

It is the opinion of this office that the one pint of liquor <u>sold</u> is sufficient to sustain the felony charge

of selling without a license, and the second charge would be based upon the liquor seized plus the testimony of J. C. Henderson that he purchased one-half pint out of the liquor seized.

We trust that you have received copies of the padlock proceedings consisting of a Bill for Injunction, Temporary Injunction and a Notice of Filing of Suit. It occurs that this would be an excellent opportunity to test the new padlock proceedings in this State.

We shall be glad to prepare any further pleadings or papers in the matter.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting Attorney General)

FER:FE

TAXATION AND REVENUE:) Tax law can provide receipts to go to exclusive
) fund for specific purpose.
BILLS.)

1-14

January 10, 1935.

FILED
59

Senator James C. McDowell
Capitol Building
Jefferson City, Missouri

Dear Senator:

We herewith render you an opinion in respect to your oral request for our views on the following proposition:

> "May the General Assembly enact a cigarette tax and provide that the proceeds thereof be placed in a special fund from which to pay old age pensions?"

At the general election held November 8, 1932, the people adopted Constitutional Amendment No. 1, being an amendment to Section 47 of Article IV of the Constitution of Missouri, by adding the following phrase to said section:

> "Provided further, that nothing in this Constitution contained shall be construed as prohibiting the general assembly from granting or authorizing the granting of, pensions to persons over seventy years of age, who are incapacitated from earning a livelihood and are without means of support, as may be provided and regulated by law."

Section 47 of Article IV of the Constitution prohibits the General Assembly from authorizing any county or political corporation or subdivision from lending its credit or granting public money to the aid of individuals. By amendments certain exceptions have been provided, one authorizing the creation of a fund for the pensioning of crippled and disabled fireman, another authorizing the granting of pensions to deserving blind. With the last amendment a further exception is made authorizing the granting of pensions to persons over seventy years of age incapable of earning a livelihood and without means of support.

This last amendment does not provide for the levy of a tax and the establishment of a specific fund from which the benefits to be granted are to be paid exclusively, as did the amendment authorizing blind pensions. We are therefore confronted with the problem as to whether the Legislature can establish such a fund although not provided for in the Constitution. We are promptly confronted with Section 44 of Article IV of the Constitution providing in part as follows:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divers the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law.* * * *"

This provision would require that all moneys collected under the provisions of the cigarette tax would have to be paid into the State Treasury and could only be expended under the authority of a legislative appropriation. If the purpose sought to be obtained is to be accomplished without a further constitutional amendment, it can be done by a provision in the tax law providing that the taxes raised under the measure are to be paid into a special fund to be known as the Old Age Pension fund, or some such other appropriation title, to be used only for the purpose of carrying out the provisions of the Constitutional Amendment No. 1, adopted by the people of Missouri on November 8, 1932. Regular appropriation bills would be necessary before the funds could be expended and the tax law itself would always be subject to legislative will, to-wit, the Legislature could by appropriate action change the purpose for which the tax was to be expended.

As authority for the foregoing suggestion we refer to the case of State ex rel. Fath vs. Henderson, 160 Mo. 190. The Supreme Court in Banc in this case passed upon the constitutionality of the Collateral Inheritance Tax Law of 1899. This law levied a collateral inheritance tax and provided that the receipts therefrom should be deposited in the "State Seminary Moneys" fund, to be devoted to the exclusive use of the University of Missouri and the Rolla School of Mines. This act read in part as follows:

> "Sec. 4. The moneys received by the State Treasurer under the provisions of this act shall be deposited in the State Treasury to the credit of the fund now existing in the State Treasury and known as the "State

Seminary Moneys," for the maintenance, support and better equipment of the buildings, apparatus, books, instruction, etc., of the University of the State of Missouri, to an amount not exceeding in any one year the equivalent of one-tenth of one mill upon every dollar of the assessed valuation of taxable property of this State for the said year: Provided, that one-eighth of all such moneys so received shall be devoted to the use of the School of Mines and Metallurgy, a department of the said University: Provided, further, that if the net amount deposited in any one year by the State Treasurer under the provisions of this act, to the credit of the 'State Seminary Moneys' be not equivalent to one-tenth of one mill upon every dollar of the assessed valuation of taxable property of this State for the said year, it shall be the duty of the State Treasurer to make good this deficiency out of the first moneys received under the provisions of this act in the next succeeding year: Provided further, that all said moneys shall be disbursed in pursuance of regular appropriations of the General Assembly, in accordance with the provisions of section five thousand six hundred and ninety-one (5691) of the Revised Statutes of 1889.

Sec. 5. The moneys received by the State Treasurer under the provisions of this act which shall exceed in any one year the amount required by section four of this act to be deposited to the credit of the 'State Seminary Moneys,' shall be deposited in the State Treasury to the credit of a fund to be known as the 'Educational Funds,' which is hereby created and established. The moneys deposited in the said fund shall be appropriated by the General Assembly for public educational purposes.* * * *"

In passing upon the constitutionality of the foregoing provision the Court stated, 208 et seq:

"The first contention of the relators is that the Act of April 19th, 1899, is unconstitutional, because it appropriates the State's revenues in an inverse order to that laid down in section 43, article 4, of the Constitution, and destroys the

priorities provided in that section.

As said by the learned counsel who maintains this proposition, a somewhat brief consideration ought to demonstrate its truth or its unsoundness.

The constitutional provision is simple, and the statute is unobscure. The argument of relator is predicated on section 43 of article 4 of the Constitution, namely, that, 'all revenue collected and moneys received by the State from any source whatsoever shall go into the Treasury, and the General Assembly shall have no power to divert the same or permit the money to be drawn from the Treasury except in pursuance of regular appropriations made by law,' which is followed by the provision directing the order in which the Legislature shall pass appropriation bills.

From these words counsel deduce the proposition 'that all revenue collected and moneys received by the State from every source shall go in the first instance into one common or general fund, unfettered, unpledged and unappropriated,' and that these words necessarily prohibit the creation of any special funds in the Treasury to be supplied out of revenue provided by the General Assembly.

Other words must be read into the article to justify such an interpretation, to-wit, 'one general fund.' If such was the intention of the framers of the Constitution they were singularly unhappy in expressing themselves, an imputation which we are unwilling to cast upon that body, especially when they were preparing an instrument so solemn and important in its nature.

Learned counsel reach their conclusion that the convention intended that all revenue and moneys collected should go into 'one general' or 'common fund' by a process of reasoning and not from any express command of the Constitution. If they are right, then all the revenues must go into one common or general fund and yet the Constitution itself provides elsewhere for special funds.

* *

> But again, section 15, article 10, leaves no doubt whatever as to the intention of the convention. It requires that 'all moneys now or at any time hereafter, in the State Treasury, belonging to the State, shall immediately on receipt thereof be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong in such bank or banks' as may be selected under that section.
>
> So that it will not do to say that the Constitution requires all revenues of the State to be first paid into one general or common fund and then disbursed in the order named in section 43, article 4, of the Constitution.
>
> That section simply requires the General Assembly to proceed in that order in passing its appropriation bills.
>
> It does not follow because the Legislature is required to pursue a specific order in passing appropriation bills, that it may not provide a tax for a public purpose, and require it to be paid into the Treasury and set apart in a special fund subject to a subsequent appropriation for the purpose for which it was levied, or for that matter, to some other public purpose, when unrestrained by a constitutional limitation.* * **

The Collateral Inheritance Tax Law was a privilege or excise tax as would any cigarette tax law undoubtedly be which is adopted. We believe the foregoing case to be in point on this question and ample authority for a provision setting up a special fund for old age pensions and providing that the proceeds in such fund shall only be used for the purpose of carrying out the Constitutional Amendment. We do not find that this case has been overruled or criticized in any subsequannt opinion of our Supreme Court.

Such a legislative enactment would of course be on the same basis as any other legislative act and could not authorize the expenditure of the funds without placing them in the treasury or without a legislative appropriation therefor. The moneys in this fund and the appropriation therefore would be on the same basis as other appropriation acts. The moneys in the fund could not be

construed as being continually appropriated for the purpose of carrying out the amendment.

In the case of State ex rel. Kessler vs. Hackman, 304 Mo. 453, the Court pointed out the distinction between the creation of a special fund and the appropriation of moneys from that fund, l. c. 458:

> "* * * *this court has held that a fund raised by an act for a special purpose, could not be paid out of the State Treasury except upon an appropriation by an act of the Legislature. (State ex rel. Fath v. Henderson, 160 Mo. 190, l. c. 214; State ex rel. v. Gordon, 236 Mo. 142, l. c. 158.) In the case last cited the court had under consideration a fund for the support and maintenance of the Game Department. It was held that the creation of a special fund is not a continuing appropriation of the fund, or of any part of it, to pay accounts drawn against it. That the creation of the fund is one thing, and the appropriation of money to pay accounts against the fund is quite another thing. The language of the Constitution is unequivocal; it requires an appropriation before payment of money received by the State 'from any source whatsoever,' The money collected by the board is received by the State; it goes into the State Treasury. To make it more specific, the requirement that an appropriation by the Legislature will be necessary before money can be paid out of the treasury of the State, it is applied, not only to state funds, but to 'any of the funds under its management.'"

Although uninformed as to the plan for the administration of the act, this fund would probably fall within the provisions of Senate Bill 124, page 414, Laws of Missouri, 1933, unless provisions were made to exempt such fund from the operation of this law. You will recall that this act provides for the transfer of all moneys in special funds into the general revenue fund at the expiration of each biennial.

While the taxing act itself would be subject to amendment or change by each general assembly, still so long as the act provided for the use of the funds to pay old age pensions, a lawful

appropriation of those funds could not be made for any other purpose. This issue has recently been settled in the case of State ex rel. Davis vs. Smith, 75 S. W. (2d) 828. In this case the Court held an appropriation act to be ineffectual which conflicted with the substantive law on the subject, l. c. 830:

> "It cannot be said that the act appropriating $3,000 from the general revenue fund to the board of barber examiners' fund amounted to an amendment of section 13525, R. S. 1929 (Mo. St. Ann. Sec. 13525, p. 637). It does not attempt to amend that section. Its sole purpose was to appropriate $3,000 from one fund to another. It reads as follows:
>
> 'There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, the sum of three thousand ($3,000.00) dollars to the Board of Barber Examiners Fund.' (Laws 1933-34, p. 12, Section 12B.)
>
> Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend section 13525, it would have been void in that it would have violated section 28 of article 4 of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as section 13525, and the mere appropriation of money are two entirely different and separate subjects. State ex rel. Hueller vs. Thompson, State Auditor, 316 Mo. 272, 289 S. W. 338." * * *

CONCLUSION.

It is therefore the opinion of this office that a cigarette tax law could be enacted providing that the receipts therefrom should be used exclusively for payment of Old Age Pensions, but that unless there is a constitutional amendment adopted so providing,

the law would be subject to legislative action at any time, but so long as the act provided the funds to be used for Old Age Pensions no other lawful appropriation thereof could be made.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM



COUNTY CLERKS - I. The amount of compensation of county clerk and deputy hire; II. Compensation of county clerk and pay of deputies must be derived annually from fees earned; III. Settlements with county courts; when made etc.; IV. Duty of the county clerk to appoint deputy or assistant; duty of county court to approve or disapprove such appointment.

February 14, 1935

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FILED
59

Honorable Theo. McCracken
County Clerk
Dent County
Salem, Missouri

Dear Sir:

We have your request of January 15, 1935 for an opinion relative to the compensation of county clerks, compensation of deputies and settlement of fees with the county court. We also have numerous other requests pertaining to similar subjects connected with the county clerk's office and therefore, for brevity, we are combining all such requests in this opinion.

I.

The amount of compensation of county clerk and deputy hire

Section 11811, Laws Mo. 1933, p. 370 fixes the maximum compensation for county clerks and deputies according to the size of the county, which compensation must be derived from fees of the office. Section 11811, supra, in part provides as follows:

> "The aggregate amount of fees that any clerk of the County Court * shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. In counties having a popula-

> tion of * the clerks shall be allowed to retain * for themselves, and shall be allowed to pay for deputies and assistants * "

The above statute varies the amount of compensation of county clerks and the pay of deputies according to the population of the county.

County clerks are elected, under Section 11664, R. S. Mo. 1929, for a period of four years, and when commissioned by the Governor,

> " * shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, * "

It will be noted from the above quoted portion of Section 11811 that the compensation of a county clerk is for "one year's service". Construing the two statutes together, such one year's service begins annually on the first Monday in January. There is no difference between one year's service and an annual service. The compensation in either case is an annual compensation.

The Supreme Court, in State ex rel. Harvey v. Linville (1927), 300 S. W. 1066, l.c. 1067, in construing the salary provision said:

> "From the context (of the statute) it must be presumed that annual salary was meant. 'Annual salary,' as used in said section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further than 'annual', as applied to salaries, means not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the 1st day of April of each year."

While the above quotation refers to a salary, there is now no distinction in this State between the term "salary" and "compensation". Both mean the same. State ex rel. O'Connor v. Riedel, 46 S. W. (2d) 131.

It is, therefore, the opinion of this office that the maximum amounts of compensation for the county clerk and the pay of deputies, payable exclusively from fees of the office, as set out in Section 11811, supra, are limited to the year of incumbency, beginning annually on the first Monday in January.

II.

Compensation of county clerk and pay of deputies must be derived annually from fees earned

In Harrington v. City of St. Louis (1891), 107 Mo. 327, the court, in construing the meaning of "fees", "commissions" and "emoluments" accruing to an officer by virtue of his office, l.c. 330, said:

> "For illustration we will take the first year of the first term in this case. The receipts for that year will be composed of the fees and emoluments earned and collected during that year, and, also, of the fees and emoluments earned during the year, but collected during a subsequent year. In other words, the fees of a particular year are those earned during that year, no matter when collected. It often occurs that fees and commissions are earned in one year and collected in a succeeding year. All such fees and commissions must be carried into the account of the year in which they were earned. Allen v. Cowan, 96 Mo. 193."

It is, therefore, the opinion of this office that the term "aggregate amount of fees" which a county clerk may retain annually under Section 11811 is the amount of fees earned in that year, whether collected or not.

III.

Settlements with county courts; when made, and disposition of fees in excess of annual compensation of county clerk and deputy hire.

Section 13, Article IX, Constitution of Missouri relating to fees of county and other officers, provides:

> "The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

It will be noted that the above provision of the Constitution merely provides that the officer shall

make return quarterly of all fees by him received.

By Section 11810, R. S. Mo. 1929, it is made the duty of

> "Every clerk of a court of record in every county in this state shall make return quarterly to the county court of all fees by him received to date of return, * The county court shall at each regular session examine such statement, and may examine any person as to the truth of the same, and allow all necessary clerk or deputy hire, not exceeding the amount allowed in the next succeeding section of this chapter for deputies or assistants, and deduct the same from the aggregate amount received by the clerk, and if there be an amount still in the hands of the clerk exceeding the sums specified in the next section succeeding, the court shall ascertain the amount of such excess over and above the amounts allowed to be retained by the clerk and paid to deputies and assistants, and make an order directing such clerk to pay the amount so ascertained into the county treasury: * "

Section 11814, Laws Mo. 1933, p. 372, in part, also provides:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices * Such clerk shall, at the end of each quarter, file with the county clerk a report of all fees paid and accruing to his office during such quarter, * and which said report shall be verified by the affidavit of such clerk. And quarterly such clerk shall pay into the

> county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law. * "

The term "fees collected in excess of the sums permitted to be retained", as used in Section 11814, Laws Mo. 1933, supra, and the term "amount of such excess over and above the amounts allowed to be retained by the clerk", as used in Section 11810, R. S. Mo. 1929, refer to the maximum annual compensation as set out in Section 11811, Laws Mo. 1933, supra, fixing the amount that the clerk can annually retain for himself and pay of deputies. It does not mean that the clerk shall, at the end of three months, pay over all fees in excess of three months' compensation of himself and deputies. There may be quarters during the year in which he did not earn and collect sufficient fees for pay of himself and deputies, and we have heretofore pointed out that his compensation is not a quarterly stipend, but is an annual amount. Neither is the compensation and pay of deputies to be reckoned on a term basis.

It is the opinion of this office that the county clerk is elected for a term of four years, but he is not entitled to compute his compensation and pay of deputies upon a single unit basis of four years. In the Harrington case, supra, l.c. 330, the Supreme Court, in speaking of this matter, said:

> "The excess of one year cannot be carried into another year for the purpose of bringing the fees of that year up to $10,000, with deputy hire added. * His compensation for each year must come from the fees and emolu-

ments of the office for that year, * "

IV.

Duty of the county clerk to appoint deputy or assistant; duty of county court to approve or disapprove such appointment.

The power of the county clerk to appoint a deputy, found in Section 11680, R. S. Mo. 1929, reads in part as follows:

> "Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, * "

The term "court", as used in Section 11680, refers to all courts of record, including the county court. It therefore appears, with reference to the appointment of deputy county clerks, that two acts are necessary:

(1) The appointment of such deputy by the county clerk;

(2) The approval of such appointment by the county court, or by two judges of the county court.

The duty to appoint a deputy clerk is placed upon the county clerk, and the duty to approve or disapprove such appointment is made the duty of the county court. Such is the construction placed upon a similar term, "approved by the court", in Butler v. Sullivan, 108 Mo. 630, l.c. 638. In that case, the statute gave the county collector the power to employ attorneys "with the approval of the county court" to aid the prosecuting attorney in the handling of tax suits. The Supreme Court, in construing this term in that case, l.c. 638, said:

> "The statute neither authorizes the county court to employ counsel nor to charge the county with liability for his compensation. The power to employ an attorney is granted solely to the collector; this compensation and the liability therefor is provided for by the law. The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court."

The meaning of a power or duty conferred upon an official which is subject to the approval of another official, is fully set out in Makemson v. Dillon et al, 171 Pac. 673, l.c. 676 in the following terse language:

> " * The grant to New Mexico is to be effectuated by selection, not only of these lands granted in quantity, but also as indemnity, and they are to be selected under the direction and <u>subject to the approval</u> of the Secretary of the Interior. The words 'subject to the approval' we do not regard as

> giving the Secretary of the Interior discretion to arbitrarily refuse a selection for no reason at all. These words are to be understood to mean that the Secretary of the Interior shall investigate and pass upon and render judgment as to whether the lands selected are within the terms of the grant, and, if so, it is his duty to list them to the state."

It is the opinion of this office that the county court has the authority to approve or disapprove of the appointment of a deputy, but such authority does not include the power to fix the salary or compensation to be paid such deputy from the fees of the county clerk's office. The refusal of the county court to approve the appointment of any particular person as deputy county clerk must be a refusal based upon reasonable, not arbitrary, grounds.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

BUILDING AND LOAN
ASSOCIATION : Building and loan corporation dissolved the same as any other corporation. However, first must comply with Section 5626, Laws of Mo. 193

3-22

March 21, 1935.

FILED
59

Hon. Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter as follows:

"The inclosed letter from George S. Metcalfe, secretary of the Roosevelt Savings and Loan Association, of St. Louis, is self-explanatory.

In the last paragraph of Mr. Metcalfe's letter, he asks the question 'we will appreciate it if you will advise us what steps to take to surrender the charter and to obtain our bonds.'

This is to request that you advise us as to the answer we should give Mr. Metcalfe relative to the matter of surrendering his charter and obtaining the surety bonds now held by this department as required by the statutes."

Mr. Metcalfe's letter reads as follows:

"Believing that the money offered a Federal Savings and Loan Association by the National Government offered a a worthwhile inducement to a small institution, we submitted the matter of conversion to our shareholders, and without effort obtained a favorable

> vote of 70% of our total, with no one dissenting. We feel sure that you will understand our reason for taking this step and will agree with us that it is the right thing to do for an Association of our size.
>
> We want you to know that we have the highest regard for you and your department, and believe that the examinations being given by your assistants at this time are as thorough as any in our experience.
>
> We will appreciate it if you will advise us what steps to take to surrender the Charter, and to obtain our Bonds."

A building and loan association is a corporation and created by statute. Its powers and duties and rights are prescribed by the Legislature. Laws of Missouri, 1931, pages 141 to 165, inclusive, and amendments, pertain to "Building and Loan Association." Section 5585 of said Act deals with incorporating of building and loan associations, and said section in part provides as follows:

> "* * * shall become a corporation on complying with the provisions of this article, and shall remain a corporation, with all the powers and privileges, and subject to all the duties, limitations and restrictions, conferred by general laws upon corporations, except as hereinafter otherwise provided."

Section 5626, Laws of Missouri, 1931, page 162, in part provides as follows:

> "No association shall cease to do business or attempt to make a voluntary assignment of its assets or in any other manner to liquidate its affairs prior to the maturity of all of its

> stock, except with the consent of two-thirds of its stockholders and the approval of the supervisor of building and loan association. * *"

Thus, the above section is a restriction on a building and loan association. If a building and loan association complies with Section 5626, supra, then the question arises as to how it may have its charter canceled. The building and loan laws do not provide for a procedure to surrender or annul a charter. A charter issued by the State may be dissolved in several ways: (1) By operation of law, namely, the expiration of the charter; (2) by order of court in quo warranto proceedings; (3) by non-usage or abandonment of its charter by the corporation.

As to abandonment of a charter by a corporation, we quote from the case of Moore et al. v. Whitcomb, 48 Mo. 543, wherein the Supreme Court of Missouri, page 548, said the following:

> "It had itself abandoned these ends and objects, for it is alleged in the petition that the corporation was created for the sole purpose of constructing and operating the railroad; and that purpose, as the petitioner shows, was given up and abandoned. Spencer, C. J., in delivering the opinion of the court in Slee v. Bloom, says: 'The argument is that, being incorporated for twenty years, there exists a corporate capacity for that period, and that although all the functions of the corporation have ceased, yet they may be resumed. The Legislature never meant, nor does the act authorize the conclusion, that the corporation should remain and continue during all that period nolens volens. It was implied that during that period they should do nothing to forfeit their rights, nor surrender them back, nor

do any act tantamount thereto.

* * * * * *

> Upon the whole we are disposed to hold, in accordance with the decision in Slee v. Bloom, that the facts alleged in the petition sufficiently showed a dissolution of the corporation by a practical surrender and abandonment of its corporate rights and franchises."

However, a building and loan association may not abandon its charter or cease to do business unless compliance is made with Section 5626, supra. However, we assume that Section 5626 has been complied with and it is now only a matter of annulling the charter.

Article I, Chapter 32, R. S. Mo. 1929, relates to "corporations" and Section 4562 provides "how dissolution may be accomplished." This section is lengthy and we shall not quote it. However, two methods are provided for dissolution of a corporation: First, by a suit in equity whereby the court dissolves it, and, second, "by unanimous vote of all the shareholders, a resolution shall be adopted favoring the dissolution of said corporation, after the payment of all debts, claims or bills, then said corporation may be dissolved without suit by filing an affidavit of dissolution with the secretary of state, setting forth the above facts, and when said affidavit of dissolution is filed it shall be taken as prima facie evidence of such voluntary dissolution."

As to the dissolution of the corporation by affidavit, we invite your attention to the case of Hecht Bros. Clothing Co. v. Walker, 35 S. W. (2d) 372.

From the above and foregoing it is our opinion that ~~a corporation~~ an association in order to surrender its charter must first

comply with Section 5626, supra, and after satisfying the requirements of that section the association could be dissolved the same as any other corporation.

We are returning herewith to you Mr. Metcalfe's letter.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG
Enc.

FEES--DRAINAGE DISTRICTS--TOWNSHIP ORGANIZATIONS: Fees for collecting and disbursing drainage funds are independent allowances and should be paid as such even under township organization:

March 23, 1935.

FILED
59

Honorable E. A. McDonald
Prosecuting Attorney
Mercer County
Princeton, Missouri

Dear Sir:

Your request for an opinion dated March 15, 1935, is as follows:

> "I call your attention to Sections 10880 and 10881, Statutes 1929.
>
> "Our County is under Township Organization.
>
> "The County Treasurer is Ex Officio collector of delinquent taxes. In collecting delinquent drainage tax will he receive two per. cent. on all sums collected as collector and also receive one per. cent as Treasurer.
>
> "It is contended by some that in as much as the Treasurer and Ex-Officio collector is the same and one person he would be entitled to only two per. cent."

Section 10796 R. S. Mo. 1929, provides that the Secretary to the Drainage District shall extend and certify drainage tax to township collectors. You state that in your County, now under township organization, the County Treasurer is ex-officio Township Collector. Said section also provides the duties imposed on the township collector, provides for a separate bond, independent of his bond as County Treasurer, covering his ex-officio office and allows him the same compensation for collecting as County Collector are allowed in Counties not under township organization. Said Section reads as follows:

"In counties where the provisions of chapter 86, R. S. 1929, are, or may hereafter be in force, the secretary of the board of supervisors shall extend all drainage taxes under the provisions of this article on separate tax books for the respective townships in which such lands are situate, and such tax books shall be certified to the township collectors of such townships at the same time and in the same manner as provided for county collectors. Such taxes shall be collected by such township collectors at the same time and in the same manner as state and county taxes are collected, and each township collector shall give bond, have the same authority to collect such taxes, receive the same compensation therefor and pay over such taxes to the secretary of board of supervisors, as provided for county collectors under this article, and shall be subject to the same penalties and liabilities. Such township collectors shall make due return of such tax books under oath in the same manner as required of county collectors. The delinquent drainage taxes shall be certified by the secretary of the board of supervisors to the county treasurer as ex offico collector of delinquent taxes, who shall collect such delinquent drainage taxes at the same time and in the same manner as is herein provided for the collection of the delinquent drainage taxes in counties not under the provisions of chapter 86, R. S. 1929. The said treasurer as ex-officio collector of delinquent taxes shall give bond, have the same authority to collect such taxes, receive the same compensation there-

> for and pay over the said taxes to the treasurer of the drainage district as is provided for county collectors under this article, and shall be subject to the same penalties and liabilities. All township drainage tax books, and the return of the collectors of such books, shall be taken as prima facie evidence in all courts of all matters therein contained, and that the delinquent tax shown in such books was properly levied and extended against such lands and remains unpaid. The lien of such tax shall be enforced and suits to collect such delinquent tax shall be instituted and prosecuted in the same manner provided by this article, except such suits shall be instituted by the drainage district on tax bills duly made out and certified by the county treasurer as ex officio collector of delinquent taxes."

Section 10832 R. S. Mo. 1929, requires the County Treasurer to be a custodian of the funds of the District, except as otherwise provided. No doubt it is these funds, coming into his hands as treasurer, on which he demands a commission. Said Section requires that he receive and receipt for all such funds, and that he enter into a separate bond with each District covering receipts. Said Section provides as follows:

> "The treasurer of the county in which a drainage district is located shall act as treasurer of the district and shall be the custodian of the funds of the district, except as otherwise provided in this article. He shall receive and receipt for all such funds and shall enter into a separate bond for each district in the county in a sum to be fixed by the court, not less than the probable amount of funds of said district to be in his possession at any one time. Such bond shall be payable to the district, shall be

> approved by the court, shall be signed by two or more resident freeholders in the county or by a surety company authorized to transact business in the state and shall be conditioned for the faithful and prompt disbursement according to law of all such funds as shall from time to time be in his possession. The premium on such bond may be paid by the district. Except as otherwise provided in this article, the treasurer shall keep all district funds received by him deposited in a bank or banks selected in the same manner and at the same time that the depository for county funds is selected. All interest accruing on district funds shall be credited to the district and any premium on a surety bond may be paid by the district."

As custodian of the funds it becomes his duty to disburse said funds as the statutes provide. It is not necessary to go into the situation where he, as county treasurer, is authorized to disburse, for purposes of this opinion. It is necessary that we observe that his duties as ex-officio collector are independent of his duties to disburse as County Treasurer.

Section 10880 R. S. Mo. 1929, provides for the fee to township collectors for collecting drainage tax, and reads as follows:

> "The county and township collectors for collecting current taxes for drainage and levee districts shall receive one per cent. of all such taxes collected, and for the collection of delinquent taxes for such they shall receive two per cent. of all sums collected.

Section 10881 R. S. Mo. 1929, provides for the fee for the County Treasurer as custodian of drainage funds and reads:

> "County treasurers for receiving, receipting for, preserving and paying out funds of drainage and levee districts, shall receive one per cent. of sums paid out."

The above provisions of law provide that the ex-officio collector shall receive one per cent. for collecting current taxes and two per cent. for collecting delinquent taxes. Said provisions also allow a one per cent. fee to the County Treasurer as custodian and disburser of drainage funds. It is not unusual for the Legislature to provide additional fees to an officer imposed with added duties.

In the case of Little River Drainage District v. Lassater, 29 S. W. (2d) 716, l. c. 719, the Supreme Court said:

> "It would seem that, in collecting taxes for drainage districts, even though such drainage district might include the entire territory of the county, county collectors would be performing no duties or functions of their offices as county collectors. In performing these duties they are agents and officers of and perform them for such districts."

In your case it can equally be said that as ex-officio collector of delinquent taxes the County Treasurer is performing no duty of said office of County Treasurer, but is the agent of the drainage district.

CONCLUSION.

It is the opinion of this office that the collection of drainage taxes is no part of the duties

ordinarily incident to the office of township collectors. Such statutory duties are additional duties dependent upon the existence of a drainage district having lands, taxable for district purposes, lying within the territorial jurisdiction of said officer. It is our further opinion that township collectors, in collecting such taxes, are officers and agents of the particular drainage district, required to give separate bonds to any such districts, and entitled to receive for collecting the fees allowed in Section 10880, supra.

We are further of the opinion that as County Treasurer, the statutory disbursement of drainage funds for drainage districts is additional to the ordinary duties of a County Treasurer. He is required to give a bond separate from his official bond as County Treasurer to all such drainage districts in the territorial jurisdiction of said officer. His duties have been enlarged upon.

In addition to fees provided for in Section 10880, it is our opinion that he is also entitled to receive the fee provided for in Section 10881, supra, for disbursing funds of the drainage district, held in his custody, independent of his duty as County Treasurer to disburse County funds.

We are of the opinion that the duty of collecting, as ex officio collector, and the duty of disbursing as custodian, were intended by the Legislature to be paid for as separate independent services. The Legislature so provided and if it intended different it would not have been so particular about providing otherwise.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

GAMBLING - "Bank Night"

4-3

March 27, 1935

FILED
59

Honorable J. C. McDowell
State Senator
Jefferson City, Missouri

My dear Senator:

We have your request of March 20, 1935 for an opinion, which request is as follows:

> "There was introduced into the House this Session House Bill No. 203, which endeavored to make it unlawful for a picture show or place of amusement to maintain any drawing in the nature of a lottery or gift enterprise in connection therewith, or any so-called 'bank' or 'cash night' at which any money or any other thing of value shall be distributed either by ticket or by registration or by any other method or identification. Some of my friends are interested in knowing whether what is known as 'Bank Night' in motion picture theaters is lawful under our Missouri Statutes. As I understand the plan, in brief, provides that the operator of a motion picture house shall decide upon the amount of money that is to be awarded, and arrange with a bank to guarantee the payment of the award to those to whom the award is made. It provides that a registry book shall be kept at or near the theater, but outside of the box office, where any adult person, without limitation or restriction whatsoever, and without any charge, without the purchase of a theater ticket, without a token of admission and entirely

free, and without any qualification of any character, may enter his name in the registry book as a qualified participant. The theater ticket seller has no registration book or equipment, and the purchase of a ticket does not qualify the purchaser as a participant. No one is permitted or required to purchase a ticket in order to register. The holder of a ticket of admission who does not enter his name in the registry book is not a qualified participant. Only those persons who register are qualified. In other words there is no relation or dependency between the purchase of a ticket and the qualification of a participant. The plan provides that placards or banners both inside and outside the theater shall inform the public that registration for 'Bank Night' is absolutely free. It provides that the party registering must register his own name and only once, and that one registration will be good for all 'Bank Nights', and that the signature must indicate whether it is Mr., Mrs. or Miss, and that it must be a signature and not printed, and that theater employees or relatives are not allowed to participate. It provides that the money to be given away or awarded shall be deposited each week, in advance of the 'Bank Night', in the bank account in the Bank in which proper arrangement has been made. The numbers appearing on the register where the party signs serves only as an identification number. These numbers are to be placed in an open container, and one number is drawn out on 'Bank Night', and this one is given to a committee of three mem who take the number and refer to the register book and then announce the name of the winner by announcing the name either Mr., Mrs. or Miss, and also the address. If the party is properly identified, then the money will be paid to him or her at a certain designated hour next morning. If the party whose name is called on 'Bank Night' does not appear (only one name is drawn on each 'Bank Night'), then the amount of the account is carried over to the next week, and this is added to the current week's account, etc. The drawing is made by a child, blind-folded, who takes from the container one number and this number is handed to

the judges. At the same time, the party's name is called in the lobby of the theater and also in front of the theater. A reasonable time is given, and if the party whose name is called does not appear from the inside of the theater or from the crowd outside, then announcement is made that the bank account which has not been claimed will be added to the following week's account. The number called is returned to the container, whether it wins or not. The 'Bank Night' arrangement specifically provides also that the participant does not have to be in the theater at the time of the drawing or hold a ticket of admission in order to participate. If the holder of the number drawn happens to be outside the theater, he is permitted to enter without charge to claim the award.

"I am reliably informed that this plan is now in operation in a majority of the States of the United States and I have had called to my attention the opinion of the Attorney Generals of two of our adjoining States, to wit: Iowa and Kansas, holding that such a plan is lawful and not prohibited by the laws of those states, specifically that it is not a lottery. The following cases bearing on the question have been called to my attention: People v. Cardas, 28 Pac. (2) 99 (California); Cross v. People 18 Colo. 321, 32 Pac. 821; Yellowstone Kit v. Alabama, 88 Ala. 196, 7 L.R.A. 599; Holt v. Rural Weekly Co. (Minnesota) 217 N.W. 345.

"Will you, therefore, give me your opinion whether the operation of the 'Bank Night' plan in the manner outlined above, where the participants neither pay nor promise to pay or surrender anything of value for the right to participate, and the element of consideration is entirely lacking, is within the prohibition of the law relating to lotteries, or is a legitimate advertising plan."

#4 - Honorable J. C. McDowell

We find that Section 4314, R. S. Mo. 1929 makes it a criminal offense to establish a "lottery" or "gift enterprise" in this State. It appears that this section was passed in pursuance of the constitutional mandate contained in Article XIV, Section 10 of the Missouri Constitution, which provides as follows:

> "The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

The three essential elements to bring any activity within the provision of the lottery law are set out in State v. Emmerson, 1 S. W. (2d) 109 to be, (1) consideration, (2) prize, (3) chance. This makes the Missouri lottery law conform to court holdings in other states. In Maugh v. Porter, 157 Va. 451, 161 S.E. 242, the court held that a scheme whereby an auctioneer gave tickets for a prize drawing on an automobile in order to attract a crowd to his auction was a lottery. From your letter, it appears that the money to be given away constitutes the prize; that the method of giving it away by selecting a winner by lot or drawing constitutes the "chance" element essential to every lottery.

The third element, "consideration", is therefore the last one to be considered in this opinion. It is not necessary that people should pay directly or purchase a ticket in order to furnish the element of consideration. In Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579, the court said:

#5 - Honorable J. C. McDowell

> "The question of consideration does not mean that pay shall be directly given for the right to compete. It is only necessary that the person entering the competition shall do something or give up some right. The acquisition and sending in of labels is sufficient to comply with that requirement. Nor does the benefit to the person offering the prize need to be directly dependent upon the furnishing of a consideration. Advertising and the sales resulting thereby, based upon a desire to get something for nothing, are amply sufficient as a motive."

In your request, it is stated that the "Bank Night" arrangement does not require the participant to be in the theater at the time of the drawing or to hold a ticket of admission; that if the holder of the winning number happens to be outside of the theater, he is permitted to enter without charge to claim the award. In Featherstone v. Independent Service Station, 10 S. W. (2d) 124 (Texas Civil Appeals), filling stations, for the purpose of increasing trade and drawing business from competitors, gave away tickets to customers and non-customers, and the scheme was held to be a lottery. In State of Washington v. Danz, 250 Pac. 37, the Supreme Court of Washington held that it was immaterial that free tickets to a drawing were offered persons not purchasing theater tickets.

In People v. Cardas (1933), 28 Pac. (2d), 99, the California lottery law defined lottery as,

> "any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, # "
>
> - Penal Code, Section 319.

#6 - Honorable J. C. McDowell

Virtually the same definition of a lottery is found in Section 2464 Rem. Comp. Stat. of Colorado, involved in the case of State v. Danz, (1926) 250 Pac. 37. In People v. Cardas, supra, the California Superior Court, Los Angeles County, held that a motion picture theatre operator's scheme to give away steamship excursion tickets as prizes to holders of lucky tickets distributed in the vicinity of, and announced in or at the entrance to the theatre, was not a lottery. The Supreme Court of Colorado, (1893) in Cross v. People, supra, in construing the same definition of a lottery, held that the gratuitous distribution of business cards to all persons calling or writing for same entitling the holders to a chance on a piano was not a lottery, since no valuable consideration was paid. Yellowstone Kit v. Alabama, 7 L. R. A., 599 is a similar case wherein consideration is limited to a direct payment of consideration. In that case, the court held there was no consideration involved in the matter.

An examination of the Missouri statute involved will reveal that it is much broader than the penal codes, California, Colorado, Alabama, in that the Missouri statute makes it a criminal offense to establish a lottery or gift enterprise unfettered by any definitions or limitations as to the essential elements of a lottery.

Generally, the term "consideration" is defined as being a benefit to the party promising, or a loss to the person to whom the promise is made. 12 C. J. 525.

The general rule is stated in 38 C. J., p. 297, Section 17 as to the importance of consideration, in the following language:

> "It is obvious that where a gift enterprise lacks the essential element of chance or of consideration, it is not a lottery, * "

A reference to the Missouri statute, 4314, will reveal that it includes gift enterprises as well as lot-

#7 - Honorable J. C. McDowell

teries, and it would therefore appear that no consideration was necessary for a gift enterprise. However, from your letter it is apparent that the holder of a prize-winning number must go to the theatre, at the proper time, and wait outside for the time of the drawing so as to be available in the event he holds the lucky number. If the ticket holder travelled 100 miles in order to be present in front of the theatre for the drawing, no one would question but what his long journey was sufficient consideration for the prize offered by the theatre. Under such conditions, the necessity of his going to the theatre is sufficient consideration. It is immaterial as to how much consideration he pays, whether it be 1¢ or $100.00, or whether he travels across the street or 100 miles in order to be present at the drawing; in the final analysis, he is giving consideration for the chance to win a prize.

The giving away of tickets with each newspaper subscription which qualifies the holder to receive a prize, and the awarding of the prize by lot has been held in this State to constitute a lottery. State v. Munford, 73 Mo. 647.

In view of the above and foregoing, it is therefore the opinion of this office that the scheme for "Bank Night" as outlined in your letter constitutes a lottery in violation of the criminal laws of this State.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FM

TAXATION: Supplemental opinion to opinion written on November 21, 1934 Re: TAXATION: County Court may change valuation after tax is delinquent.

April 3, 1935.

FILED 59

Hon. Battle McCardle
Associate Judge, Western District
Jackson County Court
Kansas City, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"As a member of the County Court of Jackson County I would appreciate it if you will give me some information.

No body in Jackson County wants to pay any taxes and every man is seeking to obtain abatements and reductions in valuation. I am perfectly familar with Section 9946 R. S. Mo., 1929, and believe that it means just what it says, but on all sides there is a clamor that it allows the Assessor and the County Court to cut a valuation for three or more years back and as a consequence reduce the taxes based on the old valuation. In a word men owe taxes delinquent since 1929 and now they want the valuation for each back year cut and the taxes cut also.

Men who demand the above pay no heed to the words 'mistakes' or 'errors'. They base their demands on their present want of money and even urge that an abatement of taxes will aid a refinancing scheme.

I have practised law in this city for more than thirty-five years and do not agree with above views.

"I know that there is no statute authorizing abatements of taxes and am glad there is not.

Your office through Mr. Howell gave our Assessor an opinion some time ago concerning Section 9946 but it does not answer my question.

I contend that Section 9946 is not an abatement statute. This letter is written on behalf of the County Court and any information you can give the court as to the meaning of Section 9946 will be appreciated."

Your inquiry pertains to Section 9946, R. S. Mo. 1929, and as this Department on November 24th, 1934, rendered an opinion to Honorable Walter H. Miller, County Assessor of Jackson County, construing said section, we shall not again review the matter contained therein. You state, "Your office * * * gave our Assessor an opinion some time ago concerning Section 9946 but it does not answer my question." We shall, then, by this opinion, supplement the above referred to opinion. We shall answer your question by illustration.

(1) Assume that the assessor placed a valuation of $500 on jewelry that a person owned as of June 1st, and in making out the tax books this jewelry was listed thereon at $5000 instead of the valuation of $500 placed on such by the assessor. The question arises as to whether or not the valuation of $5000 appearing on the tax books, placed there by error or mistake, could be corrected. We are of the opinion that the county court, under and by virtue of Section 9946, supra, could change that error or mistake from $5000 to $500 so that the valuation will be what the assessor placed on it. It is seen that the correction of the error is one affecting the valuation placed on the books but it was an erroneous valuation placed there by mistake; in other words, an error on the part of the person copying it on the tax books.

(2) Assume, as a second illustration, that the assessor placed $500 valuation on jewelry, which was a correct valuation

in his judgment, as of June 1st, and that said amount, namely, $500 was placed on the tax roll so that the valuation on the tax book shows the same valuation as placed thereon by the assessor. May the county court change that valuation when not sitting as a board of equalization or a board of appeals? In our opinion the county court would have no right to change that valuation from $500 to any other figure if there was no error or mistake in the placing of that valuation on the tax books. In this connection, Section 9946, supra, would not be authority for the county court to change the valuation, as it was not an erroneous valuation or an error or mistake in the placing of same on the tax books. In other words, the valuation of the assessor is the same valuation as on the tax roll; the valuation being what was intended by the assessor to be placed on the property.

We trust that the above answers your inquiry, and in this connection we are also enclosing copy of opinion rendered by this Department, dated February 15th, 1933, written to Senator J. C. McDowell, which discusses errors appearing in connection with taxes, and invite your attention to page 6 thereof wherein the term "erroneously assessed" is discussed. We further invite your attention to this, found on page 7:

> "we are indeed doubtful that under Section 9946, R. S. Mo. 1929, the county court would be authorized to lower the valuation fixed by the board of equalization upon property that they now deem too highly assessed and justify such action upon the theory that it is a correction of an erroneous assessment."

As stated hereinbefore this opinion supplements the one written to Honorable Walter H. Miller on November 24th, 1934, and is controlling on the question under consideration.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

BUILDING AND LOAN: Voting by proxy.

April 18, 1935.

FILED
59

Hon. Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter dated April 15, 1935, as follows:

> "The inclosed letter from Mr. W. B. Henderson, 308 E. 10th Street, Kansas City, Missouri, requests an opinion on the adequacy of a proxy form which he has attached. This is to ask for your opinion on this matter."

The letter referred to in your request, written by Mr. Henderson to your Department on March 27, 1935, reads as follows:

> "I am enclosing copy of a form that I forwarded to you with a letter written more than a month ago but have not had a reply.
>
> It is very important that I hear from you as early as possible as to whether the enclosed form contains any objectionable features from the standpoint of your department or the Attorney-General's office.
>
> I am not asking you at this time to pass upon whether you will permit the assets of the Franklin Savings & Loan Association to be 'assigned'.

Any move of the kind contemplated will have to be preceded by securing the signatures of the members of the association to some kind of a form authorizing us to take action. Even though the assignment of the assets may be subsequently approved, you might find it necessary to qualify your approval or withhold it because the form of the proxy signed by the members is not in the opinion of the Attorney-General's office sufficient.

Our attorney is of the opinion that an ordinary proxy will not answer the purpose but he thinks the enclosed form is sufficient if it meets with the approval of your department and the Attorney-General.

He feels that no form would be sufficient if it did not meet with the approval of your department and the attorney-General's office."

The form of proxy appended to Mr. Henderson's letter in part reads as follows:

"NOW THEREFORE, the undersigned member of the Franklin Savings & Loan Association and owner of _____ shares of said Association hereby consents to and authorizes and directs the Board of Directors of said Association to exercise their own judgment about the transfer or assignment of the assets of the Association, or the reorganization of the Association into a Federal Savings and Loan Association, or any other type of financial institution or to merge said association with another savings and loan association, or any other type of financial institution, or to take over other building and loan associations, or other types of financial institutions, or to take any other step in the interest of the members that has the approval of

> the Supervisor of the Bureau of Building and Loan Supervision of Missouri and to accomplish this purpose I constitute and appoint the Board of Directors of the Association as now or hereafter constituted, or a majority of them, attorneys and proxies, authorizing them to vote for me in my name at any general, special or adjourned meeting of the shareholders and/or stockholders of the Association at which I am not personally present, on any such proposition presented with the approval of the Board of Directors."

It is to be noted that the above form of proxy directs and authorizes the board of directors of said association to do many things concerning the building and loan association and further permits them to vote for a shareholder at "any general, special or adjourned meeting of the shareholders."

50 Corpus Juris, p. 843, defines "proxy" as follows:

> "An agency; the agency for another who acts through the agent; authority by one, having the right to do a certain thing, to another to do it; authority or power to do a certain thing; authority to act for another."

9 Corpus Juris, p. 936, in part provides as follows:

> "Among other things, the rights of the stockholder include that of voting in person or by proxy at a legal meeting of the shareholders, * * * * *."

The laws relating to building and loan associations do not provide for the voting by proxy on matters similar to that sought to be accomplished by Mr. Henderson.

The Kansas City Court of Appeals in the Appeal of Powell and Doyle, 93 Mo. App. 296, l. c. 300, said:

> "* * * The defendant is purely a creation of the statute, having only such powers as the statute gives and such as are necessarily implied."

In Bertche v. Loan and Investment Ass'n of Mo., 147 Mo. 343, l. c. 360, the Supreme Court of Missouri said:

> "One who becomes a member of an association becomes chargeable with the knowledge of the provisions of its charter and by-laws and is bound by them. He can not be ignorant of them, nor can he refuse obedience to them unless indeed they are illegal or require the performance of acts which the law forbids. By-laws not illegal, and not requiring the performance of acts contrary to law, must therefore be deemed binding upon all persons who become members."

In State ex rel. v. Brown, 68 S. W. (2d) 55, l. c. 59, the Supreme Court of Missouri said:

> "Measured by this standard the public policy of this state for more than forty years has been to place building and loan associations upon a different footing from that of corporations created under the general corporationslaws of the state."

Section 5590, Laws of Missouri, 1931, page 147, in part provides:

> "The shareholders of such corporation may make and adopt all necessary by-laws for the government of the affairs and business of the corporation, provided that the same shall not be inconsistent with the Constitution or laws of the state."

From the above we conclude, that as the statutes relating to building and loan associations are silent concerning voting by proxy, then in order for proxies to be voted such must be provided for in the by-laws of the association. Consequently, not having the by-laws before us, we cannot determine if such provides that proxies may be used (voted), or in what form.

2.

The form of proxy attached to Mr. Henderson's letter permits of many things to be done by the board of directors concerning the assets of the association. For one thing--the shareholders authorize and direct the board of directors to exercise their own judgment about the transfer or assignment of the assets of the association and if the directors seek to merge with another like and similar association, under and by virtue of Section 5611, Laws of Missouri, 1931, page 157, said merger would not be effective because that statute says,

> "* * * such terms as may be agreed upon by three-fourths of the members of each of such bodies present at the meeting of the members convened for that purpose, * *."

The form of proxy further provides:

> "* * *, or the reorganization of the Association into a Federal Savings and Loan Association, * * *."

And in order to accomplish that, the consent of two-thirds of the shareholders is necessary. See our opinion to you dated March 17, 1934.

3.

In conclusion, as stated hereinbefore, we respectfully decline from rendering an opinion because we do not know what is provided for in the by-laws of said association relative to proxies.

If the association desires to merge with another like and similar corporation, then it must comply with Section 5611, supra. And if it desires to change from a State association to a Federal Savings and Loan Association, then it must comply with Section 5626, Laws of Missouri, 1931, page 162. It is thus seen that a further reason for declining to render an opinion is that if we approve the form of proxy as submitted, it might be implied by the board of directors that we have approved its manner and method in procuring the consent of its stockholders to do the things sought to be accomplished. We do not desire that directors and officers of an association shall rely, by implication, upon our opinion and place themselves in a position so that they will be amenable to Section 5610, Laws of Missouri, 1931, page 157.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

BUILDING AND LOAN: Building and Loan Associations are not permitted to conduct a safety deposit box business as such is not conferred by their charter.

June 25, 1935.

FILED
59

Hon. Ira A. McBride, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Attention Mr. J.W. McCammon
Chief Clerk.

Dear Sir:

This is to acknowledge your request for an opinion as follows:

> "Please let us have an opinion as to whether a building and loan association's charter would permit the association to conduct a safety deposit box business as a side issue to the building and loan business."

We have searched the building and loan statutes and nowhere do we find any authority permitting a building and loan association to conduct a safety deposit box business. Chapter 34 R. S. Mo. 1929 pertains to the State Department of Finance, and Article V of said chapter pertains to savings banks and safety deposit institutions, and referring to said Article it is seen that provision is made for the creating of a corporation to conduct a safety deposit box business. Section 5496. Banks and Trust Companies may also engage in the safety deposit box business upon compliance with Articles II and III of said chapter.

It is thus seen that the Legislature has enacted statutes pertaining to safety deposit boxes and has seen fit to place a limitation upon who may engage in said safety deposit box business. Nowhere is it provided that building and loan associations may engage in said business.

Corpus Juris, Vol. 9, entitled Building and Loan Associations, paragraph 63, page 952 has the following to say:

> "Building associations can exercise only such powers as are conferred by the legislative body creating them, either by express terms or by necessary implication. While it may be said that they have the usual powers of corporations, this is true only in a general way, as frequently the statute authorizing their creation, or the charter granted them, confers powers not possessed by corporations generally and withholds powers possessed by other corporations."

In Grohmann v. Brown, 68 Mo. Apps. 630, l. c. 635, the Kansas City Court of Appeals in 1897 said the following concerning a building and loan association:

> "The rule is well settled that corporations can only exercise such powers as are granted to them by their charter or are necessarily implied from those expressly granted. The statute under which the association was organized neither expressly nor by necessary implication conferred on it the power and authority of a bank of deposit or discount. It nowhere lends countenance to the notion that associations created under its provisions are authorized to borrow money to loan to its members or others. The exercise of this function is beyond the limits of the grant of their statutory powers."

We answer your question in the negative, and such is our opinion.

Yours very truly

APPROVED:

James L. HornBostel
Assistant Attorney General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

BUILDING AND LOAN: Interpretation of the word "salesman" -- Who deemed to be "salesmen."

9-17

September 10, 1935.

FILED
59

Hon. Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter concerning the interpretation of Section 5628a, paragraph "d", Laws of Missouri, 1935, page 195, relating to the word "salesman." Your letter, in part, reads as follows:

> "This is to ask your opinion as to just who is classified as salesmen and who is exempt under the provisions of this act from having to comply with this statute in the matter of being licensed by this department as a salesman."

Preceding answer to your inquiry, we desire to invite your attention to certain fundamental and cardinal rules to be followed in the interpretation of statutes.

In State ex rel. v. St. Louis-San Francisco Ry. Co., 300 S. W. 274, the Supreme Court of Missouri, en banc, page 277, said:

> "A construction should never be given to a statute or a constitutional provision which would work such confusion and mischief, unless no other reasonable construction is possible."

In Hannibal Trust Co. v. Elzea et al., 286 S. W. 371, the Supreme Court of Missouri, page 377, said the following:

> "While the fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature, such intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, otherwise they would be assuming legislative authority. 36 Cyc. 1106. As said by this court, in Banc, in Grier v. Railway Co., 286 Mo. loc. cit. 534, 228 S. W. 457:
>
> 'The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used. All other rules are incidental and more aids to be invoked when the meaning is clouded. When the language is not only plain, but admits of but one meaning, these auxiliary rules have no office to fill. In such case there is no room for construction.'
>
> * * * * *
>
> "Another cardinal rule in the construction of statutes is that effect must be given, if possible, to every word, clause, and sentence. 36 Cyc. 1128. That rule has been frequently recognized and followed by this court. (Cases cited).
>
> "Again, in the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. 36 Cyc. 1114."

Bearing in mind the above rules in construing statutes, we proceed to your question.

In Laws of Missouri, 1935, page 195, is found an Act to regulate "sales of and dealings in building and loan securities." Section 5628a defines certain terms used in the act, and paragraph "(d)" (the part under consideration) defines the word "salesman" as follows:

> "'Salesman' shall include every natural person who, in this state, whether on his own account or as an agent, directly or indirectly and by whatsoever means, solicits or attempts to solicit or aids in soliciting or attempting to solicit any application or subscription for or sells or attempts to sell or aids in selling or attempting to sell any building and loan security prior to or under circumstances which in the ordinary or usual course of dealing would involve the issuance thereof: Provided, however, that no officer or employee of any building and loan association shall be deemed a salesman by reason of performing, in the line of his duty as such officer or agent, any routine or clerical act or acts incident to the issuance by such association of any such security or its employment, in behalf of and in the name of itself or any salesman registered in the manner hereinafter prescribed in this act, of any advertising medium calculated or intended to induce applications or subscriptions for such securities."

There is no question but that the Legislature in the exercise of the police powers of the State has provided that no one shall solicit or attempt to solicit, or sell or attempt to sell "building and loan securities," as defined in the act, unless licensed. While the definition of the word "salesman" seems to be harsh and all inclusive, yet, when read in conjunction with the exceptions we believe that it was the intention

of the Legislature to only cause those persons to be licensed who solicit or attempt to solicit, directly or indirectly, or sells or attempts to sell, or aids in selling building and loan securities under circumstances which in the usual or ordinary course of dealing would cause one to purchase said securities or involve the issuance thereof.

We believe that the word "solicit" as found in said definition determines the legislative intent. We are further of the belief that the word "solicit" should be given a similar interpretation as that given it by the Supreme Court of Washington. We quote from Words and Phrases, 3d Series, Vol. 7, page 40:

> "Under a municipal ordinance prohibiting taxicab drivers from soliciting business from passengers at certain times and on certain premises, 'soliciting' is to ask for or to seek to obtain the right and privilege of passengers to transfer such passengers or their baggage for hire by actual persuasion or persistent entreaty, and the mere presence of such drivers, whether in uniform or not, and whether or not accompanied by a vehicle, is not 'soliciting,' within the ordinance. Seattle Taxicab & Transfer Co. v. City of Seattle, 150 P. 1134, 1137, 86 Wash. 594."

Who is, and who is not classified as a "salesman" under the act, would depend entirely upon the facts, and we take the means of answering your question, as to how salesmen should be classified, by a few illustrations:

(1) If John Doe is employed by a building and loan association, and whose duties consist of interviewing people for the purpose of selling them "building and loan securities," then said person would have to be licensed.

(2) If a person, after reading literature or advertisements of a building and loan association, decides to make further inquiry concerning "securities" of said association

and calls at the office of the association and interviews an employe, and through the efforts of the employe said person purchases "securities," then, in our opinion, that employe should be licensed. However, if a person voluntarily applies to a building and loan association and with his mind fully made up to purchase "securities" and so informs an employe of the association of his intention, and the employe merely issues the "securities" to him, then, in our opinion, said employe need not be licensed.

(3) Assume that the president of a building and loan association is playing a game of golf with a person and said person, during the course of the game, would inquire of the president concerning "securities" of the building and loan association of which he was president, and the president would give him the information requested, it would be our opinion that such isolated case would not constitute the president a "salesman"because such would not be, "under circumstances which in the ordinary or usual course of dealing would involve the issuance thereof." However, if the president actively solicited other persons and told them about the "securities," then such person (president) would in our opinion have to be licensed.

From the above it is thus seen that it is difficult to draw the line of demarcation in classifying "salesmen." However, we hope the above illustrations will be of assistance and a guide for you in determining the facts in each individual case as to whether or not a license is required. We believe that you would be within your rights to require every association that has building and loan "securities" for sale to have at least one of its employes licensed. In other words, the employe of a building and loan association, whose duty it is to confer with persons seeking to purchase its stock, should be licensed.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

JLH:EG

BUILDING AND LOAN: Salesmen of "securites" for (1) State chartered B. & L. associations, (2) B. & L. Associations or Savings & Loan Associations, incorporated under laws of United States, and (3) B. & L. associations or Federal Savings & Loan Associations incorporated under laws of other states, operating in Missouri, must be licensed; (4) penalty for violation.

September 13, 1935.

9-17

FILED
59

Hon. Ira A. McBride
Supervisor
Bureau of Building & Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter of recent date, asking our opinion concerning Paragraph "(c)" of Section 5628a, Laws of Missouri, 1935, page 195.

You inquire:

> "Does the definition of 'Building and Loan security' or "Building and loan securities", as set forth in article 'c' of the hereinabove mentioned statute, apply alike and without discrimination to --
>
> First: All state chartered building and loan associations incorporated under Missouri laws, operating in Missouri.
>
> Second: All federal savings and loan associations incorporated under the laws of the United States operating in Missouri.
>
> Third: Any building and loan association or federal savings and loan association incorporated under the laws of any other state, whose home office is in some other state but which does business in this state."

I.

Salesmen of State chartered building and loan associations' "securities" must be licensed.

Please refer to our opinion dated September 10, 1935, to you, wherein we had under consideration the classification of "salesmen" as defined in the Act.

Paragraph "(c)" of Section 5628a, Laws of Missouri, 1935, page 195, reads as follows:

> "'Building and loan security' or 'building and loan securities' shall include stock, scrip and any other certificate or certificates of interest which have been, are now being or shall hereafter be issued by any building and loan association, or savings and loan associations incorporated under the laws of this state or of the United States or incorporated under the laws of any other state and licensed to do business in this state."

Before any building and loan "securities" may be sold in the State of Missouri by any salesman of said association, said salesman must be licensed as provided by Paragraph "(d)", Section 5628, supra (See our opinion to you, supra).

From the above it is our opinion that persons "selling" securities of a state chartered building and loan association must be licensed.

II.

Federal Savings and Loan Associations, incorporated under the laws of the United States and operating in Missouri, must also have their salesmen licensed if the stock of such associations is sold in Missouri.

It is to be noted that Paragraph "(c)", supra, specifically provides that stock or securities of "any building and

loan association or savings and loan associations incorporated under the laws of this state or of the United States" issued or sold in this State, are subject to the provisions of the Act, which means that the salesmen of such stock of any building and loan association or savings and loan association, incorporated under the laws of the United States, shall be licensed. In other words, the Legislature has recognized that Missouri has building and loan associations which are "Federalized" and it was its intention to have the salesmen of the stock of said associations licensed. We believe that the Legislature in the exercise of the police powers of the State can impose an excise or occupational tax on persons selling stock of a building and loan association incorporated under the laws of the United States, for the reason that said salesmen are not engaged in a governmental agency of the United States.

In Kansas City, Mo., v. Johnson et al., 70 Fed. (2d) 360, the Circuit Court of Appeals, Eighth Circuit, in deciding a case involving the right of Kansas City, Missouri, to collect a gasoline tax against a receiver appointed by the Federal Court, said the following (page 361):

> "Federal receivers authorized to conduct and carry on the business of a corporation as a going concern as such are not exempt from the payment of taxes legally assessed and levied against them by city ordinance or state laws. The Supreme Court of the United States in Michigan v. Michigan Trust Company, Receiver, 286 U. S. 334, loc. cit. 346, 52 S. Ct. 512, 515, 76 L. Ed. 1136, speaking through Mr. Justice Cardozo, said:
>
> 'To protect through a receiver the enjoyment of the corporate privilege and then to use the appointment as a barrier to the collection of the tax that should accompany enjoyment would be an injustice to the state and a reproach to equity.'"

In Broad River Power Co. v. Query, 77 L. Ed. 685, 288 U. S. 178, the Supreme Court of the United States, having

before it for determination a suit to restrain the enforcement of a statute of South Carolina imposing a tax on the production and sale of electric power because said power company was granted a license by the Federal Power Commission under the Federal Power Act, held, in answer to the attack made upon said statute by the power company that it was a tax imposed upon an agency of the United States, the following:

> "The separate complaint of the Lexington Water Power Company is that it is generating current at a water power plant, on the Saluda river, which was constructed and is operated pursuant to a license granted by the Federal Power Commission under the Federal Water Power Act (U.S.C. title 16, chap. 12) and hence that the tax is an 'excise, license or privilege tax' upon a Federal agency.
>
> "It is apparent, however, that the complainant in generating and selling power is not acting as an agent for the Government. It acts with the Government's permission, and while it may be said to have received a privilege from the Government, it is not a privilege to be exercised on behalf of the Government. The tax is not upon the exertion of, and cannot be said to burden, any governmental function. Fox Film Corp. v. Doyal, 286 U. S. 123, 130, 76 L. ed. 1010, 1015, 52 S. Ct. 546. The tax is not laid upon the license granted by the Federal Water Power Commission but upon the production and sale of power which the company generates at its own pleasure and exclusively for its own profit. Notwithstanding the special characteristics of electrical energy, the company is engaged in producing and selling an article of trade. Utah Power & Light Co. v. Pfost, 286 U. S. 165, 180, 181, 76 L. ed.

> 1038, 52 S. Ct. 548. The product is property. The fact that a privilege has been received from the Federal Government does not exempt that property or the local business in producing and selling it from the burdens of taxation otherwise valid. * * * * * * * * * * Thus, the 'permissive grant' by the Federal Government to a telegraph company to use the military and post roads of the United States for its poles and wires 'did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State.'"

In Federal Compress and Warehouse Company v. McLean, 78 L. Ed. 622, 291 U. S. 17, the Supreme Court of the United States, in an opinion delivered by Mr. Justice Stone, held that a state excise tax of Mississippi, imposed upon a Delaware corporation doing business by virtue of a license issued by the United States Warehouse Act, did not violate the Federal Constitution or was not an imposition upon a Federal instrumentality, having the following to say (page 627):

> "Appellant's license under the United States Warehousing Act did not confer upon it immunity from state taxation, for neither the appellant nor its business was, by force of the license, converted into an agency or instrumentality of the federal government. The Warehousing Act confers upon licensees certain privileges and secures to the national government, by means of the licensing provisions, a measure of control over those engaged in the business of storing agricultural products who find it advantageous to apply for the license. The government exercises that control in the furtherance of a governmental purpose to secure fair and

> uniform business practices. But the appellant, in the enjoyment of the privilege, is engaged in its own behalf, not the government's, in the conduct of a private business for profit. It can no longer be thought that the enjoyment of a privilege conferred by either the national or a state government upon the individual, even though to promote some governmental policy, relieves him from the taxation by the other of his property or business used or carried on in the enjoyment of the privilege or of the profits derived from it. (Cases cited)
>
> "The fact that the license is used also as a means of government control of appellant's business does not call for a different conclusion. The national government has not assumed to tax the business or to exercise any control over the taxation of it by the state. The state does not tax the license itself and the tax upon petitioner's business, applied without discrimination to all similar businesses whether licensed or not, does not impair the control which the federal authority has chosen to exert. The mere extension of control over a business by the national government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

Building and loan associations incorporated under the Home Owners' Loan Act of 1933, are engaged in business solely for profit and gain. And the fact that such derive their entity by virtue of the Laws of the United States and are supervised and regulated by an instrumentality of the United States, does not, in our opinion, make such building and loan associations agencies or instrumentalities of the United States, especially as concerns the license

placed upon salesmen selling the "securities" of said Federalized building and loan associations.

It is our opinion that a salesman selling "securities" of a building and loan association or savings and loan association, incorporated under the laws of the United States, must be licensed in order to sell the "securities" of such association in the State of Missouri.

III.

Building and Loan Associations or Federal Savings and Loan Associations, incorporated under the laws of other states, selling "securities" and doing business in this State, must have its salesmen licensed.

It is our opinion, in view of the act to regulate sale of and dealings in building and loan "securities," and particularly Paragraph "(c)", supra, that any building and loan association, incorporated under the laws of any other state and licensed to do business in this State, must likewise have its salesmen licensed if the "securities" of said association are sold or offered for sale in this State.

IV.

Penalty.

We invite your attention to Section 5629g, Laws of Missouri, 1935, page 200, which provides a penalty for any violation of the provisions of said act, making such violators amenable to punishment by imprisonment in the county jail or payment of a fine, or both.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

SALES TAX: Municipally owned plants selling light and water to users and consumers are subject to the tax.

11-18

November 15, 1935

FILED
59

Hon. E. A. McDonald
Prosecuting Attorney
Mercer County
Princeton, Missouri

Dear Sir:

This Department is in receipt of your letter requesting an opinion as to the following state of facts:

> "The Princeton Light and Water Plant is owned and operated by the City of Princeton.
>
> As the City Attorney I have advised the City Council that in my opinion that in collecting the City Light and Water Bills the Sales Tax should not be collected. I am basing my opinion on Sec. 3, Exemptions, on page 416 Session Acts, 1935.
>
> We would be pleased to have your opinion."

Section 2, Laws of Missouri 1935, page 415, provides, in part, as follows:

> "From and after the effective date of this Act and up to and including December 31, 1937, there shall be and is hereby levied and imposed and there shall be collected and paid:
>
> * * * * * * * * * * * * * * *

> (c) A tax equivalent to one (1) per cent. of amounts paid or charged on all sales of electricity or electrical current, water and gas (natural or artificial), to domestic, commercial or industrial consumers."

Section 5 of this Act, provides, in part, as follows:

> "Every person receiving any payment or consideration upon the sale of property or rendering of service subject to the tax imposed by the provisions of this Act, or required to make collection of the tax imposed by the provisions of this Act, shall be responsible not only for the collection of the amount of the tax imposed on said sale or service but shall, on or before the 15th day of each month, make a return to the State Auditor of all taxes collected for the preceding month or required to be collected for the preceding month, and shall remit the taxes so collected or required to be collected to the State Auditor. The seller of any property or person rendering any service, subject to the tax imposed by this Act is directed to collect the tax from the purchaser of such property or the recipient of the service as the case may be.
>
> The tax imposed by this Act is a tax upon the sale, service or transaction and shall be collected by the person making the sale or rendering the service at the time of making or rendering such sale, service or transaction. * * * * * * * * * * * * * * *"

In the first section of the Emergency Revenue Act of 1935, municipal corporations are expressly included

within the term "person." This section provides:

> "The following words, terms and phrases when used in this Act, have the meanings ascribed to them in this Section, except where the context clearly indicates a different meaning:
>
> (a) 'Person' includes any individual, firm, copartnership, joint adventure, association, corporations, municipal or private, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

From the above quoted sections of the Emergency Revenue Act, it is clear that a municipal corporation is required to collect the tax equivalent to one per cent. of the amount paid or charged for all sales of electricity or electrical current, water and gas (natural or artificial) to domestic, commercial or industrial consumers.

If municipal corporations are to be exempted from the provisions of this Act it could only be by reason of Section 3 of the Act, which provides:

> "There are hereby specifically exempted from the provisions of this Act * * * such portion of the gross receipts as is derived from sales of tangible personal property, services, substances and things which the general assembly of the State of Missouri is prohibited from taxing or further taxing under the Constitution of this State."

In view of the fact that the Act specifically includes municipal corporations as being subject to this tax, both as vendor and vendee, to exempt such corporations would be to hold said Act unconstitutional with respect to said municipal corporations. The settled policy of this de-

partment, with the exception of certain instances where the unconstitutionality of the law has been clear and unmistakable, has been to uphold the constitutionality of all statutes and leave the final determination of the matter to the courts of the State of Missouri. The late Judge Fitzsimmons, in the case of State v. Ward (Supreme Court of Missouri) 40 S. W. (2d) 1074, said:

> "It is a fixed rule, scarcely needing restatement, that no legislative enactment should be declared unconstitutional unless it appears very clearly so, and every reasonable intendment should be made to sustain it."

And in the more recent case of State ex inf. McKittrick v. American Colony Insurance Company (Supreme Court of Missouri) 80 S. W. (2d) 876, l. c. 883, Judge Ellison stated:

> "We think this contention is sound. The rule of construction invoked by respondents is well established. In State v. Ward, 328 Mo. 658, 664, 40 S. W. (2d) 1074, 1076, the late lamented Fitzsimmons, C. said: 'It is a fixed rule, scarcely needing restatement, that no legislative enactment should be declared unconstitutional unless it appears very clearly so, and every reasonable intendment should be made to sustain it.' Likewise, in State ex rel. Columbia Telephone Co. v. Atkinson, 271 Mo. 28, 42, 195 S. W. 741, 745, the rule is said to be that if the act be 'fairly susceptible of two or more constructions, that interpretation will be adopted which will avoid the effect of unconstitutionality, even though it may be necessary, for this purpose, to disregard the more usual or apparent import of the language employed.' See, also, Black on Interpretation of Laws (2d Ed.) Sec. 41, p. 113. Some authorities say 'courts are bound to go to the very verge of construction to sustain the constitutionality of statutes,' 12 C.J.

Sec.220, p. 790; and this rule applies in making state statutes harmonize with the Constitution of the United States as well as with the Constitution of the state. 59 C. J. sec.616, p. 1038; Overton v. State, 7 Okl. Cr. 203, 205, 114 P. 1132, 123 P. 175, error dismissed 235 U. S. 31, 35 S. Ct. 14, 59 L. Ed. 112."

CONCLUSION

In view of the foregoing, it is the opinion of this department that municipal corporations are subject, both as vendor and vendee, to the Emergency Revenue Act of 1935 (Laws of Missouri 1935, page 411).

Respectfully submitted,

OLLIVER W. NOLEN

JOHN W. HOFFMAN, Jr.
Assistant Attorneys General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

BUILDING AND LOAN ASSOCIATION: If the by-laws of the Building Loan do not prohibit a director from selling his own commodity to said association, of which he is a director, then there is no statute that prohibits him from doing so.

December 16, 1935.

12-18

FILED
59

Hon. J. W. McCammon, Chief Clerk
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This is to acknowledge your letter dated December 10, 1935, as follows:

> "We will be greatly obliged if you will let us have an opinion as to whether a member of the board of directors of a building and loan association, who is the sole owner of a business, or a member who owns the majority of the stock of that business, if it is incorporated, or, who is the manager of a business or corporation, may legally sell his own merchandise or other commodity, or that of the corporation, to the association which he serves as a director?
>
> "And, as such director, should he have a voice in the determination of reasonableness of the charges made for such merchandise?"

We have searched the Building and Loan Laws and fail to find any statutory provision prohibiting a director, "who is the sole owner of the business, or a member who owns the majority of the stock of that business, if it is incorporated, or, who is the manager of a business, corporation" from selling "his own merchandise or other commodity, or that of the corporation, to the association which he serves as a director", and if the by-laws do not prohibit a director from doing the above, then in our opinion it would be legal for a director to sell

the Building and Loan Association a commodity or merchandise under the circumstances enumerated in your letter. It is our further opinion that such sale would not be against public policy.

Section 5593, Laws of Missouri, 1935, page 201, does prohibit directors from loaning moneys of the association to themselves. Said section provides in part as follows:

> "* * * *No real estate loan shall be made by an association to a director or officer or to a partnership or firm in which a director or officer is interested, or to a corporation of which a director or officer of the association is a director or officer or stockholder or upon real estate in which any director or officer has an interest as mortgagee; provided, however, that a real estate loan may be made to a director or officer upon the security of a first mortgage or deed of trust upon the single family residence or homestead of such director or officer, where such loan has first been approved in writing by a two-thirds majority of the board of directors and a copy of such written approval has been recorded in the minutes of the board of directors. * * * *"

Corpus Juris, volume 9, page 928, paragraph 16, in part reads as follows:

> "* * * *Officers and directors of building and loan societies possess such powers as are granted by statute, charter, and by-laws, and such as are not inconsistent therewith and are necessary to the discharge of their several offices;* * * *"

The reasonableness of the charges made for merchandise sold would be a matter for the Building and Loan Association to determine and not this department. However, if the charges were so excessive as to be a fraud against the Building and Loan Association then said Association would have recourse against said director in the courts.

Yours very truly

James L. HornBostel
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN JR.
Assistant Attorney General.

JLH:H

PUBLIC HEALTH: Registration of births under Section 9054a.

1-14

January 11, 1935.

FILED
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Hon. E. T. McGaugh
State Health Commissioner
Capitol Building
Jefferson City, Missouri

Dear Dr. McGaugh:

This is to acknowledge your letter of January 3d, 1935, as follows:

> "Relative to Chapter 52, Article 2, Section 9054a, page 230 of the Session Laws of 1931, it has been the custom of the Bureau of Vital Statistics to require the fee of two dollars and fifty cents ($2.50) to be paid in advance before sending out the necessary blanks to complete the registration of a birth occurring prior to 1910, the fee of course being returned if it is impossible to complete the registration of such a birth.
>
> Will you please render this office an opinion as to whether or not it is legal to collect this fee in advance or whether the blanks should be sent out without demanding advance payment and register same only when the blanks are returned with the two dollar and fifty cent ($2.50) fee."

Article 2, Chapter 52, R. S. Mo. 1929, pertains to "Registration of Births and Deaths." Section 9049 of said article and chapter provides in part as follows:

> "It shall be the duty of the state board of health to have charge of the state

> system of registration of births and deaths; to prepare the necessary methods, forms and blanks for obtaining and preserving such records, and to insure the faithful registration of the same in the registration districts and in the central bureau of vital statistics at the capital of the state."

Section 9041 of said article and chapter provides in part as follows:

> "The secretary of the state board of health shall have supervision over the central bureau of vital statistics, which is hereby authorized to be established by said board, and shall act as state registrar of vital statistics."

Laws of Missouri, 1933, page 269, Section 9024, provides in part as follows:

> "The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished."

Thus, the Commissioner of Health since July 24, 1933, by virtue of Section 9024 performs the same duties relative to the central bureau of vital statistics as did the secretary prior to that time.

Section 9043, R. S. Mo. 1929, provides in part as follows:

> "Within ninety days after the taking effect of this article, or as soon thereafter as possible, the state board of health shall appoint a local registrar of vital statistics for each registration district in the state."

Section 9052, R. S. Mo. 1929, provides in part as follows:

> "It shall be the duty of the attending physician or midwife to file a certificate of birth, properly and completely filled out, giving all

> the particulars required by this article, with the local registrar of the district in which the birth occurred, within ten days after the date of the birth."

Section 9053 provides as to what the certificate of birth shall contain.

Section 9057 provides in part as follows:

> "The state registrar shall prepare, print and supply to all registrars all blanks and forms used in registering, recording and preserving the returns, or in otherwise carrying out the purposes of this article; and shall prepare and issue such detailed instructions as may be required to secure the uniform observance of its provisions and the maintenance of a perfect system of registration. And no other blanks shall be used than those supplied by the state registrar."

A reading of the above statutes shows that the Commissioner of Health is the State Registrar of Vital Statistics and that the State Board of Health has charge of the State system of registration of births and deaths and that local registrars are appointed by the State Board of Health and certain duties imposed upon them. The attending physicians or midwives are required to fill out a certificate of birth within ten days after such occurs, upon a blank furnished to the local registrars by the Commissioner of Health.

Section 9059 provides for fees for local registrars. And Section 9060 provides fees for the State registrar.

In 1931, Laws of Missouri, 1931, page 230, Section 9054a, was enacted and said section reads as follows:

> "Whenever, prior to the taking effect of this article, a person was born in the state of Missouri, or a resident of Missouri born outside this state, such birth may be registered in the manner and according to, nearly as

> possible, the provisions of section 9053 of this article, by filling out blank registration papers secured from the local registrar and filing same, together with a registration fee of $2.50, with the state registrar of vital statistics. Such papers shall contain the affidavits, sworn to before a notary, of at least two persons, knowing the facts. The state registrar may require further affidavits to establish the truth of the facts endeavored to be made of record by the certificate and may withhold filing of such birth certificate until his requirements are complied with. The state registrar may make and enforce appropriate rules and regulations to carry out this act and to prevent fraud and deception."

There is nothing mysterious or ambiguous about the above section. The words employed by the Legislature when given their plain, usual and ordinary meaning simply provide that any birth desiring to be registered by a person born in this State, or a resident of Missouri born outside of this State, prior to the date of registering births provided by Article 2, Chapter 52, R. S. Mo. 1929, shall obtain a blank secured from the local registrar and fill it out and send same to the State registrar (Commissioner of Health) for filing, and enclose a fee of $2.50 for such filing.

In your letter you state that it has been the custom to require a fee of $2.50 to be paid in advance before sending out the necessary blanks. In view of the above statute, which authorizes such filing of certificates of birth before Article 2, Chapter 52, was effective, we do not see possibly how such a custom could have prevailed as the statute (9054a) says that the blanks shall be obtained from the local registrar and when properly filled out and filed the $2.50 fee shall accompany. It is needless to say that this custom should be done away with and that the statute creating and allowing the acceptance of this fee should be complied with.

A further reason why we do not understand how such a custom could have been promulgated is in view of Section 9060, R. S. Mo. 1929, which in part provides as follows:

> "And the state registrar shall keep a true and correct account of all fees by him

received under these provisions, and turn the same over to the state treasurer."

If, as stated in your letter, you exact a fee in advance when you forward the blanks to the person desiring to register a birth under the provisions of Section 9054a, then it means that these fees must be kept separately and do not find their way into the State Treasury until after the blanks have been returned properly filled out and ready for filing. Section 9060 says that all the fees shall be turned over to the Treasurer, and a like section was enacted in 1933, Laws of 1933, page 414.

What we are saying is this: That when the fees are collected such must be turned over to the Treasurer, and when they are turned over to the Treasurer you could not possibly return the fee to the person, in the event the blanks were not filed. If it has been your custom to exact the fee in advance and keep that fee pending the time in which the blanks were actually filed, then such custom is illegal, unauthorized, unwarranted and without the sanction of the statutes. If the blank when presented for filing is not sufficient as to form and substance, then such should be returned to the person presenting same for completion, and the fee, if it accompanies the certificate, should likewise be returned. No fee should be accepted until the blanks are in proper form and ready for filing.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

BOARD OF HEALTH:)
) Fund for water analysis after being placed
) in treasury may not be withdrawn unless
APPROPRIATIONS:) appropriated by the Legislature.

February 6, 1935.

FILED
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E. T. McGaugh, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Dr. McGaugh:

This is to acknowledge your letter dated February 4th, 1935, as follows:

> "The Revised Statutes of Missouri 1929, Chapter 52 Section 9032 - Subject - Analysis, fees - states that 'analysis of all waters required by this article shall be made at the state board of health laboratories at Jefferson City, Missouri. The fees collected by the state board of health under this article shall be turned over to the State Treasurer, who shall place them in a special fund to be known as the state board of health water and sewerage fund and as much as is necessary of this fund shall be used for maintaining the division of the state board of health to be known as the division of water and sewerage and said fund is hereby appropriated for said purpose, and the state auditor shall draw his warrant for claims against this fund after such claims have been approved by the secretary of the state board of health:'
>
> After reading this article I would like an opinion as to whom are eligible to draw their salaries from this fund. It seems to me that it is not placed in the State Board of Health fund or any Health Department fund. Would it be

"proper and legal for the Engineering Department and part of the Laboratory Personnel who make these water analyses and make this fund possible to draw their salaries and a limited amount of their expenses therefrom."

Section 9031, R. S. Mo. 1929, provides as follows:

"The state board of health shall make and enforce adequate rules and regulations for the maintenance of a safe quality of water dispensed to the public and for the collection of samples and analysis of water, either natural or treated, furnished by municipalities, corporations, companies, or individuals to the public and shall fix the fees for any service rendered under the rules and regulations to cover the cost of the service."

Section 9032, R. S. Mo. 1929, provides as follows:

"The analysis of all waters required by this article shall be made at the state board of health laboratories at Jefferson City, Missouri. The fees collected by the state board of health under this article shall be turned over to the state treasurer, who shall place them in a special fund to be known as the state board of health water and sewage fund and as much as is necessary of this fund shall be used for maintaining the division of the state board of health to be known as the division of water and sewage and said fund is hereby appropriated for said purpose, and the state auditor shall draw his warrant for claims against this fund after such claims have been approved by the secretary of the state board of health: Provided, no fees under this section shall be paid by any city or municipality except when the waterworks is owned and operated by said city or municipality."

We direct your attention to the fact that Section 9031, supra, provides that the State Board of Health shall make and enforce adequate rules and regulations for the maintenance of a safe quality of water dispensed to the public and shall fix the fees for the service rendered under rules and regulations to cover the cost of the service. The State Board of Health, then, fixes the rules and regulations and fixes the fees to cover the cost thereof. Section 9032, supra, provides that the fees shall be collected and turned over to the state treasurer with direction to him to place such in a special fund to be known as the "state board of health water and sewage fund" and such fund "shall be used for maintaining the division of the state board of health to be known as the division of water and sewage."

From the above, then, it is seen that the fees collected cover the actual cost of the service of water analysis and are placed into the state treasury into a special fund. After the moneys are placed into the treasury, then such may only be withdrawn by an appropriation act. If salaries are to be paid out of this fund, then the Legislature should appropriate out of this fund for the payment of such. Sans an appropriation by the Legislature this fund cannot be withdrawn from the treasury. Such has been the holdings of the Supreme Court of Missouri in many cases.

We direct your attention to Section 43, Article IV, of the Constitution of Missouri, which in part provides as follows:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law."

Section 19, Article X, of the Constitution of Missouri, provides in part as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law."

Section 9032, supra, provides in part, "and said fund is hereby a propriated for said purpose, and the state auditor shall draw his warrant for claims against this fund after such claims have been approved by the secretary of the state board of health" and it might be argued that the auditor must issue his warrant on this fund when accounts are properly presented without a special appropriation by the Legislature.

In State ex rel. Kessler et al. v. Hackmann, State Auditor, 264 S. W. 366, the Supreme Court of Missouri answered a similar question, having the following to say:

> "On the other hand, this court has held that a fund, raised by an act for a special purpose, could not be paid out of the state treasury except upon an appropriation by an act of the Legislature. State ex rel. Fath et al. v. Henderson, 160 Mo. 190, loc. cit. 214, 60 S. W. 1093; State ex rel. v. Gordon, 236 Mo. 142, loc. cit. 158, 139 S. W. 403. In the case last cited the court had under consideration a fund for the support and maintenance of the game department. It was held that the creation of a special fund is not a continuing appropriation of the fund, or of any part of it, to pay accounts drawn against it. That the creation of the fund is one thing, and the appropriation of money to pay accounts against the fund is quite another thing. The language of the Constitution is unequivocal; it requires an appropriation before payment of money received by the state 'from any source whatsoever.' The money collected by the board is received by the state; it goes into the state treasury. To make it more specific, the requirement that an appropriation by the Legislature will be necessary before money can be paid out of the treasury of the state, it is applied, not only to state funds, but to 'any of the funds under its management.'

"It is manifest that the intention of the Legislature in placing the funds in the hands of the state treasurer was, not only to provide official information as to its disbursement, but to keep the expenses of the department within the limits provided by the Legislature. The Legislature may be presumed to have had the constitutional restrictions in mind when they passed the act creating the fund.

The peremptory writ is denied."

CONCLUSION.

It is our opinion that it will take an act of the Legislature to appropriate the moneys out of this fund for the payment of salaries, expenses or any other items.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

JLH:EG

APPROVED:

ROY McKITTRICK
Attorney-General.

BOARD OF HEALTH: (
(Reinstatement of expired certificate discussed.
COSMETOLOGY: (

February 14, 1935. 2-16

FILED
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E. T. McGaugh, M. D.
State Health Commissioner
Jefferson City, Missouri

Attention: Mr. H. G. Cherry

Dear Dr. McGaugh:

This is to acknowledge Mr. Cherry's letter concerning the following:

"Your letter of January 19 received regarding Mr. Ernest Fiedler, 323 South Ave., Springfield, Missouri, who desires to renew his certificate No. 4, and his license of 1931, No. 1626. I want to call your attention to Section 20 of our law regarding reinstatement of an expired certificate within three years.

Our records show that Mr. Fiedler had a 1931 license that expired December 31, 1931. The three years or time that this certificate should have been restored expired December 31, 1934. The only way that this certificate could be restored would be to issue him a new certificate of 1934 and then allow him to renew his 1934 license by paying the fee of two dollars to secure his 1935 license. This might be done providing we have satisfactory proof of his qualifications to resume practice of such occupation.

We would like to have your opinion as to whether this would be permissable under our law."

Section 9089, R. S. Mo. 1929, provides in part as follows:

> "It shall be unlawful for any person in this state to engage in the occupation of hairdresser or cosmetologist or manicurist, or to conduct a hairdressing or cosmetologist's or manicurist's * *, unless such person shall have first obtained a certificate of registration as provided by this article."

Section 9094, R. S. Mo. 1929, provides that a person desiring to practice the occupation provided for in the act shall file a written application detailing qualifications provided for in said section.

Section 9095, R. S. Mo. 1929, provides for the qualifications of applicants.

Section 9096, R. S. Mo. 1929, reads as follows:

> "If said state board of health finds the applicant has submitted the credentials required for admission to the examination and has paid the required fee, said board shall admit such applicant to examination or registration."

Section 9098, R. S. Mo. 1929, provides in part as follows:

> "If an applicant for examination for operator passes such examination to the satisfaction of the examining board and has paid the fee required and complied with the requirements pertaining to instructors provided in this article, the state board of health shall issue a certificate to that effect, * * *. Such certificate shall

> "be evidence that the person to whom it is issued is entitled to engage in the practices, occupation or occupations stipulated therein as prescribed in this article. Such certificate shall be conspicuously displayed in his or her principal office, place of business or employment. * * * * *."

From the foregoing it is seen that every person desiring to practice the occupation of cosmetology, hairdressing or manicuring, must possess certain qualifications and be licensed by the State Board of Health. The Board determines one's qualification by means of an examination.

Section 9101, R. S. Mo. 1929, provides in part as follows:

> "All who are engaged in the actual and continuous practice of any of the practices of the qualified occupations named in this article, prior to the passage of the same shall be entitled to a certificate to practice hereunder <u>without an examination</u> upon the payment of a fee of five dollars."

Article 5, Chapter 52, relating to "Cosmetologists, Hairdressers and Manicurists" was enacted in 1929. The Legislature exempted persons engaged in practice of the occupations provided for in said article from taking the examination if they were engaged in such practices at the time of the passage of the Act. We, therefore, conclude that every person, to practice the occupations enumerated in said article and chapter, must have a certificate, and the Act provides for the obtaining of said certificates by two means: (1) By examination; and (2) by being engaged in the practice at the time the Act took effect. In either event, no person is permitted to practice unless such has a certificate from the Board.

Section 9103, R. S. Mo. 1929, provides as follows:

> "The holder of a certificate issued by the state board of health who continues in active practice or occupations shall on or before the 31st day of December, 1930, renew his or her certificate and pay the renewal fee of two dollars. A certificate which has not been renewed prior to the 31st day of December in any year thereafter shall expire on the 31st day of December in that year. The holder of the expired certificate may have the certificate restored within three years of the date of expiration upon the payment of the delinquent renewal fee of fifteen dollars and satisfactory proof of his or her qualifications to resume practice of such occupation."

We invite your attention to the fact that a holder of a certificate must renew same annually and if it is not so renewed "the holder of the expired certificate may have the certificate restored within three years of the date of expiration upon the payment etc." The legislature by this section intended that one holding a certificate must renew it annually, and failure to do so within three years left the person in the same position as one never having a certificate. Thus, the failure of a person holding a certificate to renew it within three years means that such person in order to again be licensed and obtain a certificate of registration must atart anew the same as one never holding a certificate. The statute says "within three years", and although it is plain and unambiguous, nevertheless, we shall define the word "within."

In Door et ux. v. Bankers' Surety Co., 218 S. W. 398, l. c. 400-401, the St. Louis Court of Appeals said:

> "In the instant case the contract specifically provided that the entire

> "contract price should be paid in certain installments as the work progressed, and the final payment of $3,616 should be made within 10 days after the completion of the work. This clearly gave the owner, in the absence of any notice of default on the part of the contractor, the right to make the final payment at any time within 10 days after the completion of the work. The word 'within,' as used in the provision, does not necessarily mean at the end of 10 days, but, as it plainly says, payment can be made, within 10 days, which means at any time within 10 days."

Words & Phrases, 3d series, Vol. 7, page 1057, has the following to say concerning the word "within":

> "The use of the word 'within' as a limit of time, or degree, or space, embraces the last day, or degree, or entire distance, covered by the limit fixed. Rice v. J. H. Beavers & Co., 71 So. 659, 196 Ala. 355."

CONCLUSION.

In your letter you state that your records show that a person "had a 1931 license that expired December 31, 1931" and "the only way that this certificate could be restored would be to issue him a new certificate of 1934 and then allow him to renew his 1934 license by paying the fee of two dollars to secure his 1935 license." You inquire, "We would like to have your opinion as to whether this would be permissible under our law." The answer, in our opinion, is in the negative.

The method you propose to restore this person's certificate would be a subterfuge to evade the plain provisions of the statute. The statutes prescribe your duties and should be followed, and any attempt to evade same indirectly does not have the sanction of the law. It follows that the person in order to obtain a certificate must file an application, take the examination etc., the same as one would have to do that never had been licensed. As a further observation, we say to you that your present so-dalled "five year extension plan" (presumably executed under Section 9101, supra) is illegal and without the statutes. Thus, if a person was practicing at the time the Act went into effect you could not license him now after the lapse of five years, as Section 9101, supra, intended to apply only if taken advantage of at the time the Act went into effect.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

COUNTY COLLECTOR: A vacancy does not exist by collector-elect's failure to give bond and he may qualify by meeting the legal requirements any time he is able to do so.

February 21, 1935.

FILED
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Hon. J. C. McKeehan,
Collector of Adair Co.,
Kirksville, Missouri.

Dear Sir:

You recently made an inquiry in person of this office as to whether or not a county collector must qualify by taking the oath and giving bond and as to the results of his failure so to do.

In 1933 the Legislature repealed Section 9885, R.S. Mo. 1929 and enacted in lieu thereof a new section to be known as Sec. 9885, Laws of Mo. 1933, page 464, which provides:

> "Every collector of the revenue in the various counties in this state, and the collector of the revenue in the City of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties.

> Provided, that in all counties which now have or which may hereafter have a population of less than 75,000 inhabitants, according to the last preceding federal decennial census, the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depository or depositories, as may have been selected by such county court pursuant to the provisions of Section 12184, Revised Statutes of Missouri for 1929, to the credit of a fund to be known as 'County Collector's Fund'; provided further, that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount; provided further, that no such county collector shall be required to make daily deposits for such days when his collections do not total at least the sum of One Hundred Dollars ($100.00); and provided further, the collector shall not check on such 'County Collectors' Fund' except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositories."

Section 9886, R.S. Mo. 1929, relating to the bond of ex-officio collectors, is as follows:

> "In any county where any officer thereof is ex officio collector of the revenue of said county, he shall give bond and security as such ex officio collector to the State of Missouri, to the satisfaction of the county court of such county, in a sum of at least equal to the amount of all the revenue to be by him collected for any one year, conditioned that he will faithfully and punctually collect and pay over all state and county revenue during his term as such ex officio collector, and that

> he will in all respects faithfully perform all the duties of collector according to the statute laws of the State governing county collectors of the revenue."

Section 9887, R.S. Mo. 1929 deals with the failure of the county collector to give bond, and is as follows:

> "If any collector shall neglect or refuse to give bond, as required by the next preceding section, his office shall, immediately upon such neglect or refusal, be vacant."

Noting that Section 9887, supra, contains the phrase "as required by the next preceding section", said preceding section being Sec. 9886, supra, we are of the opinion that it has no bearing on the question in the instant case for the reason that the Collector of Adair County is not an ex-officio collector of the revenue of said county, but is amenable to the provisions of Sec. 9885, supra. We must therefore consider the question in the instant case as of any other officer failing to qualify.

The effect of a statute requiring officers to qualify within a given period of time is discussed in the case of State v. Churchill, 41 Mo. 42, wherein the Court said:

> "It is stated that Jasper N. Norman was duly elected treasurer of the County of Laclede at the election in November, 1866, received his certificate of election, gave his bond, which was approved by the county court and ordered to be filed, and took the oaths required by law, which were enclosed in his certificate or commission; but that a few days afterwards, on motion of the county attorney, the county court made an order rescinding the approval of the bond, and declaring it annulled, for the reason that it had not been offered and filed within ten days after the election, as required by the statute--G.S. 1865, ch. 38, sec. 5. The court also declared the office vacant and proceeded to appoint the defendant county treasurer, who gave the required bond, was duly qualified, and entered upon the duties of his office.
>
> We think the court erred in this proceeding. The bond was not void, nor voidable, merely

> because not presented and filed within the ten days. This provision of the statute is directory only. The matter of time was not essential to the validity of the bond, nor a condition precedent to the party's title to the office. The time not being of the essence of the thing required to be done here, it was not material-- Rex v. Lexdule, 1 Burr. 497; Sedgw. Stat. & Const. Law, 368-74. When a sheriff was required to give bond within twenty days after his election, it has been held that the statute as to the time of giving the bond was directory merely, and that the failure to give bond within that time did not forfeit his title to the office-- People v. Holly, 12 Wend. 481. We are of the opinion that the orders of the court vacating the bond, declaring the office vacant, and appointing the defendant treasurer, should be regarded as having been done without authority of law and as mere nullities. The treasurer elect, having complied with all the provisions of the statute and received his commission, was entitled to hold the office."

The effect of failure to give bond and qualify is discussed in the case of Aiken v. Sidney Steel Scraper Company, 198 S.W. l.c. 1142 in which the Court said:

> "****A failure to qualify by filing a bond when required does not vacate the office. State v. Churchill, 41 Mo. 41; State v. County Court, 44 Mo. 230. In Sproul v. Lawrence, 33 Ala. 674, it is said that the election gives the right and invests him with title to the office. And that is the view taken in this state; even the commission being held to be mere evidence of his title. ****"

Regarding the failure to give bond and qualify, 46 C.J. pp.962-963 says:

> "In the absence of a statute so providing, it is generally held that a failure to qualify, although it affords cause for forfeiture of the office, does not create a vacancy; and even though it is irregular and improper to induct one into office, without giving the required bond, such a one is legally in office and so remains until removed by judicial process, and if the oath is taken or the bond filed at any time before proceedings are taken to declare a vacancy, it is sufficient."

Likewise, in the case of Cantley v. Village of Mt. Moriah, 49 S.W. (2d), l.c. 277, the Kansas City Court of Appeals,said:

> "Some statutes provide that the failure to give bond shall work a vacancy or a forfeiture of the office, but it is usually held that, under these statutes, the officer continues to be a de jure officer until a vacancy or forfeiture is declared. See State ex rel. v. Ely, 43 Ala. 568; State ex rel. v. Callow, 78 Mont. 308, 254 P. 187; People ex rel. v. Benfield, 80 Mch. 265, 45 N.W. 135; People ex rel. Brooks v. Watts, 73 Hun. 404, 26 N.Y.S. 280. In the case last cited the court quoted approvingly (page 282 of 26 N.Y.S. 73 Hun. 404) from Dill. Mun. Corp. (4th Ed.) as follows:
>
> 'Statutes requiring an oath of office and bond are usually directory in their nature; and unless the failure to take the oath or give the bond by the time prescribed is expressly declared, ipso facto, to vacate the office, the oath may be taken or the bond given afterwards, if no vacancy has been declared.'"

Section 9883, R.S. Mo. 1929 is as follows:

> "The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified: Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

The above quoted section makes the tenure of office of collector four years, and the person holding the office shall retain the same until a successor is duly elected and qualified.

The result of the collector-elect not qualifying by reason of his failure to give bond is discussed in the case of Abington v. Harwell, 201 Mo. App. l.c. 349 in the following language:

> "The first bond submitted to the county court, on December 2, 1914, by the appellant, was rejected by it on the ground that the Governor of the State had no authority to make the appointment but that under the Statute, section 11745, such authority was vested in the county court. It further appears that the first bond was not in sufficient amount, and on December 17, 1914, the appellant presented a new bond to the county court which was finally approved on April 15, 1915; thereupon the tax book or lists were turned over to him. Prior to that time the defendant continued to act as Collector of the Revenue in his township under the authority of his election as such, his successor not having been duly appointed and qualified."

CONCLUSION

According to the statutes and the decisions above quoted, if the collector-elect shall fail to qualify by being unable to give bond, it is the opinion of this department that a vacancy would not exist in the office of county collector of Adair County such as could be filled by appointment by the Governor; hence, the present collector would retain the office until his successor is elected and qualified, which in the instant case, might be four years, or until another legal statutory election for the election of a county collector is held.

This conclusion is further augmented by Section 5 of Article XIV of the Missouri Constitution, which is as follows:

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Having ruled that Section 9887, R.S. Mo. 1929 is not pertinent to the question involved, it is the opinion of this department that the collector-elect may qualify by meeting the requirements of the statute any time that he may be able to do so, and until that time the present collector may remain in office.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.



OWN:AH

STATE BOARD OF HEALTH: May Establish designation for registration districts.

3-22

March 21, 1935.

FILED
60

State Board of Health
Jefferson City, Missouri

Attention of Dr. E. T. McGaugh

Dear Doctor McGaugh:

Acknowledgment is herewith made of your request for an opinion of this office respecting the designation of registration districts for the registration of births and deaths. Your request is long and for that reason I shall only quote a part thereof:

> "I am herewith submitted to you a question concerning the possibility of a change being made in the naming and identifying of the birth and death registration districts of each county and the local registrar in charge of such districts.
>
> * * * * * * * * * * * * * * *
>
> Will you please render to this office an opinion as to whether or not there is anything in the statutes preventing the State Registrar from designating his districts in the above mentioned manner."

I.

REGISTRATION OF BIRTHS AND DEATHS 'IN CHARGE' OF STATE BOARD OF HEALTH.

All state health matters are under the general supervision and direction of the State Board of Health. The registration of births and deaths is provided for in Article II, Chapter 52, R. S. Mo. 1929, Section 9040 of such Article reads as follows:

> "It shall be the duty of the state board of health to have charge of the state system of registration of births and deaths; to prepare the necessary methods, forms and blanks for obtaining and preserving such records, and to insure the faithful registration of the same in the registration districts and in the central bureau of vital statistics at the capital of the state. The said board shall be charged with the uniform and thorough enforcement of the law throughout the state, and shall from time to time promulgate any additional forms and amendments that may be necessary for this purpose."

By this provision a specific duty is laid upon the State Board of Health to have charge of and direct the state system of registration of births and deaths. So as to effectuate this duty it is authorized to establish uniform and thorough enforcement of the law and to promulgate such additional forms and amendments, rules and regulations as may be necessary or advisable to effectuate the purpose of the act.

By virtue of Section 9042 R. S. Mo. 1929, the State Board of Health is required to designate the boundaries of rural registration districts. By Section 9043 the State Board of Health is authorized and required to appoint local registrars and for cause to remove such appointees. The duties of the State Registrars are principally set forth in Sections 9057 and 9062, which sections though laying specific duties on the State Registrar do not authorize the changing by him of the method of designating registration districts.

In view of the specific duty laid upon the State Board of Health to prepare the necessary methods to insure the faithful registration of births and deaths, it appears certain that if this responsibility rests with the Board of Health it is their duty to promulgate the necessary rules and regulations. A practical method of classifying and designating the various registration districts would seem to have considerable bearing upon the efficiency of the Department.

It is therefore the opinion of this office that a promulgation of a systematic designation of registration districts for the purpose of registering births and deaths rests in the State Board of Health.

II.

STATE BOARD OF HEALTH MAY PROMULGATE ANY EFFICIENT METHOD OF DESIGNATING REGISTRATION DISTRICTS.

Section 9042 R. S. Mo. 1929, provides the only limitation upon the State Board of Health in the manner of designating registration districts for the purpose of registering births and deaths. This section reads as follows:

> "For the purpose of this article the state shall be divided into registration districts, as follows: Each city and incorporated town shall constitute a primary registration district; and for that portion of each county outside of the cities and incorporated towns therein, the state board of health shall define and designate the boundaries of a sufficient number of rural registration districts, which it may change from time to time as may be necessary to insure the convenience and completeness of registration."

It is apparent that this section in itself constitutes every city and incorporated town as a primary registration district. It also provides for the designation of rural registration districts by the State Board of Health. This statute distinguishes between primary registration districts and rural registration districts and so long as this statutory classification is retained, the State Board of Health may adopt any numerical or other designation deemed advisable, conformable to such statutory provision. The statute particularly constitutes every city and incorporated town as a primary registration district and any classification conflicting with such statutory requirement would be void.

The plan detailed in your communication would appear to ignore this statutory classification. However, if it does not in fact do so, it could be adopted by the Board if in the judgment of the Board such system would insure the faithful registration of births and deaths.

CONCLUSION.

It is therefore the opinion of this office that subject to the provisions of Section 9042 R. S. Mo. 1929, the State Board of Health is at liberty to adopt any system for the designation of registration districts which the Board might deem advisable in insuring the faithful registration of births and deaths.

Respectfully submitted,

HARRY G. WALTNER, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

MOTOR VEHICLES: LIGHTS--White lights to be used in front of an automobile and red lights to the rear; other lights prohibited.

March 25, 1935.

3.27

FILED
60

Hon. J. H. McNatt
Assistant Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Mr. McNatt:

This is to acknowledge your letter as follows:

"The State Highway Patrol has been making a number of arrests in our County of bus and truck drivers who have other than white lights displayed on the front of the vehicle and other than red lights displayed at the rear.

We are wondering what our position should be in this matter under Sec. 7778 and under Rule 52 of the Missouri Bus and Truck Law, which sets out the requirements for motor vehicles, but the language of the Statute and the rule does not seem to limit to those particular requirements.

We would appreciate an expression of opinion from your office on this matter. In other words, if an operator has the required white head lights and the red rear light on his vehicle, can he be prosecuted for having other than a white light in front and other than a red light in the rear of such vehicle."

In Schwartzman Service, Inc., v. Stahl et al., 60 F. (2d) 1034, the District Court, Western District of Missouri, Central Division, said (l. c. 1037):

> "At the outset it must be acknowledged that the state has the power to regulate and control the movements of motor vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection of the highways.
>
> * * * * * *
>
> The highways belong to the state. It may make provisions appropriate for securing the safety and convenience of the public in the use of them."

In Ex Parte Kneedler, 243 Mo. 632, l. c. 641, the court said:

> "Every person who operates or uses a motor vehicle must be regarded as exercising a privilege and not an unrestricted right."

Article 1, Chapter 41, R. S. Mo. 1929, relates to the regulating of motor vehicles. Section 7778 of said article and chapter pertains to lights used on motor vehicles and said statute regulates and restricts the use of lights on motor vehicles. Said section in part provides as follows:

> "For the purpose of revealing its position and direction, a motor vehicle, while on the highway, whether in operation or at rest, during the period from one-half hour after sunset to one-half hour before sunrise, and at all times when fog or other atmospheric conditions render the operation of motor vehicles dangerous on the highway, shall carry lighted signal lamps as

herein required; * * * . Motor vehicles * * * shall display at least two white lights mounted at the front and directed forward, and one red light mounted at the back and directed to the rear. * * * * * No vehicle shall display or project to the front or sides any other than white light, or such shades as are commonly known and recognized as white, and no vehicle shall display at the back, or project toward the rear, any other than a red light, excepting that on motor vehicles and trailers which are required to carry number plates on the rear; the rear lamp shall be constructed, mounted and adjusted as to project from its sides, top, bottom or front, sufficient white light upon such plate to make the number plainly visible from a distance of twenty-five (25) feet: Provided, however, nothing in this section shall be construed to prohibit the use of additional red rear lights carried for added safety or of such white lights of low intensity as may be required in the operation of mechanical rear signalling devices, but no motor vehicle shall have mounted at its back any lamp projecting towards the rear a light of sufficient intensity to conceal the number or to interfere with the vision of anyone following. * * * * * * All motor vehicles, * * * shall carry, in addition to or in lieu of the front signal lamps, two lighted head lamps, and motorcycles and motortricycles shall carry at least one lighted head lamp for the purpose of illuminating the road ahead when the vehicle is in motion;

* * * * * * * * *

Dirigible search lights, or lights commonly known as spot lights, shall not be used on highways within the limits of municipalities, except in emergencies or when headlights are inadequate owing to rain or fog,

> and then only: Provided, the shaft of condensed light is directed downward below the level of the lamp, and at no time into the eyes of other persons, but such lights may be used at any time on public highways outside of the limits of municipalities: Provided, their light is directed as hereinabefore required. No search light, or spot light, shall be equipped with a bulb stronger then twenty-one (21) candle power; such search lights and spot lights shall be so constructed and mounted that their light and direction can be fully and easily controlled from the driver's seat while the vehicle is in motion."

Section 7778, supra, regulates the candle power of the head lamps with specific direction as to the placing of the lights on the vehicle and the distance such are required to illuminate the highway ahead of same.

The purpose and intention of the Legislature by regulating the lights on motor vehicles is easily understood, namely: (1) That a motor vehicle shall have at least two head lights that project a white ray a certain number of feet ahead of the vehicle and placed in such a position so as not to "blind" or interfere with the driver of an approaching vehicle, and also; (2) That the vehicle shall have at least one red rear lamp to warn an approaching motorist. Spot lights are restricted in their use and provision is made for additional rear red lights. However, said section specifically states,

> "No vehicle shall display or project to the front or sides any other than white light, or such shades as are commonly known and recognized as white, and no vehicle shall display at the back, or project toward the rear, any other than a red light."

Penal statutes must be strictly construed. Such was the holding in the case of Northern Securities Company v. United States, 193 U. S. 197, 48 L. Ed. 679, wherein the court said, l. c. 358 (U. S.):

> "It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used."

Section 7786, R. S. Mo. 1929, Paragraph "(d)", provides:

> "Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars ($5.00) or more than five hundred dollars ($500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

From the above, then, it is seen that there is a statute regulating lights on automobiles and penalty provided for violation of its provisions.

In your letter you state, among other things,

> "In other words, if an operator has the required white head lights and the red

rear light on his vehicle, can he be prosecuted for having other than a white light in front and other than a red light in the rear of such vehicle."

In our opinion, our answer to your question will be in the negative, i. e., if a motor vehicle has lights other than prescribed in the statute such would be a violation of Section 7778, supra. However, an exception to the rule would be the case of trucks with plates on the side thereof, in which event a white light may be projected toward the rear in order to illuminate such plates. The intent of the Legislature being that white lights only should be used at the front of the motor vehicle and red lights used in the rear.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

STATE BOARD OF HEALTH:)
) Fees earned in the division of vital statistics to be turned
VITAL STATISTICS:) over to the State Treasurer.

5-3

May 8, 1935.

FILED
60

Hon. E. T. McGaugh
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"We are somewhat confused as to where monies received for certified copies should be placed.

"In the 1933 Session Acts, under section 32 Vital Statistics, it states: 'Assistant registrar, Statistician, clerk recording deaths, clerks for routine Vital Statistics work.' They are the ones responsible for collecting this money, and are designated under the Health Department of the State Board of Health.

"In Section 9060, of the Revised Statutes of 1929, this statement is made: 'And any such copy of the record of a birth or death, when properly certified by the State Registrar to be a true copy thereof, should be prima facie evidence in all courts and places of the facts therein stated. For any search of the files and records, when no certified copy is made, the State Registrar shall be entitled to a fee of fifty cents for each hour or fractional hour of time of search, to be paid by the applicant. And the State Registrar shall keep a true and correct account of all fees by him received, under these provisions, and turn the same over to the State Treasurer.'

"What I would like to know, and have your opinion, is this: Are these fees for certified

copies to be placed into the Health Department of the State Board of Health, or are they to be placed in the State Treasury? I feel that if the division of Vital Statistics earns these fees that the fees should be returned to the Department of Health, of the State Board of Health, to pay the expenses of the clerks who makes it possible to collect said fees.

"Your immediate opinion will be very much appreciated."

Section 9024, R. S. Mo. 1929, as re-enacted in the Session Laws of 1933, on page 269, provides in part:

"****The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. Where any law refers to the Secretary of the State Board of Health as heretofore constituted, same shall, after the passage of this Act, be construed as referring to and meaning the Commissioner of Health as hereby and herein constituted."

Section 9041, R. S. Mo. 1929, provides in part:

"The secretary of the state board of health shall have supervision over the central bureau of vital statistics, which is hereby authorized to be established by said board and shall act as state registrar of vital statistics. ****"

Section 9060, R. S. Mo. 1929, provides as follows:

"The state registrar shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under provisions of this article, for the making and certification of which he shall be entitled to a fee of fifty cents to be paid by applicant. And any such copy of the record of a birth or death, when proper-

> ly certified by the state registrar to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated. For any search of the files and records, when no certified copy is made, the state registrar shall be entitled to a fee of fifty cents for each hour or fractional hour of time of search, to be paid by the applicant. And the state registrar shall keep a true and correct account of all fees by him received under these provisions, and turn the same over to the state treasurer."

Section 9062, R. S. Mo. 1929, provides in part:

> "**** The state registrar is hereby charged with the thorough and efficient execution of the provisions of this article **** to the end that all the requirements shall be uniformly complied with. ****"

In view of the foregoing statutes, it is the opinion of this department that the Commissioner of Health, when acting as a State Registrar, shall be charged with the carrying out of the provisions of the statutes, in that he shall keep a true and correct account of all fees by him received under the provisions of Section 9060, supra, and turn the same over to the State Treasurer.

We conclude in the construing of Section 9060, supra, that it is mandatory upon the State Registrar to turn the fees received by him or his assistants over to the State Treasurer despite the fact that said fees are earned in the Division of Vital Statistics of the State Board of Health.

Yours very truly,

APPROVED:

J. E. TAYLOR
Assistant Attorney-General.

ROY McKITTRICK
Attorney-General.

RCS/JET:afj

CITIES OF THE THIRD CLASS: Mayor not disqualified from election or holding ~~State~~ said office.

5-13

May 8, 1935.

FILED 60

Honorable John H. McNatt
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

We acknowledge your request for an opinion dated April 20, 1934, which is as follows:

> "I would like to know what the qualifications for the Mayor are in a city of the 3rd class. Whether or not he must be a county and State tax payer to be qualified?"

Section 6724 R. S. Mo. 1929, provides as follows:

> "No person shall be mayor unless he be at least thirty years of age, a citizen of the United States and a resident of such city at the time of and for two years next preceding his election. When two or more persons shall have an equal number of votes for the office of mayor, or an election for mayor be contested, the matter shall be determined by the council."

Section 6743 R. S. Mo. 1929, provides as follows:

> "All officers elected or appointed to offices under the city government shall be qualified voters under the laws and Constitution of this state and the ordinances of the city, and, except the city sextons, must be residents of the city. No person shall be elected or appointed to any office who shall at the time he be in arrears for any unpaid city taxes, or forfeiture or defalcation in office."

Section 6969 R. S. Mo. 1929, relating to cities of the 4th class is in the exact words of the above section which relates to cities of the third class.

This office rendered an opinion on May 11, 1934, to Honorable Leo Politte, wherein we held that by reason of Section 6969 R. S. Mo. 1929, one elected to the office of mayor in cities of the fourth class, who on election day is in arrears for unpaid city taxes is "ineligible to be elected and incapable of gaining such public office by election."

We are enclosing herewith a copy of said opinion which we believe properly states the law for cities of the third class as far as eligibility to the office of mayor is affected by delinquency in city taxes.

CONCLUSION.

We are of the opinion that the qualifications for mayor in cities of the third class are that he be thirty years of age, a gitizen of the United States and a resident of the city at the time of the election, and that he have his city taxes paid up on election day. We are further of the opinion that he does not have to be a State and County tax payer in order to qualify for said office.

Sections 6724 and 6743, supra, are the only sections of law providing the qualifications of mayor in cities of the third class. In construing these sections it is evident that when the Legislature was setting down the qualifications for the office of mayor they had no idea of making State and County tax payers the only persons eligible to the high office or they would have said so when they were on the subject of tax paying.

The object of the law relating to government of cities of the third class was to provide good government within the political subdivision. The Legislature realized that one may have a common interest in and an attachment to a city of the third class and still not be a State and County tax paying citizen. They realized that a State and County tax receipt is no index to respectibility, and so the Statutes of 1879, Section 4833 requiring that a mayor in a city of the third class "must possess a freehold estate," was repealed in the laws of 1881, and the

property requirement for holding said office ceases to exist to this day.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

STATE BOARD OF HEALTH: County Court required to appoint County Health Nurse upon filing of sufficient petition, Section 9039 R. S. Mo. 1929.

COUNTY COURT;

5-15

May 14, 1935.

FILED
60

State Board of Health
Jefferson City, Missouri

Attention of Doctor E. T. McGaugh.

Dear Doctor McGaugh:

Acknowledgment is herewith made of your request for an opinion of this Department on the following matter:

> "Will you kindly render an opinion in the following matter:
>
> 1 - Under the provisions of section 9039 of the Revised Statutes, is it mandatory that a Missouri county court, upon the presentation of a petition signed by two hundred and fifty taxpayers, to provide for the employment of a public health nurse to serve the citizens of the county in the control of communicable diseases and the promotion of the health of the community; and
>
> 2 - In case the county court fails or refuses to immediately consider such petition, do the citizens of the county represented by the two hundred and fifty petitioners, have any recourse; and
>
> 3 - Under the provisions of section 9039 or any other applicable sections, is the county court empowered to cooperate with the state and federal health agencies and local committees such as tuberculosis associations and chapters of the American Red Cross, in providing communicable disease prevention and health promotion activities in the county."

I.

SECTION 9039 R. S. Mo. 1929, IS MANDATORY.

Public Health Nurses were first authorized to be employed by the provisions of Senate Bill 575, page 299, Laws of Missouri, 1915. Section 4 of that act provided:

> "In case a petition is signed by 250 taxpayers and presented to any city council of the second, third or fourth class or any county court, asking for the appointment of a trained nurse or nurses, or that any place infected with tuberculosis be disinfected, as designated in section one of this act, it shall be the duty of said city council or county court, as the case may be, to provide for the appointment of said nurse or nurses and for the disinfecting of any infected place, and to pay for the same as provided in section three hereof."

This section became Section 5795 of the Revised Statutes of 1919, and was amended in 1925, page 253, Laws of 1925, so as to read as it is now constituted and denominated Section 9039 R.S. of 1929. This Section is as follows:

> "In case a petition is signed by two hundred and fifty taxpayers and presented to any city council of the second, third or fourth class or any county court, asking for the appointment of a public health nurse or nurses or that any place infected with infectious or contagious disease be disinfected, as designated in Section 9035, it shall be the duty of said city council or county court, as the case may be, to provide for the appointment of said nurse or nurses and for the disinfecting of any infected place and to pay for the same as provided for in Section 9038 here."

It should be noted that in the above Section it is provided that upon the filing of the required petition "* * *it shall be the duty of said county court,* * *to provide for the appointment of said nurse or nurses." This provision is quite different from the provision of Section 9036 which authorizes and directs the State Board of Health to make formal report to any County Court and recommend a course of action to prevent the spread of infectious or contagious diseases. This section provides:

> "Said county court at its next meeting* * *shall consider said report and recommendation, and act upon it * * *and such county court shall* * * be authorized to employ* * * *a public health nurse* * * *"

Under the provisions of this section it is apparent that the Legislature intended that the County Courts should exercise their discretion in employing a public health nurse in the event the matter was called to their attention by the Board of Health. However, far different terms have been used in the provisions of Section 9039, and it appears that by the provisions of this latter section, it was the legislative intent to require the County Court to act promptly upon the filing of the petition without any independent inquiry as to the need or advisability of the employment of such public health nurse.

It is the general rule that the word "shall" is mandatory rather than directory. As stated in the case of State ex rel. Stevens vs. Wurdeman, 246 S. W. 189, 194:

> "The statute says the defendant 'shall be entitled to be discharged' save in the two excepted situations, supra. Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute.* * * *"

Most certainly there is nothing in the section in which this word is used to indicate that it is not intended to be used in its mandatory sense. In fact, the difference in the terms used in Section 9036 and the instant section are such as to clearly indicate the legislative intent to require the county court to act upon the filing of the petition.

There is nothing in this Section to indicate that the power to act is limited to the case of an epidemic or the wide spread existence of an infectious or contagious disease. Just a casual reading of the Section itself indicates that the existence of an infectious or contagious disease refers particularly to the power to disinfect premises. Nor is there anything in the history of the enactment or the amendment thereto which indicates that this power can only be exercised during an epidemic of infectious or contagious diseases. In fact the amendments of 1925 clearly indicate, if there was ever any doubt in this matter, that the power to appoint a public health nurse or to petition therefor does not depend upon the existence of an epidemic.

II.

THE PETITIONER MAY MANDAMUS THE COUNTY COURT TO ACT UPON THE PETITION.

It is elemental that a petition meeting the requirements of the statute be filed with the County Court before there is any obligation upon the County Court to act. The County Court has the power in the first instance to pass upon the sufficiency of the petition. They would be authorized to pass upon the genuiness of the signatures as well as upon the qualifications of the signers. However, if a sufficient petition has been presented, the acts of the county court thereafter are but ministerial and mandamus will lie to compel the performance of this duty. In case this were required the sufficiency of the petition would be one of the issues upon which the Court would have to pass.

In the case of State ex rel. Carpenter vs. City of St.Louis, 2 S. W. (2d) 713, the Court stated, in respect to the power to require the performance of a ministerial duty, l. c. 728:

> "The effect of that argument is that any official may nullify any law, which he is sworn to execute, by simply ignoring it. A law does not have to provide details by which it may be enforced. The courts have inherent power to enforce it, and, in case of a plain ministerial duty such as this, to command official action. The city authorities have provided means to collect the money, they will have it in control; therefore we can command them to appropriate for the purpose contemplated by the law."

The requirements of the statute being mandatory it therefore appears that the duties of the County Court are ministerial, in the event a sufficient petition is filed, and therefore mandamus would be the proper remedy to compel the performance of that duty.

III

THE COUNTY COURT IS EMPOWERED TO COOPERATE WITH STATE AND FEDERAL HEALTH AGENCIES AND LOCAL COMMITTEES INPROVIDING COMMUNICABLE DISEASE PREVENTION AND HEALTH PROMOTION.

Section 9028 R. S. Missouri, 1929, provides:

> "All rules and regulations authorized and made by the state board of health in accordance with this chapter shall supersede as to those matters to which this article relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities. Nothing herein shall limit the right of local authorities to make such further ordinances, rules and regulations not inconsistent with the rules and regulations prescribed by the state board of health which may be necessary for the particular locality under the jurisdiction of such local authorities."

Under the provisions of this Section all local health agencies and authorities are required to observe the rules and regulations established by the State Board of Health. This is evidence of an intention on the part of the Legislature to obtain uniformity in health matters throughout the state, and insure cooperation throughout the various health agencies and authorities. The question presented is very broad and in answering it it must be remembered that the county courts are not the general agents of the County, but only have such powers which are directly given to them by statute or which can be reasonably implied from the authority given. This statement needs no citation of authority to support. On the other hand it must be remembered that the business of the county is placed in the hands of the County Court, and it should be distinctly to the advantage of a county to obtain the cooperation of the various state, federal and local agencies in the prevention of disease and the control of it. We therefore are required to answer this question conditionally. The County Court may lend such cooperation as it deems advisable to the various agencies, but must be able to find support specifically or by reasonable implication in the statutes for any expenditures they incur in this behalf.

CONCLUSION.

It is therefore the opinion of this office, not passing upon the constitutionality of this section, that it is mandatory upon the County Court under Section 9039 R. S. Mo. 1929, to provide for the appointment of a public health nurse upon the presentment of a sufficient petition, and in the event the County Court fails to perform this duty it may be required to do so by mandamus; and that the County Courts are authorized to cooperate with local, state and federal health agencies in preventing communicable disease and in promoting good health to the extent authorized by law.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

PHYSICIANS AND SURGEONS: Records obtained by laboratory tests from samples submitted by physicians are privileged and not open for inspection to the public.

PUBLIC RECORDS:

5-15

May 15, 1935.

FILED
60

E. T. McGaugh, M. D.
Commissioner of Health
State Department of Health
Jefferson City, Missouri

Dear Dr. McGaugh:

This is to acknowledge your request for an opinion concerning the status of records obtained by your Department when it makes laboratory tests for medical doctors, in particular concerning communicable diseases. You desire to know whether or not the records thus obtained are public in so far as they are open to the inspection of any person desiring to see them.

We assume that you have in mind concerns those records made in your laboratory after conducting a laboratory analysis upon the request of a medical doctor after he has submitted a sample from which your Department makes the test. If the medical doctor does not send to your laboratory the samples, then your Department would have no record concerning the matter. The laboratory tests are conducted solely upon the request of the doctor attending the patient. The result of the laboratory test is made known to the medical doctor and we presume that you also keep a record of the result of said examination.

Section 9018, R. S. Mo. 1929, provides as follows:

> "The board shall designate those diseases which are infectious, contagious, communicable or dangerous intheir nature and shall make and enforce adequate rules, regulations and procedures to prevent the spread of those diseases and to determine the prevalence of said diseases within the state."

The prevention of contagious, infectious and communicable diseases is a matter of public health and the Board of Health is charged with the solemn duty of preventing and eradicating said diseases in so far as possible.

Section 1731 R. S. Mo. 1929, provides in part as follows:

> "The following persons shall be incompetent to testify:* * * * * * * * * * * * * * * *
>
> fifth, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon."

It is thus seen from the above statute that communications between a physician and patient are privileged and such cannot be divulged except by the consent of the patient. In other words, a physician treating a patient for some disease could not testify as to knowledge imparted to him by virtue of his relationship with his patient. However, the patient may waive the privilege.

In Galli v. Wells, 239 S. W. 894, the St.Louis Court of Appeals, page 896, said the following:

"It will be noted that the foregoing statement offered in evidence is a record preserved by the hospital of the plaintiff's condition and treatment made by her physicians while she was a patient at the hospital. Ordinarily such a record would be inadmissible because it is privileged communication between physician and patient. Under the provisions of our disqualification statute (section 5418, R. S. 1919), a physician is incompetent to testify concerning any information which he may have acquired from any patient while attending him in a professional character, and which was necessary to enable him to prescribe for such patient.

In the case of Smart vs. Kansas City, 208 Mo. 162, 105 S. W. 709, 14 L. R. A. (N.S.) 565, 123 Am. St. Rep. 415, 13 Ann. Cas. 932, it is held that a hospital physician is not competent to testify as to what he learned of the patient's condition while so attending him, and it is further ruled that the official hospital record into which the physician had copied the diagnosis of the case is privileged, and not admissible in evidence. In that case it was further ruled that the fact that the city ordinance of Kansas City required such records to be kept furnished no reason why the statute against disclosure of privileged communications should be violated.

In the present case, however, we have an entirely different question, as it is conceded that the plaintiff, by taking the stand and testifying to her physical condition, and also by calling her own physician to testify on that subject, has waived the privilege given to her by the statute." * * * *"

If a physician or surgeon, in treating a patient, determines that it is necessary for him to have certain laboratory tests performed by the laboratory of the Department of Health, and submits to said laboratory a sample of the substance sought to be analyzed and examined, and certain facts are obtained by said test or examination, then, in our opinion, such information would be privileged and could not be divulged except by waiver of the patient. In other words, records obtained by the laboratory of the Department of Health from samples submitted by physicians would be in the same classification as information obtained by physicians. from patients.

We do not understand your request to be as to the admissibility of your records in a court. Consequently we have not written on that mateer. Kirkpatrick et al. vs. Wells, 6 S. W. (2d) 591. Our understanding of your request is, whether or not records obtained from samples submitted by physicians are public in the sense that any one has a right to the inspection of them.

We have ruled above that if the patient waives his right of privilege, then such records may be open to the inspection of the public. In this connection we add that the patient would have a right to the use of said information.

Respectfully submitted,

James L. HornBostel,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

JLH:MM



CITIES:)
) Cities of fourth class or other cities may limit the number of
INTOXICATING LIQUORS:) places where intoxicating liquors may be sold.

June 21, 1935.



Hon. E. McQuerry
City Attorney
Mound City, Missouri

Dear Sir:

This will acknowledge your telegram of recent date requesting an opinion from this department which reads as follows:

> "May fourth class cities limit number of stores retailing liquor in original packages by refusing license to persons otherwise qualified. * * *"

We endeavor in this opinion to point out the general law respecting what cities may do towards enacting ordinances not inconsistent with the general laws of the State concerning the sale of intoxicating liquors and applicable statutes thereto. We also point to cases and authorities respecting the limiting of the number of places where intoxicating liquors may be sold and set forth the reasoning of the courts regarding same.

There is no provision in the Liquor Control Act limiting the number of places in a city where intoxicating liquor may be sold.

Section 7018 of R.S. Mo. 1929, regarding cities of the fourth class provides in part:

> "* * * and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order,

> the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same. ****"

It is evident from the above section of the statutes that the cities may enact or ordain ordinances not inconsistent or repugnant to the Constitution or Laws of the State as they deem expedient for the preservation of peace and good health of their inhabitants.

Inasmuch as the sale of intoxicating liquors in the different cities presents various problems akin only to themselves, the Legislature, since giving the right to cities to regulate and control the sale of intoxicating liquors within their limits, contemplated that cities would enact ordinances as they deemed expedient to give effect to the power granted provided that such ordinances be not inconsistent with the provisions of the Liquor Control Act.

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We direct your attention to Section 25 of the Liquor Control Act which provides in part that cities may charge for licenses and regulate the sale and control of sale of all intoxicating liquors within their limits. Said section reads in part as follows:

> **** The Board of Aldermen, City Council or other proper authorities of incorporated cities, may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of such ordinances, where not inconsistent with the provisions of this act."

In construing the words "regulation" and "control", we submit the following cases.

The Court in the case of State ex rel. v. Fields et al., 218 Mo. App., loc. cit. 167, in defining the word "regulate" said:

> "To 'regulate' means 'to adjust, order, or govern by rule, method, or established mode; direct or manage according to certain standards or laws; subject to rules, restrictions or governing principles.'
> ****"

The word "control" is defined in City of St. Louis v. Howard, 119 Mo. loc. cit. 46, by the Court as follows:

> "The word 'control' means power or authority to check or restrain; **"

In the case of In Re Wan Yin, (U. S.) 22 Fed. 701, the Court said:

> "The words 'control and regulate' ex vi termini imply to restrain, to check, to rule and direct; ****".

In the case of State ex rel. v. Berryman, 142 Mo. App. loc. cit. 384, the Court in construing the right of municipalities to pass by-laws under general welfare clause said:

> "In State v. Butler, 178 Mo. 272, we find the rule to be declared as follows: 'The powers of a municipal assembly to pass by-laws under a general welfare clause, can never be exercised to enlarge or annul specific provisions.'"

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We direct your attention to Section 7289, R. S. Mo. 1929, applicable to municipalities enacting laws in conformity with State laws. Said section reads as follows:

> "Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state laws upon the same subject."

It is plain from a careful reading of the above section that municipalities must confine their restrictions and ordinances to and in conformity with State laws upon the same subject.

The general proposition of law respecting the enactment of ordinances by municipalities regulating the sale of intoxicating liquors within their limits is found in 33 Corpus Juris, page 521 et. seq., Section 70. Said section reads as follows:

> "In respect to the enactment of ordinances prohibiting or regulating the traffic in liquors, municipal corporations have been consistently held to have only such powers as are expressly conferred upon them by their charters or by statute, or such as are necessarily or fairly implied in or incident to the powers expressly granted, and further it has been held that their charters or enabling acts will be construed with a reasonable degree of strictness in this particular, the rule being that the power claimed must be shown to exist either explicitly or by proper implication, and that it is not sufficient to show merely that its exercise has not been forbidden. If the statute designates the municipal board or officers who are to be vested with the authority of the municipality in this regard, its terms are to be taken as absolutely exclusive. And if express power to control the sale of liquor is given to a city, village, or town, this will exclude any similar authority on the part of the county in which it is situated.

> **** When a municipal corporation is invested with power to license or regulate the sale of intoxicating liquors, it has implied authority to make all such ordinances as may be necessary to make the grant of power effectual, and to preserve the public peace, good order and security against dangers arising from the traffic in such liquors. It is only required that such ordinances should be within the scope of the powers granted, and not unreasonable, unjust, or unduly oppressive, or unfairly discriminating. ****"

In State ex rel. v. McCammon, 111 Mo. App. loc. cit. pages 631 and 632, the court quoted approvingly Black on "Intoxicating Liquor", Section 223, and said:

> "'The powers conferred upon a municipal corporation must be exercised in conformity to the general laws of the State, unless it is clear that the exclusive control of the subject is given to the municipality or that the general law is to be superseded or suspended by the charter. A statute granting authority to a city to pass ordinances in relation to the liquor traffic does not repeal the general laws on that subject. The rule is that the municipal ordinances cannot set aside, limit or enlarge the statute law of the State, unless its power to do so can be shown in express terms or by necessary implication.' And again at section 224 the same author says:
>
> "' Whenever a change of policy takes place in the State on the subject of its liquor legislation, by the adoption of a different system -- as when general prohibition, or prohibition for particular localities is enacted by a constitutional amendment or general statute, or when the Legislature provides a uniform and general system for the licensing of the traffic -- this has the effect to repeal all inconsistent provisions in municipal charters and the ordinances adopted under them.'

> "Under power conferred on cities of the fourth class 'to regulate and to license' dramshops, there is no authority to wholly prohibit or suppress. Where there is mere power in a municipality to regulate in a State with a general policy of conducting licensed saloons, authority to prohibit is excluded. 'The difference between regulation and prohibition is clear and well marked. The former contemplates the continuance of the subject-matter in existence or in activity; the latter implies its entire destruction or cessation.' Black on Intox. Liq., section 227; 17 Amer. & Eng. Ency. Law (2 Ed.), pp. 285, 286, 1 Dillon on Munic. Corp. (3 Ed.), section 357, note 2, section 363 and notes; Berry v. Cramer, 58 N. J. Law 378; Steffy v. Monroe City, 135 Ind. 466; Champer v. Greencastle, 138 Ind. 339; Ex Parte Hinkle, 104 Mo. App. 104."

In People v. Harrison, 99 N. E. loc. cit. 904 and 905, the Supreme Court of Illinois, in discussing the right of the City to limit the number of saloons based upon the population, had the following to say:

> "The business of selling intoxicating liquor is attended with danger to the community and is a recognized subject for regulation by the police power of the state. **** The manner and extent of its regulation, if permitted to be carried on at all, are to be determined by the state, so as to limit, as far as possible, the evils arising from it. Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620. In cities, authority for such regulation **** has been conferred by the Legislature upon the city councils, and all sales of intoxicating liquor are unlawful and are prohibited unless made by virtue of a license granted under an ordinance. The power conferred upon the city is co-extensive with that of the state, and includes authority to adopt any means to reduce the evils arising from the sale of intoxicating liquor, reasonably adapted to that end, which do not violate constitutional rights.****

> "The city council having determined that the interests of the municipality will be subserved by limiting the number of saloons within its boundaries, its discretion cannot be controlled by the court, even if the latter should not agree with the conclusion. No one's constitutional right is impaired, and, if the limitation prevents some persons from keeping dramshops who might do so under an unlimited ordinance, that result is merely an incidental effect, which does not affect the validity of the limitation imposed with a view to the public welfare in the reasonable exercise of the police power of the state. Everybody has an equal right to apply for a license, and when the number authorized by the ordinance has been granted everybody is equally excluded from the business. It was said in People v. Gregier, supra, though the specific question was not involved in that case (138 Ill. 421, 28 N. E. 817): 'There can be no doubt that said reservation, by the ordinance, of a discretion as to the number of licenses to be granted was valid, as it was clearly a reasonable exercise of the power over the subject given to the village board by the statute, and the same thing appears inferentially from the fact that precisely the same discretion is given by the dramshop act to county boards in respect to the territory under their jurisdiction.' The limitation of the number of saloons within a municipality in proportion to the population has been uniformly sustained by the courts. Decie v. Brown, 167 Mass. 290, 45 N. E. 765; In re. Jorgensen, 75 Neb. 401, 106 N. W. 462; State v. Common Council of City of Northfield, 94 Minn. 81, 101 N. W. 1063; Schweirman v. Town of Highland Park, 130 Ky. 537, 113 S. W. 507."

In the case of Schweirman v. Town of Highland Park, 113 S. W. loc. cit. pages 508 and 509, one Mr. Schweirman sought by mandamus to compel the board of trustees of a city of the sixth class to issue him a license for the sale of intoxicating liquors inasmuch as the city had voted for the sale of intoxicating liquors within their limits and had already issued four licenses to persons who were qualified. The Kentucky statute provided that under the circumstances the board of trustees of such town had no right, power, privilege or dis-

cretion to refuse to issue licenses for the sale of intoxicating liquors within their limits. The court, in the above mentioned case, very thoroughly discussed the right of the board of trustees to limit the number of saloons in cities of the class above mentioned and had the following to say:

> "The board of trustees in these towns are elected by the people for the purpose of managing and controlling the affairs of the town within statutory limits. It is to be presumed that they will perform faithfully their duties by carrying out the reasonable will and wish of the people in respect to municipal affairs. It was not intended by the statute to take from these boards the exercise of all discretion, and to compel them, although it might be manifestly detrimental to the growth and prosperity of the town, hurtful to its morals, and injurious to its business, to issue licenses to every applicant who possesses the statutory qualifications and complied with the other requisites. But, as well said in Riley v. Rowe, supra, the object of the statute was to deny these boards the right to refuse to grant licenses to any person, thereby defeating the will of the people after they had declared in favor of the sale of liquor at an election held for that purpose. Of course, it is difficult to say how many saloons shall do business in a town, or what number of licenses the board may be compelled to grant, or at what point the mandatory requirements of the statute shall be satisfied, so that each case must be adjudged by the facts and circumstances applicable to it. But manifestly there is a point in respect to numbers alone beyond which the statute does not enjoin upon the trustees the imperative duty of issuing licenses. There is a place at which in this particular their discretion begins, and this discretion the courts will not interfere with or seek to control unless it is clearly abused. Although the board in cases like this cannot refuse to grant any licenses, we hold that they may exercise a reasonable discretion in determining how many saloons are necessary to afford the citizens of the town the privilege they obtained by voting in favor of the sale of

liquor. It is also well to keep in mind that it is the interest of the town and its people, and not the interest of the applicant or the particular citizen, not only in respect to liquor licenses but concerning municipal affairs generally, that the board of trustees is charged with the duty of looking after. When the people in Highland Park voted in favor of the sale of whisky, they simply meant to assert that they were in favor of licensed saloons and the sale of liquor thereat; not that they wished to fix the number of saloons or designate the persons who should obtain licenses. Nor does the statute undertake to declare how many persons shall be licensed, but only that licenses must be granted to some person. If the board of trustees of a little town in which there are four licensed saloons have no discretion to refuse licenses to other applicants, then every person possessing the proper qualifications who is willing to pay the license fee must upon proper application be granted a license, without regard to the convenience, necessities, or demands of the people, and although the number might greatly exceed the needs of the community and be a positive disadvantage to all persons engaged in the business, to say nothing of the inhabitants generally, or some applicant must be discriminated against. Along this line the argument is made that if the trustees have the authority to limit the number of licenses, and the persons to whom they may be granted, it will result in favoritism-- that licenses will only be granted to those who have the ear of the board. This may in some instances be true, but we know of no scheme that has ever been devised that will prevent this sort of inequality. In every case in which boards or bodies of men are vested with the discretion to appoint persons to office or place or give them privileges not enjoyed by the body of the people, there is an occasional abuse of discretion, but this is not an argument against the power. It is merely a manifestation of one of the infirmities of government that cannot be remedied or cured. If there are a number of applicants for a place or privilege, and all cannot be satisfied, one or more of

> them in the very necessity of things must be refused; and this, everything else being equal, amounts to discrimination. And so in the granting of liquor licenses, except that in respect of these, the discrimination cannot be so pronounced, as in other cases, because such a license is not a privilege or right that any citizen may demand or have for the asking. It is rather in the nature of a favor that may or may not be granted by those in authority. There is no disagreement among the authorities on this point. Hence we have little difficulty in reaching the conclusion that the argument in respect to discrimination and favoritism that might be urged with great force as to other harmless employments or pursuits, is weakened when it is attempted to be extended to a business that has always been the subject of police regulation and is generally regarded as a tolerable evil. This idea is well illustrated by the fact that it is always competent to inquire into the character of the applicant for license to retail liquor and to refuse license if his reputation is immoral or objectionable. And so in respect to the locality at which it is proposed to conduct the business. Here,a reasonable discretion may be exercised and license refused if it would not be proper to have a saloon at the proposed place. There are localities in every town in which it would be offensive to the common sense of all good people to have saloons, as, for instance, near by or adjacent to schools or churches or in residence neighborhoods; and boards in the exercise of a discretion may refuse to license a grogshop next door to a school-house, in front of a church, or in the center of a street set apart for residential purposes. Following out this theory, we see no reason why this discretion may not be extended to numbers as well as to persons and localities. *****

In the case of State ex rel. Howie v. Common Council of City of Northfield, 101 N. W. loc. cit. 1064, the Supreme Court of Minnesota said:

> ***** It is contended that the council has no right arbitrarily to limit the number of saloons to be licensed; that,

> if it determines to grant licenses at all, it must grant them to all applicants who bring themselves within the provisions of the law. We do not concur in this contention. The provisions of the charter vest in the common council authority to regulate and control the sale of intoxicating liquors within the city, and in exercising that authority the council is clothed with discretionary powers, the exercise of which cannot be controlled by the courts. The power to regulate and control includes the power to do all that is deemed, in the judgment of the council, for the best interests of the municipality and its inhabitants. It necessarily confers the power to refuse a license, or to limit the number of licenses to be granted, when, in the judgment of the council, the welfare of the city suggests such action. ****" Perry v. City Council, 25 Pac. Rep. 739.

From a careful reading of the above authorities, municipal authorities cannot limit, set aside or enlarge the general laws of the State unless such power to do so can be done in express terms or necessary implications. The power given to cities to regulate and control the sale of intoxicating liquors within their limits would not be such a power given that the cities of the fourth class or any other city could wholly prohibit or suppress the sale of intoxicating liquors, in that the regulation and control of the sale of intoxicating liquors would contemplate the continuance of the subject-matter in existence.

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It is evident from a reading of Section 25, supra, that the Legislature intended that cities may enact ordinances dealing with the various situations presented in each city, In giving effect to the power thus conferred, the interests of the municipalities would be subserved by limiting the number of places where intoxicating liquors may be sold, provided however, any ordinance limiting the number of places where intoxicating liquor may be sold be not inconsistent with the provisions of the Liquor Control Act.

CONCLUSION.

It is the opinion of this department that since Section

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25 of the Liquor Control Act has given the city the power to license and charge for licenses issued to those engaged in business of the manufacture, wholesale and retail of intoxicating liquors within its limits, fix the amount to be charged for licenses and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for violation of such ordinances, we rule that any city may enact and ordain ordinances regulating and controlling the sale of intoxicating liquors as they deem expedient for the peace, health and good order of the inhabitants thereof; provided, however, that such ordinances be not unreasonable, arbitrary or inconsistent with the provisions of the Liquor Control Act.

We conclude that a city may limit the number of stores engaged in the sale of intoxicating liquor by ordinance if such ordinance or ordinances be not unreasonably or arbitrarily enacted with a view of creating a monopoly in one or more persons or with a view of prohibiting rather than reasonably controlling the sale of intoxicating liquors.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

(See Zinn v. City of Steelville, 173 S.W.2 398, in connection with the above subject)

MEDICINE: STATE BOARD OF HEALTH: Applicant not entitled to privilege of taking medical examination unless he is able to qualify under law as it presently exists.

11-18

November 15, 1935

FILED
60

State Board of Health of Missouri,
Jefferson City, Missouri.

Attention: E. T. McGaugh, M. D.,
State Health Commissioner.

Gentlemen:

We acknowledge receipt of your letter of November 7, 1935, requesting an opinion of this office, which is as follows:

> "The Board has referred this matter to your office for an opinion:
>
> "It seems that Amedeo Pascuita graduated from the P. and S. when the word, 'Reputable,' was left out of the law. He slept on his rights relative to asking for the privilege of taking the examination. He now comes in and wants to take the examination, and predicates his rights with the statement that he was eligible to take the examination when he graduated, and should not be denied at this time.
>
> "The Board asks that you give them an opinion whether or not they should grant him the privilege of taking the examination."

At the 41st General Assembly in the year 1901 an act was passed regulating the practice of medicine and surgery. No requirement was made as to the kind of medical college the applicant must have attended to permit him to take the examination. At the 44th General Assembly the act

was amended so as to require evidence of having received a diploma from some "reputable" medical college.

Laws of Missouri, 1907, page 360, states in part that

> "They shall also furnish satisfactory evidence of having received a diploma from some reputable medical college * * *."

The requirement is set out in the Revised Statutes of Missouri, 1929, in the following language:

> "They shall furnish satisfactory evidence * * * of having received a diploma from some reputable medical college * * *."

The question is, assuming the applicant for examination could have qualified under the act as passed by the 41st General Assembly, where no requirement was made as to the production of evidence of having received a diploma from a "reputable" medical college, but failed to ask for the privilege of taking the examination, can he now come in and demand that his rights be predicated on the statute as it existed in 1901?

In the case of State v. State Board of Dental Examiners, 1 Ohio Nisi Prius (New Series) 449, reported in Vol. 14 Ohio Decisions, Vol. 11 Nisi Prius 245, l. c. 249, the court in holding that a person who is qualified to receive a license or certificate under a certain statute is not entitled to a license or certificate thereunder upon an application made after its repeal, said:

> "Relator had no inherent or inalienable right, and such is not claimed for him. His right or privilege was one created by statute. When he located in the state, he, together with others under like circumstances, was afforded the privilege under the provisions of the act of 1892, to apply to said state board of examiners for a certificate to practice dentistry, and by complying with the re-

quirements therein provided, he could obtain such certificate without examination. He did not see proper to take advantage of this privilege, and made no application until after the repeal of that law. In April, 1902, the legislature saw proper to raise the standard for those persons applying to practice dentistry in the state, and so amended the law as to require an examination for all persons in relator's class before they could receive a certificate of registration from the state board of examiners.

"There is no question but that the law-making power can continue to raise the standard in matters of this kind as often as the necessities may require. That is so held in Dent v. West Virginia, 129 U. S. 114 (9 Sup. Ct. Rep. 231), a leading case, and one that has been followed by the courts in many of our states.

* * * * *

"He simply permitted the time to pass within which he could have perfected his rights under said act, and having done so, the privilege accorded him under that act was taken away by its repeal, and by the amended act another privilege, with additional burdens, was substituted.

"My opinion is that relator has now no vested rights under said act of 1892, and to entitle him to a certificate of registration he must apply in accordance with the provisions of the amended act of 1902."

CONCLUSION

From the foregoing, we are of the opinion that Amedeo Pascuita, although qualified under a former statute to take the examination, having failed to take advantage of the privilege, is not entitled to the privilege at this time unless he is able to qualify under the law as it presently exists.

Respectfully submitted,

J. E. TAYLOR,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

INQUESTS - CORONERS - Cases in which to be held - Necessity of reference by physician.

11-16

November 15, 1935.

E. T. McCaugh, M. D.
State Health Commissioner,
Jefferson City, Missouri.

FILED
60

Dear Sir:

A request for an opinion has been received from you under date of October 24, 1935, such request being in the following terms:

"Under the date of July 27, 1934 you furnished to Dr. E. T. McCaugh, state health commissioner, an opinion relative to 'coroner's cases'. I should like at this time a supplementary opinion in regard to coroner's cases.

If a death certificate is signed by the attending physician under the conditions outlined in the opinion on July 27, 1934, are there any conditions under which a coroner can compel an inquest?

What deaths are to be referred to the coroner for an inquest by an attending physician who is qualified to sign a death certificate?

On what deaths does a coroner hold an inquest?"

I

CASES FOR CORONER'S INQUEST WHERE ATTENDING PHYSICIAN SIGNS DEATH CERTIFICATE

R. S. Missouri, 1929, Section 11608, provides in part as follows:

"A coroner shall be a conservator of the peace throughout his county, and shall take inquests of violent and casual deaths happening in the same, or where the body of any person coming to his death shall be discovered in his county,"

The phrase "casual deaths" in such section apparently means "death by * * casualty", for the latter phrase is used in R. S. Mo., 1929, Section 11612.

It will be observed that Section 11608 does not make, and none of the sections in the chapter in which such section is found, namely Chapter 76, entitled "Inquests and Coroners", makes the holding of inquests by coroners dependent upon whether a physician was in attendance on the deceased or not. Our previous opinion, dated July 27, 1934, related primarily to the statutes relating to the signing of certificates of death. In that opinion we advised you that Sections 9046 and 9047 of R. S. Mo., 1929, relating to certificates of death in cases where there is and cases where there is not an attending physician, respectively, applied to mutually exclusive situations, and we cited to you the case of O'Donnell v. Wells, 323 Mo. 1170, 21 S.W. (2d) 762 (1929). It might appear on the face of these two statutes and in the light of our opinion and this decision by the Supreme Court of Missouri that no inquests are to be held under the statute in cases where an attending physician sign the certificate of death, because only in Section 9047, providing for cases in which an attending physician does not signs the certificate of death, is there any provision for reference of cases to coroners. However, as quoted in our opinion of July 27, 1934, the case of O'Donnell v. Wells contains the following statement:

> "In cases calling for an inquest it would be the duty of the attending physician to notify the coroner." (21 S.W. (2d) 765)

Furthermore the Court in that case says that the duty of a coroner to sign a certificate of death, in cases in which his signing such a certificate is required by statute, "is incidental to the duties of a coroner under Chapter 48 (Sections 5916, 5957) Rev. St. 1919, which provides for taking inquests of violent and casual deaths." (21 S.W. (2d) 765). Therefore, even though the statutes provide no machinery for the referring to a coroner of a case in which an attending physician signs the certificate of death, nevertheless Section 11608, which defines the duties of coroners in holding inquests, contains no qualification, saying that inquests shall only be held where no physician was in attendance, and in our opinion, coroners should hold inquests in connection with the deaths described

in Section 11608, whether a physician signs the certificate of death or not.

II

DUTY OF PHYSICIAN SIGNING CERTIFICATE OF DEATH TO REPORT CERTAIN DEATHS TO CORONER

In the light of the foregoing, in answer to your second question, although no statute requires the physician signing the certificate of death to refer this matter to the coroner, in view of the language of the Supreme Court of Missouri above quoted from the case of O'Donnell v. Wells, we believe that physicians signing certificates of death, in which the death falls within one of the classifications of Section 11608, should refer each such case to the coroner.

III

CASES FOR CORONERS' INQUESTS GENERALLY

The answer to your third question is contained in our answer to your first question, set out under I above. However, we call your attention to R. S. Missouri, 1929, Section 11634, which provides in part as follows:

> "Whenever any known person shall have died from any cause other than violence or casualty, and a certificate of the cause of death is necessary for the burial of the body of such person, the coroner shall, at the request of the relatives or friends of such person, hold a view or inquest on the body, and the person making such request shall pay all costs, fees and expenses of such inquest or view,"

This section relates to a special situation, is inapplicable to deaths from violence or casualty, and also to cases in which an attending physician has signed a proper certificate of death.

In conclusion, it is our opinion that a coroner can, and is under duty to, hold an inquest whenever such coroner has reasonable cause to believe, and does believe, that a death has been caused by violent or casual means, or where the body of any person coming to his death shall be discovered in his county, and also in cases where a certificate of death is necessary and

is requested under the provisions of R.S. Missouri, 1929, Section 11634; it is our further opinion that physicians signing certificates of death should report to the coroner all such cases in which the death has in their opinion been due to violence or casualty.

Very truly yours,

Edward W. Miller
Assistant Attorney General

Approved:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

VACANCY: Members of Board of Aldermen in cities of Fourth Class.

5-18

May 13, 1935

FILED 61

Mr. Roland Merrigan
City Clerk
Conception Junction, Missouri

Dear Sir:

We wish to acknowledge receipt of your letter in which you state as follows:

> "In our recent city election the two candidates who were placed on the official ballot for alderman of the First Ward refuse to qualify for the office. The Alderman who is now holding the office also refuses to continue to hold it. At the election the name of R. Merrigan was written in and received one vote. Could Mr. Merrigan qualify for the office or will it be necessary for us to hold another election to fill the vacancy."

Section 6094 Revised Statutes Missouri 1929, provides how villages may become cities of the fourth class thus:

> "All towns not now incorporated in this state containing less than five hundred inhabitants, are hereby declared to be villages. Provided, that any village in this state now or hereafter having more than two hundred inhabitants may by majority vote of the

qualified electors therein elect to become a city of the fourth class."

The last national census shows that Conception Junction, Missouri had a population of 514, and to be incorporated. We assume that Conception Junction elected to become a city of the fourth class.

Section 6951 Revised Statutes Missouri 1929, sets out the terms of the elective officers thus;

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to-wit: Mayor, marshal, collector and board of aldermen, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successor shall be elected or appointed and qualified."

Under the above provision the members of the board of aldermen hold office for the term of two years and until their successors are elected and qualified.

Section 6963 Revised Statutes Missouri 1929, provides for the election of alderman thus;

"The board of aldermen shall, by ordinance, divide the city into not less than two wards, and two aldermen shall be elected from each ward by the qualified voters thereof, at the first election for aldermen in cities adopting the provisions of this article. At such election for

> aldermen, the person receiving the highest number of votes in each ward shall hold his office for two years, and the person receiving the next highest number of votes shall hold his office for one year; but thereafter each ward shall elect annually one alderman, who shall hold his office for two years."

Section 5, Article XIV of the Constitution of Missouri, provides as follows:

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

You state that two candidates refused to qualify for the office of alderman. Our court has held that such a situation does not create a vacancy in office; that the incumbent is entitled to hold office until a successor is elected or appointed and qualified.

In the case of State v. Brown 274 S. W. 965, l. c. 967, the court said:

> "The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel. Luck, 18 Mo. 333; State ex rel. Stevenson v. Smith 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State

ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel v. Ranson, 73 Mo. 78.

> The law under which appellants were appointed fixed their terms of office at one year, and contemplated that at the end of that time new appointments would be made. But, since the appointing power might not be promptly exercised, to prevent a vacancy the law provided for the incumbents to hold over until their successors were appointed and qualified. This is a wise rule as applied to public officers, for thereby the public is protected from possible evils naturally attendant upon a situation wherein neglect and waste might result. This contingency, as contemplated by the law, enters into every such appointment, and it must be concluded that the time an incumbent holds over the designated period is as much a part of his term of office as that which precedes the date when the new appointment should be made. The authorities are uniform on this rule, and we think there can be no question about it."

Thus we see that the present incumbent would be entitled to hold office until his successor had been duly elected and qualified. However, you state that an alderman now holding the office refuses to continue to hold it and in such instance a vacancy would clearly exist.

You inquire as to whether the name R. Merrigan, whose name was written in and received one vote, could qualify for office in the place of two candidates who received the highest number of votes but did not qualify.

In an opinion rendered by this department addressed to Leo A. Politte, Prosecuting Attorney, a copy of which we are inclosing, a similar question was raised and we ruled as follows:

> "We fail to find any provision in the statutes allowing those persons receiving the next highest vote to qualify as

officers in cities of the Fourth Class, as suggested in your letter."

Section 6973 Revised Statutes Missouri 1929 provides as follows:

"If a vacancy occur in any elective office, the mayor or the person exercising the duties of the mayor shall cause a special election to be held to fill such vacancy, giving at least ten days' notice thereof by publication in some newspaper published in the city, or at least twenty handbills posted up at as many public places within the city: Provided, that when any such vacancy occurs within six months of a general municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the mayor or the person exercising the duties of the mayor by appointment: Provided further, that any vacancy in the office of alderman which may occur within said six months preceding a general municipal election shall be filled in such manner as may be prescribed by ordinance. If a vacancy occur in any office not elective, the mayor shall appoint a suitable person to discharge the duties of such office until the first regular meeting of the board of aldermen, thereafter, at which time such vacancy shall be permanently filled."

From the foregoing, we are of the opinion that under the circumstances should the present incumbent resign or refuse to hold over until his successor is elected or qualified, then a vacancy exists and should

be filled in accordance with the provisions of Section 6973 Revised Statutes Missouri 1929.

Respectfully submitted,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

JET
MW:LC

Inclosure

STATE BOARD OF OPTOMETRY: Board must elect a president in July in each year, and failure thereof means that the president and secretary hold at the pleasure of the board, and may be removed at any time.

July 18, 1935.

FILED
61

Dr. Louis Medege,
Member Missouri State Board of Optometry,
105 Main Street,
Richmond, Missouri.

Dear Dr. Medege:

This is to acknowledge your letter dated July 17, 1935, as follows:

> "As a member of the Missouri State Board of Optometry, I would like to have your opinion on the following question, according to Section 13498 of the Revised Statutes of Missouri of 1929, which sets out that the members of the board shall annually in the month of July meet and organise by electing a president from among the members thereof and etc.
>
> "The question I have is in the event the board shall fail to elect in the month of July would they have a right to elect at a later meeting, or would the present president of the board continue, and, if so, would he continue as president until an election is held, or would he continue until the next annual meeting in July of the next year?
>
> "I would appreciate your opinion on this as our annual meeting is to be held soon, and it is possible that the board may not agree on a president at this meeting."

Chapter 101, R. S. Missouri, 1929, pertains to State Board of Optometry, and Sec. 13498 of said chapter provides, in part, as follows:

> "The governor, with the advice and consent of the senate, shall appoint five persons from among such

> practicing optometrists of the state* * * who shall constitute the state board of optometry. * * * * The members of the state board of optometry, before entering upon the discharge of their duties, shall make and file with the secretary of state, the constitutional oath of office. The members of said board shall within thirty (30) days after appointment, and annually thereafter in the month of July, meet and organize by electing a president from among the members thereof, and a secretary who shall also be the treasurer of said board, who shall not be a member of said board, but who shall 'be a reputable practicing optometrist.'"

Article 14, Section 6, of the Missouri Constitution pertains to the constitutional oath of office, and in part provides as follows:

> "All officers, both civil and military, under the authority of this State, shall, before entering on the duties of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office."

Therefore, a person appointed to membership of the State Board of Optometry, before he can enter upon the discharge of his duties as a member must subscribe to the constitutional oath, which provides that said person will support the constitution and laws of the state, and faithfully demean himself in office.

Section 13498, supra, makes it mandatory and part of the duties of the members of the board to meet annually, in July, and elect a president and secretary. Therefore, if the board members do not elect a president and secretary at the time prescribed by statute, such would be derelict in the performance of their duty, as well as violate their oath of office. Hence we do not perceive why the members would fail or neglect to comply with Section 13498, supra.

However, your question assumes that the board might fail or neglect to comply with the statute relative to electing a president at the July meeting, and you desire to know what the effect of such would have upon the incumbent (present president).

We do not find any statute or case decided in our courts which covers the particular question. However, we do find a case which, by analogy, would apply. We refer to State ex rel. Rife v. Hawes et al., 177 Mo. 360. Note the language of the Supreme Court en banc in said case, pp. 377-378:

> "The law is firmly settled in this State that an officer who has served his full term, holds thereafter as a mere locum tenens until his successor is appointed or until the appointing power chooses to remove him. (State ex rel. Withers v. Stonestreet, 99 Mo. 361.)
>
> "In that case, it was expressly held that 'where the term of office of the incumbent has expired, and where he is simply holding over at the pleasure of the executive, * * * the power of removal is incident to the power of appointment, without cause shown, or notice given or hearing had. (Ex parte Hennen, 13 Pet. 230; Field v. Commonwealth, 32 Pa. St. 478; Keenan v. Perry, 24 Tex. 253, and cas. cit.) * * *."

By virtue of the above case it is our opinion that if the Board should fail to elect a president at the time, as provided by Sec. 13498, supra, the present president would hold the office as president at the pleasure of the Board, and said Board would have the power to remove him at any time it so desired.

However, as hereinbefore stated, we do not believe that this contingency will arise, because the Board must do its duty according to their oath of office.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH/LD

LDS: Under Sec. 11543 it is the duty of the Recorder of Deeds to record deeds which shall be proved or acknowledged according to law.

RECORDER OF DEEDS:

729

July 26, 1935.

FILED
61

Mr. Lemuel R. Mead,
Recorder of Deeds,
Marshall, Missouri.

Dear Sir:

This department is in receipt of your letter of July 19th wherein you request an opinion regarding Section 11543, R. S. Mo. 1929. Your complete inquiry is as follows:

> "I will appreciate it if your office will give me some information on the following matter:
>
> "Have I any right to accept and record in my office, contracts, papers and writings affecting or concerning real estate which have not been acknowledged? If I do not have any right to record such papers which have not been acknowledged, should I record them if they do not affect or concern real estate.
>
> Section 11543, Revised Statutes of Missouri for 1929, says:
>
> "'It shall be the duty of the recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any

> lands and tenaments, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices.'
>
> "This section does not say that I shall not record papers which have not been proved or acknowledged according to law. I do not want to record any paper if I have no right to do so, and will appreciate it if your office can advise me in this matter."

Section 11545, referred to in your letter, in its entirety is as follows:

> "It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; second, all papers and documents found in their respective offices, of and concerning lands and tenements, or goods and chattels, and which were received from the Spanish and French authorities at the change of government; third, all marriage contracts and certificates of marriage; fourth, all commissions and official bonds required by law to be recorded in their offices; fifth, all written statements furnished to him for record, showing the sex and date of birth of any child or children, the name, business and residence of the father, and maiden name of the mother of such child or children."

As your request refers only to the first division of this section, the authorities herein referred to will be confined to the same.

Section 3039, R. S. Mo. 1929, relates further to the recording of deeds and other instruments which affect the title to real estate, and is as follows:

> "Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

One of the early decisions relating to this question is the case of Stevens v. Hampton et al., 46 Mo. l. c. 407, wherein the court said:

> "The want of a proper acknowledgment does not, however, invalidate the deed, but only goes to the effect of the record. If not acknowledged or proved, its record is not provided for by law, and the fact that it may be copied upon the book of records will not operate as constructive notice to subsequent purchasers. (Dussaume v. Burnett, 5 Iowa, 95; Lessee of Schultz v. Moore, 1 McLean, 520; Barney v. Sutton, 2 Watts, 31; Hastings v. Vaughan, 5 Cal. 315; Price v. McDonald, 2 Md. 403; Johns v. Scott, 5 Md. 81.) The deed, however, is good as between the parties, and should prevail against subsequent deeds to those who had actual notice of its existence. (Dussaume v. Burnett, supra; Caldwell v. Head, 17 Mo. 561; Corby v. Rankin, 11 Mo. 647.)
>
> "In view, then, of the acknowledgment as affecting the right of record and the question of constructive notice,

> the following would seem to be a reasonable rule: that when the recorded instrument shows upon its face that the acknowledgment was taken by a party, or party in interest, it is improperly recorded, and is no constructive notice; but when it is fair upon its face it is the duty of the register to receive and record it, and its record operates as notice notwithstanding there may be some hidden defect."

The rule laid down in the case quoted supra has been followed by later cases, enlarged and further explained.

In the case of Ammerman v. Linton, 279 Mo. l. c. 453, the court said:

> "In Stevens v. Hampton, 46 Mo. l. c. 408, Judge Bliss, thus states the rule: 'In view, then, of the acknowledgment as affecting the right of record and the question of constructive notice, the following would seem to be a reasonable rule; that when the recorded instrument shows upon its face that the acknowledgment was taken by a party, or party in interest, it is improperly recorded, and is no constructive notice; but when it is fair upon its face it is the duty of the register to receive and record it, and its record operates as notice notwithstanding there may be some hidden defect.' The italics are ours.
>
> "To like effect the rule is stated in 1 Cyc. p. 530, whereat it is said: 'But where an instrument bearing a certificate of acknowledgment or proof which is regular upon its face is presented to the recording office, it becomes his duty to record it, and the record thereof will operate as

> constructive notice, notwithstanding there be a hidden defect in the acknowledgment.' The cases bearing upon the rule are collated by the learned author, and among them is Stevens v. Hampton, 46 Mo. 404, supra. In 1 C. J. 773, the same rule is announced, and a further collation of authorities given.
>
> "The rule is a sensible one. The recorder of deeds cannot hold inquiry as to defects not apparent upon the face of the instrument. It follows that the recording of the deed of trust from Kirby and wife to Taylor was notice to the world. The contention of appellant must be ruled against him. He not only bought with notice of the prior deed of trust, but he bought after the foreclosure of Kirby's interest, and after the sale to plaintiffs herein, and after plaintiff's deed was of record. He was not a purchaser without notice, nor was the trustee from whom he bought."

The court further discusses this question more pointedly in the case of Williams v. Butterfield, 182 Mo. l. c. 184:

> "There is but one vital proposition involved in this cause, presented for our consideration. That is this: Was the record of the deed from Bohlcke and wife to Wolfenden, embracing the land in dispute, admissible in evidence in this cause for the purpose of fixing constructive notice upon plaintiff of the sale of the land prior to his (plaintiff's) purchase?
>
> "The record of this deed, as offered in evidence, does not show any certificate of acknowledgment by

Henry Bohlcke, the grantor in said deed. Under the statute, it must be conceded that this deed was not entitled to be recorded, by reason of the absence of such acknowledgment. (Sec. 2418, R. S. 1889.)

"It follows from this, if the general rule is applicable to this deed, that in the absence of the certificate of acknowledgment required by the statute, it had no place upon the land records of Stoddard county, and if improperly recorded, would not impart constructive notice to a subsequent purchaser in good faith, for a valuable consideration. (Secs. 2419 and 2420, R. S. 1889; Bishop v. Schneider, 46 Mo. 472; Terrell v. Andrew Co., 44 Mo. 309.)"

CONCLUSION

From the above decisions and in the light of the wording of the statute itself, we are of the opinion that when a deed is presented for record and it bears no acknowledgment or there is a patent defect in the acknowledgment, then it is your duty not to record the same, but if the deed, mortgage, etc., appears regular on its face, then it will be proper to record the same. You should not record any instrument, paper, or writing which does not come within the purview of Section 11543, quoted supra, regardless of the fact that real estate may not be involved.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:HR

INSURANCE - Amount of reserve of mutual fire insurance companies required.

1-14

January 2, 1935.

FILED 63

Honorable T. C. Mitchell, Jr.
Assistant Actuary
Insurance Department
Jefferson City, Missouri

Dear Sir:

We have your request of December 14, 1934 for an opinion, which request is as follows:

> "In Mr. Politte's request, it appears that he limits his request for an opinion regarding foreign mutual fire insurance companies. Are we correct in assuming that the opinion rendered was intended to apply to domestic mutual fire companies as well as foreign mutual fire companies?
>
> "Will you please also inform us whether or not, in approving a non-assessable form for mutual fire companies, any requirement should be made as to the amount of surplus which the company must have?
>
> "Further, could a non-assessable form of policy be issued at once by a mutual company organizing, either by means of applications for policies, as provided in Section 5808, or by means of the guarantee fund as stated in this Section?"

#2 - Honorable T. C. Mitchell, Jr.

We shall treat the paragraphs of your letter separately and answer them in the order in which they appear in your letter.

You are correct in assuming that the opinion referred to rendered by this office to Leo A. Politte, Prosecuting Attorney of Franklin County under date of November 9, 1934 applies to both foreign and domestic mutual fire insurance companies. That opinion was a construction of Article VI of Chapter 37, R. S. Mo. 1929.

Relative to your second request as to whether or not there is any requirement made as to the amount of surplus which a mutual fire insurance company must have, we are unable to answer your inquiry specifically, since both Article VI and Article VII of Chapter 37, R. S. Mo. 1929 apply to such mutual insurance. We assume that insurance companies are admitted under either Article VI or Article VII, and that your records specify under which Article the mutual insurance company is admitted to do business in this state. If you care to submit a specific example or statement of facts, at the first opportunity I shall be glad to go into that in detail.

With reference to the third inquiry as to whether or not a newly licensed mutual company can begin to issue non-assessable policies from the beginning, this again depends upon which Article the company was authorized to do business under. Article VI, Chapter 5796 provides:

> " ** any mutual company upon a majority vote of its members present at an annual meeting, or at any special meeting called for that purpose after one week's notice by advertisement in one or more newspapers * may charge and receive for the mutual benefit of all its policyholders cash in payment of premiums on such of its policies as shall be, by a majority vote of such meeting, determined upon."

Thus, from the above statute, it appears that before a mutual company can issue an all-cash premium policy under Article VI, it must have been in existence prior to the issuance of such policy and therefore cannot issue all-cash premium policies from the very beginning. Section 5808, referred to in your letter, we believe is limited to the method of beginning a mutual fire insurance company and is not any authority for issuing an all-cash premium policy. Under Article VII, an all-cash premium mutual policy may be issued under and by virtue of the terms of Section 5848, R. S. Mo. 1929, provided the company, upon organizing, has a contributing surplus of at least $100,000.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

TAXATION & REVENUE: Senate Bill 94 exclusive law for enforcing delinquent state and county taxes and taxes of cities of third and fourth class.

January 18, 1935.

FILED 63

Hon. Harry Mitchell
City Collector
Anderson, Missouri

Dear Mr. Mitchell:

Acknowledgment is herewith made of your recent request for an opinion of this office, a part of which reads as follows:

> "The question with me is, shall the collectors of the counties and of cities of the 4th class bring sale procedure under Senate Bill No. 94 as shown on page 425 and following pages of 1933 session acts, or do we collectors have the choice of bringing suit as outlined in House Bill No. 44 on page 465 of 1933 session acts, similar to the old method of bringing suit through the Circuit Court and selling by sheriff sale.
>
> Please advise me if we have our choice or do we have to make the sale according to Senate Bill No. 94." * * * **

On August 8, 1933, shortly after the effective date of Senate Bill 94, page 425 et seq. Laws of Missouri 1933, this office issued its opinion to the State Tax Commission holding that House Bill 44, page 465, Laws of Missouri 1933, was effective, insofar as it purported to authorize the institution of suits, only until the 24th of July, 1933, the effective date of Senate Bill 94, and that thereafter Senate Bill 94 provided the one and only method by which the payment of delinquent taxes could be enforced in this State.

On December 22, 1934, the Supreme Court passed upon this very problem. In the case of State ex rel. Karbe vs. Bader, et al., not yet reported, the court held that House Bill 44 was but a temporary measure effective only until the date thatSenate Bill 94 became the law. In this opinion Judge Leedy speaking for the Court stated:

"There was nothing in House Bill #44 in the nature of new legislation. Its sole object was to amend section 9952 (the effective law at the time House Bill #44 was introduced) insofar as it related to back tax attorneys in counties of a designated population. It seems obvious, and we hold that the nominal reenactment of section 9952 by House Bill #44 was not intended to, nor did it have the effect of impliedly repealing or otherwise disturbing the Jones-Munger act. We think that by attaching an emergency clause to House Bill #44, the Legislature intended that it should be operative only until such time as Senate Bill #94 took effect. The latter measure not having received executive approval at the time the former was passed. But we must hold bad, as the parties tacitly concede, the emergency clause just mentioned because invalid on its face an, therefore, wholly ineffectual to make House Bill #44 operative upon being signed by the Governor, and so upon the happening of the latter event House Bill #44 became nugatory, and as if never passed. This ruling is in harmony with controlling canons of construction, and, as we believe, causes the true legislative intent to speak."

CONCLUSION.

It therefore conclusively appears that Senate Bill 94 now prescribes the one and only method by which delinquent taxes for the State and county and for cities of thethird and fourth classes can be collected at this time.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM

LICENSES: When county courts may impose a license tax on roller rinks or skating rinks.

June 26, 1935.

FILED
63

Mr. Cortland Minor
Clerk, Randolph County Court
Huntsville, Missouri

Dear Sir:

This Department wishes to acknowledge your request for an opinion wherein you state as follows:

> "Is there any authority where County Courts can place a license on skating rinks outside of city limits."

Section 14327 R. S. Missouri 1929, provides:

> "The county court of every county in this state having a population of fifty thousand inhabitants or more, and lying adjacent to cities that now have or that may hereafter have a population of three hundred thousand inhabitants or more, and the county court of all counties which now have or which may hereafter have a population of not less than one hundred fifty thousand inhabitants and nor more than five hundred thousand inhabitants, shall, at the May term of the county court of each year, impose, by an order entered of record, a license tax, such as the court may deem proper and reasonable, upon all theatrical or minstrel performances, exhibits, shows, circuses, menageries, roller rinks, or any other

> kind of public exhibitions; also scenic or gravity railways, cane racks, shooting galleries, baby racks, knife boards, or any other kind of avocation, set up in connection therewith; and it shall be unlawful for any person, association, company, corporation, or copartnership of persons (except if the same be for religious, educational or charitable purposes, then it shall be exempt from such license tax), to give, perform or present, exhibit or set up any theatrical or minstrel performances, exhibits, shows, circuses, menageries, roller rinks, or any other kind of public exhibitions, or scenic or gravity railways, cane racks, shooting galleries, baby racks, knife boards, or any other kind of avocations, set up in connection therewith, without first taking out a license therefor from the county clerk and paying the license tax imposed by the county court, as aforesaid, which shall be paid into the county treasury for the use of the general revenue fund of the county: Provided, this and the following section shall not apply to any performances exempted from license or other tax by section 14326: Provided further, that in any such county having a county license inspector, it shall be his duty to diligently see that all such licenses are taken out and that such license taxes are paid, and he shall make such reports and perform his duties under such regulations as may be prescribed by the county court."

Under the above section, the county court of every county in this state having a population of fifty thousand inhabitants or more, and lying adjacent to cities that now have or that may hereafter have a population of three hundred thousand inhabitants or more, and the county court of all counties which now have or which may hereafter have a population of not less than one hundred fifty thousand inhabitants and not more than five hundred thousand inhabitants, shall at the May term of the county court of each year, impose, by an order entered of record, a license tax, such as the court may deem proper and reasonable, upon roller rinks and various other shows and exhibitions specifically enumerated in Section

14327, supra. The county court meets at the May term of each year and determines the amount of tax it will impose, and enters it as a matter of record, so that parties coming within the scope of the article have a method of determining in advance the license tax that they will be required to pay.

We are, therefore, of the opinion that if your county court falls within the above statutory requirements as to population, it may place a license tax on roller rinks or skating rinks outside of the city limits.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
Acting Attorney General

WOS:MM

BANKS & BANKING:)
)
COUNTY COURTS:)

Power and authority of County Courts to compromise with bondsmen on depository bond.

January 14, 1935.

FILED
64

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This is to acknowledge receipt of your letter of January 10, 1935, in which you request an opinion on the question submitted in your letter; which letter is as follows:

"Re: Waynesville State Bank,
Waynesville, Missouri.
Reorganization.

The following provisions are contained in the proposed plan for the reorganization of the subject bank:

1. County deposits in the amount of approximately $56,000.00 are involved. It is proposed that by order of the County Court a check will be written for $30,000.00 in the reduction of this deposit and the County will receive in return for said check approximately $50,000.00 face value of rejected assets of the bank, in consideration of which the depository bond securing the County, executed by the bank and certain individuals, will be released. In your opinion will this release the bank from all liabilities, contingent or otherwise, resulting from such transaction?

2. In further consideration for releasing the personal bondsmen on the present depository bond of the bank, the bondsmen now indemnifying the County on behalf of the bank will execute a bond in favor of the County, in effect guaranteeing the payment of the $30,000.00 secured by rejected assets. In

your opinion will the bondsmen be legally held under a bond of this character?

You understand, of course, that upon consummation of the plan approved by all parties, the remaining deposits of the County, amounting to approximately $26,000.00, will be available.

Will you please send a copy of your opinion direct to Mr. T. O. Carver, Prosecuting Attorney, Waynesville, Missouri."

The question asked in the first sub-division of your letter is as follows: Will this release the bank from all liabilities, contingent or otherwise, resulting from such transactions?

In the second sub-division of your letter you ask the following question: In your opinion will the bondsmen be legally held under a bond of this character?

The two questions propounded in your letter are so interrelated and revolve around the question as to the power of the county court to subscribe to and agree to the arrangement for the compromising and settling of its deposit claim in a restricted bank, that we shall undertake to answer your questions in one conclusion.

County courts were created by the Constitution as provided in Section 36, Article VI, which is as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

It will be seen that the county court shall have jurisdiction to transact all county and such other business as may be prescribed by law.

Section 2078, R. S. Mo. 1929, provides as follows:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Section 12105, R. S. Mo. 1929, provides as follows:

> "All notes, bonds, bills, contracts, covenants, agreements or writings made whereby any person shall be bound to any county, or to the inhabitants thereof, or to the governor, or to any other person, in whatever form, for the payment of money or any debt or duty, or the performance of any matter or thing, for the use of any county, shall be valid and effectual to vest in such county all the rights, interests and actions which would be vested in any individual, in any such contract made directly to him."

The effect of this agreement and compromise, as set out in your letter, between the Waynesville State Bank and the signers of the depository bond of the Waynesville State Bank, and the County Court of Pulaski County, would be the compromise of said deposit of $56,000 in said bank by the county in the following manner:

If, and when, said bank is reorganized, and of course said agreement is contingent upon the reorganization of said bank and approval by the Commissioner of Finance of the State of Missouri of the reorganization plans, $26,000.00 of said deposit would be immediately available for the use of the county

court, and for the balance due, to-wit, the sum of $30,000.00, the bank would transfer to the county court by proper assignments $50,000.00 face value of rejected assets of the bank, and in further consideration for the releasing of the bondsmen on the present depository bond of said bank, these bondsmen would execute and deliver to the county court a bond or obligation guaranteeing the payment of said $30,000.00, the unpaid portion of the county's deposit secured by the rejected assets transferred to the county court.

We are assuming that the $56,000.00 on deposit with the Waynesville State Bank of the county funds have been let to the bank in accordance and compliance with all of the statutes pertaining to the letting of public funds and that the county would not have a preferred claim against the bank in the event of liquidation.

The county court has the power to transact all county and such other business as may be prescribed by law.

The Supreme Court in the case of Railway Company v. Anthony, 73 Mo. 431, l. c. 434, said the following:

> "The power to sue implies the power to accept satisfaction of the demand sued for, whether the precise amount demanded or less. The taxes were levied for the benefit of the county. The beneficial interest was in the county, and it is for the public interest that she should have the right to settle, by compromise, questionable demands which she may assert. Must the county prosecute doubtful claims at all hazards, regardless of costs and expenses, and is it for the public good that the right to settle such demands by compromise be denied her? As was said by the supreme court of New York in the case of the Board of Supervisors of Orleans Co. v. Bowen, 4 Lansing 31: 'It would be a most extraordinary doctrine to hold that because a county had become involved in a litigation, it must necessarily go through with it to the bitter end, and has no power to extricate

> itself by withdrawal or by agreement with its adversary.' The same doctrine was sanctioned in the Supervisors of Chenango County v. Bidsall, 4 Wend. 453."

If, as stated in the above case, the county court has the power to accept satisfaction of a demand sued for, whether the precise amount demanded or less, it would seem that the county court would have the right to settle and compromise a doubtful claim and obligation in favor of the county on the best terms obtainable under all the circumstances, acting at all times in good faith for the best interests of the county.

Judge Faris, District Judge in the United States District Court, Eastern District of Missouri, Eastern Division, in the case of State of Missouri ex rel. Brewer v. Federal Lead Co., 265 F. 305, l. c. 310, referring to Section 36, Article VI, of the Constitution of Missouri, said the following:

> " It is also obvious that the above constitutional provision, in conferring upon the county courts of the several counties power to transact 'all county business,' has the effect of making such county courts the general agents of the counties. If this view is correct, it is clear that the above statute and the constitutional provision above quoted have a very important bearing upon the issues presented in this case. For, absent some statutory inhibition, and I know of none, and subject to some prohibitions of the Constitution of Missouri not here relevant, the county courts are authorized to deal with all county business just as any other general agent of an individual principal might do."

The following was said in the case of Sheidley v. Lynch, 95 Mo. 487, l. c. 497:

> "So in the case of H. & St. J. R. R. Co. v. Marion County, 36 Mo. 303, it is said that the county court is the agent of the county, and may lawfully and of a right do whatever is necessary to carry out and execute the

> trusts reposed in it. So in the case of Walker v. Linn County, 72 Mo. 650-3, it is said: 'That a county court is invested with such powers only as are expressly conferred upon it by statute, or such as may be fairly and necessarily implied from those expressly granted, we think cannot be questioned.'"

Coming now to the precise question in the first sub-division of your letter, it is our opinion that the bank would be released from all liabilities under the depository bond now in force and effect, upon the final completion of the agreements.

As to the question in the second sub-division of your letter we are of the opinion that a bond or obligation could be drawn and executed by the bondsmen, who are to be released from the present depository bond, which would be binding on said bondsmen so signing to secure the $30,000.00, the balance of the deposit due from the bank to the county. Of course, we are not passing upon the question of the advisability of the county court entering into the agreement proposed as above but only as to the power and authority of it to do so.

It is, therefore, our conclusion that the county court may, in the exercise of its sound discretion and at all times acting in good faith for the preservation of the moneys belonging to the County of Pulaski, enter into agreements whereby the above arrangement would be effected.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

BANKS & BANKING: Restricted banks may reorganize under House Bill 91, Laws 1933, pages 404, 405 and 406.

1-21

January 16, 1935.

FILED
64

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This is to acknowledge receipt of your letter of January 14, 1935, relative to House Bill 91, found at pages 404, 405 and 406, Laws of Missouri, 1933, and Senate Bill 293, found at pages 402, 403 and 404; which letter is as follows:

> "House Bill No. 293, pages 402, 403, and 404, Session Acts, 1933, permitting banks in this state to operate under restrictions, will expire on February 1, 1935, and there are still twenty-three banks operating under the provisions of this Act, several of which have approved plans for reorganization that may not be consummated by February 1, 1935.
>
> In the event certain of these banks fail to consummate their plans by that date, in your opinion can the boards of directors of such banks take advantage of the provisions of House Bill No. 91, pages 404, 405 and 406, Session Acts, 1933, and continue to operate for an additional period of sixty days to perfect plans for reorganization? It is very probable that it may be of utmost importance that certain of the restricted banks take advantage of the provisions of House Bill No. 91, if consistent under the provisions thereof, and I shall appreciate an early opinion on this question.

"In my opinion it would not be proper to restrict withdrawals of trust funds deposited in these banks, and that the restrictions contained in House Bill No. 91 would apply only to present restricted deposits."

House Bill 91 had an emergency clause attached and became effective upon its approval February 22, 1933; and Senate Bill 293 had an emergency clause attached and was approved and became effective March 11, 1933, and is to become inoperative after February 1, 1935.

House Bill 91 provides that whenever, in the judgment of the president and secretary of any bank or trust company and/or the board of directors thereof, unusual withdrawals are being made, or about to be made, may suspend the payment of checks of depositors and any and all other withdrawals of assets of such bank or trust company for a period of six banking days. During this suspension period of six days, after notice to the Commissioner of Finance of the State, it becomes the duty of the Commissioner of Finance to take charge of said bank or trust company and to supervise the receipt of the deposits and payment of checks and for all other assets during the period of sixty days next following the taking charge thereof, and he shall during that time limit upon a basis of equality, prorate or prohibit entirely, all withdrawal deposits of assets from said bank or trust company during which time no preferences shall be allowed.

During this sixty day period the Commissioner of Finance shall make an audit and inventory of the assets and liabilities of said bank or trust company for the purpose of determining whether said bank or trust company shall be permitted to continue in business and if satisfactory plans of reorganization are perfected, and approved by him, then such bank or trust company may open on a normal basis.

In any plan of reorganization which does not contemplate the payment in full of all deposits such plan must have the consent of those owning or controlling 85% of the deposits

therein, which are not preferred claims, special deposits or deposits secured by bonds or collateral. If within such sixty day period said bank does not submit a plan which is approved by the Commissioner of Finance he shall proceed to liquidate the bank in accordance with the law. During this sixty day period deposits may be received from the customers of said bank or trust company and others as special deposits and may be paid out on the check of such depositors and the bank must have on hands at all times amounts of money sufficient to meet such checks on such special deposits.

Senate Bill 293 permits the Governor or the Commissioner of Finance, with the approval of the Governor to restrict and regulate the right of any bank or trust company or other institutions doing a banking business in this State to withdraw assets or to pay checks or other orders drawn upon or against deposits for such time and in such manner as to him or them may appear necessary for the protection of depositors or other creditors, and may impose such restrictions as is deemed necessary for the protection of the depositors and others interested; permitting, however, such bank or trust company or other institution to receive special deposits which at all times are to be treated as trust funds and may be withdrawn at any time by the depositor.

Certain banks and trust companies in Missouri are now operating on a restricted basis under Senate Bill 293 and are now attempting to perfect reorganization plans while operating under such restricted basis, but since Senate Bill 293 will cease to be a law and become inoperative after February 1st, 1935, the question arises as to whether or not the designated officers of restricted banks may suspend operation under House Bill 91 and the Commissioner of Finance, upon notice, may suspend the operation of said bank for sixty days after suspension of business under Senate Bill 91 to permit reorganization plans to be carried forward. Of course, any bank attempting to reorganize during this sixty day period must comply strictly with all of the provisions of Senate Bill 91 and must secure the consent of the owners of 85% or more of the deposits therein. Necessarily the special deposits will not be restricted in any event.

It is our opinion, therefore, that banks now under restriction and attempting to reorganize may do so during the sixty day period under House Bill 91 by complying strictly with the requirements therein. However, there may be certain banks or trust companies attempting to reorganize under Senate Bill 293, supra, who might not be able to submit a plan as required in House Bill 91, supra.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

BANKS & BANKING: Assignment executed by depositors of the Bank of Clark, legal and binding on them.

February 6, 1935.

FILED
64

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This is to acknowledge receipt of your letter of February 5th, 1935, with request for an opinion relative to the legality and binding effect of an assignment signed by certain depositors of the Bank of Clark. The copy of your letter is as follows:

> "I am enclosing herewith a copy of a letter written by Mr. C. M. Hulen, Attorney at Law, Moberly, Missouri, to the Reconstruction Finance Corporation, under date of February 4th, 1935, which letter contains a history of the operations of the Bank of Clark, Clark, Missouri, particularly in connection with the closing of the bank in December, 1930, procuring assignments from its depositors and reopening subsequent thereto; all of which information is essential to the consummation of a loan applied for by the Bank of Clark to the Reconstruction Finance Corporation.
>
> Will you please render an opinion as to whether or not the assignment of deposits, referred to above, a copy of which is contained in the copy of letter hereto attached, is valid and binding upon the depositors executing the same, and if I would be justified in giving my approval to the pledging of the assets of the bank for a loan to pay the present deposits in the bank, which deposits were received subsequent to the execution of the assignments."

Attached to your letter of request is a copy of an opinion dated February 4, 1935, written by Mr. C. M. Hulen, Attorney at Law, Moberly, Missouri, addressed to the Reconstruction Finance Corporation, St. Louis, Missouri, in which he sets forth a history of the closing of the Bank of Clark by its Board of Directors and surrendering same to the Commissioner of Finance for the purpose of liquidation, and in which letter he sets forth the assignment about which you request an opinion in your letter.

Also accompanying your letter of request we find a certified copy of a decree of the Circuit Court of Randolph County, dated January 16, 1931, in the case of State of Missouri ex rel. et al, Plaintiff, vs. S. L. Cantley et al, Defendant, by which judgment and decree of said court the Commissioner of Finance was compelled to relinquish his possession of the Bank of Clark to the officers of said Bank under the provisions of Section 11702, R. S. Mo. 1919, and especially under Paragraph 1 thereof (now Section 5319, 1929), in which said decree and judgment the assignments executed by the depositors of the Bank of Clark were recognized as legal and binding by the court and ordered to be posted upon the records of the Bank.

You request specially an opinion as to whether the assignment, a copy of which is hereinafter set forth, is binding on the depositors executing the same, and if you would be justified in giving your approval to the pledging of the assets of the Bank for a loan to pay the present depositors in the bank, which deposits were received subsequent to the execution of the assignment. Said assignment is as follows:

"ASSIGNMENT

"Whereas, the Bank of Clark of Clark, Missouri, was closed by order of its Board of Directors on the 26th day of December, 1930, and the said bank is now in the hands of the Department of Finance of the State of Missouri, and, whereas, I desire that said bank be not liquidated by the said department but reopened for business.

"I hereby agree that in consideration of the said reopening of the said Bank of Clark to relinquish, release and set aside to the aforesaid bank all of my deposit of _____ dollars, standing in my name on the books of said bank on the day it was closed, whether said deposit be in the form of a checking account, savings account or certificate of deposit, and I hereby authorize the representative of the Department of Finance in charge of said bank to charge my deposit with and deduct therefrom when said bank is reopened all of my deposit hereby relinquished, released and set aside to said bank.

If said deposit be in the form of a savings account, or certificate of deposit, I agree to present to the representative, the Department of Finance, my savings account book or certificate of deposit that an endorsement consistent with this agreement be made thereon.

IN WITNESS WHEREOF I have hereunto set my hand this _____ day of _____, 19____.

_____

"State of Missouri)
SS.
County of Randolph)

On this _____ day of _____, 19___, before me personally appeared _____ _____ and acknowledged the execution of the foregoing to be her or his free act and deed.

Witness my hand and official seal hereunto. My commission expires _____.

_____
Notary Public."

We are informed by your Department that the Bank of Clark was reopened by its officers and continued to operate as a normal unrestricted bank from January, 1931, to March, 1933, and has been operating since such latter date as a restricted bank, and the reopening of said bank was the stated consideration in the assignment in question. The assignment as set forth above, therefore, in our opinion, is legal and binding upon all depositors so signing same and those depositors who executed same would have no legal claim or lien upon the assets of the Bank of Clark and that said assets could be pledged to the Reconstruction Finance Corporation free and clear from all legal liability as a result of said assignment.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

BANKS & BANKING: (1. Corporation automatically dissolved by expiration of charter.
CORPORATIONS: (2. President and directors of dissolved corporation under Sec. 4561, R. S. 1929, became trustees for winding up affairs.

February 19, 1935.

2-20

FILED
64

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This is to acknowledge receipt of your letter of February 12, 1935, in which you request an opinion. Your letter of request is as follows:

> "A bank, operating under restrictions, the charter of which expired by limitation on September 27, 1932, is attempting to effect a plan for reorganization providing for the sale of its assets under House Bill No. 125, and I am now in receipt of a letter from Mr. Vance L. Sailor, Supervising Examiner, Federal Deposit Insurance Corporation, St. Louis, Missouri, requesting that I furnish him with an opinion from the Attorney General of the State of Missouri stating upon whom devolves the authority to act for this bank the charter of which has expired; and also with an opinion of the Attorney General concerning the authority of the trustees to enter into an agreement on behalf of the bank for the sale of its assets to another bank under the provisions of House Bill No. 125.
>
> For your information, the tentative contract submitted provides that the purchasing bank will assume the full deposit liability of the selling bank.
>
> I shall appreciate it if you will supply me with the opinions mentioned above at your early convenience."

Your letter of request is divisible into two parts and calls for two opinions, and we shall reply to same in the order submitted.

I.

First, you ask upon whom devolves the authority to act for a bank, the charter of which has expired?

Section 4561, R. S. Mo. 1929, provides that, "Upon the dissolution of any corporation already created, or which may hereafter be created by the laws of this state, the president and directors or managers of the affairs of said corporation at the time of its dissolution, * * * shall be trustees of such corporation, with full powers to settle the affairs, collect the outstanding debts and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them etc.," and they shall generally have control of all of the assets of the corporation for the purpose of winding it up and distributing the money and property to those to whom it is rightfully due.

After the period of the existence of a corporation has expired by force of the expressed provision in its charter, it no longer has any existence at all, either de jure or de facto, for there is no law under which it can longer exist, and it is automatically dissolved.

The charter of the bank in question having expired September 27, 1932, the corporation was thereby dissolved, and the president and directors at the time of the expiration of the charter became by operation of law trustees of such corporation for the purpose of winding up its affairs.

II.

Second, you ask our opinion as to the authority of the trustees to enter into an agreement on behalf of the bank whose charter has expired, for the sale of its assets

to another bank under the provisions of House Bill 125, viz., Section 5379, R. S. 1929, as amended by Laws of Missouri, Extra Session, 1933-34, pages 148-149.

We do not think that the trustees of a banking corporation whose charter has expired, would have any authority whatever to sell the whole or any part of the assets or business of such dissolved corporation under the provisions of the above section for the reason that this section provides that any bank may sell the whole or any part of its assets or business, or the whole or any part of the business of any of its departments to any other bank or trust company etc. And the word "bank" as used in this section means a corporation whose charter has not expired and not dissolved. The president and directors of the bank, who became trustees by operation of the statutes, could perform no corporate functions for a non-existing corporation.

However, it is our opinion that the trustees, under the circumstances which you state, would have a right to sell all of the assets of the dissolved corporation in a manner that would be advantageous to the depositors, creditors and stockholders of such corporation and in that way wind up its affairs. And if in the sale of the assets and business and property, a fair and reasonable price was received for same and was the best price obtainable under all the circumstances, they would be justified under the broad powers which they have, in entering into such contract. Of course, it must be kept in mind that the depositors and other creditors must be paid in full before the stockholders would receive anything on their shares of stock.

Section 4561 further provides that "such trustees shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands." We, therefore, are of the opinion that the trustees have the general and broad power, acting for the best interests of all the creditors, to make a sale of all of the assets

and business of a dissolved corporation for the purpose of winding up the affairs of the dissolved corporation.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

CLERK OF HANNIBAL COURT OF COMMON PLEAS: Section 11812, Laws 1933, providing for appointment of deputies is applicable to Hannibal Court of Common Pleas.

5-2

April 23, 1935.

FILED 64

Mr. Ed. H. Moore
Clerk of Hannibal Court of Common Pleas
Hannibal, Missouri.

Dear Sir:

This acknowledges receipt of your letter of recent date requesting an opinion from this office which reads as follows:

> " What I would like to know it is that this being a Court of record, and the lawyers tell me that it is sixth in the State, as to volume of business and, I have had to pay the deputy for four years to the amt. of twenty five hundred dollars, and under the session acts of 1933 the court cut the salary five hundred dollars and want me to still pay the deputy and I just can not afford to do it, and no one person can do the work for you cannot be in two places at once I am giving nine to ten hours a day I don't mind the work but do not like to have the work not kept up which one person is not able to do, as I read the Statutes Courts of record are allowed deputy or deputies sufficient to keep the work up in good and efficient manner. Now if there is no way out I will have to let it drag. for the salary now is not sufficient. thanking you in advance for any help or information I remain."

This department, in an opinion recently rendered to Honorable Walter G. Stillwell, Prosecuting Attorney, Marion County, Hannibal, Missouri, under date of January 31, 1935, ruled that that part of Section 14563, R. S. Mo.

1929, which fixes the annual compensation of the Clerk of the Hannibal Court of Common Pleas at two thousand dollars has not been repealed by implication and still governs as to the compensation of the Clerk of the Hannibal Court of Common Pleas. A copy of said opinion is enclosed for your information.

Sections 14540 to 14563 inclusive of the Appendix of the Revised Statutes of Missouri, 1929, contains the law applicable to the Hannibal Court of Common Pleas. Section 14551, R. S. Mo. 1929, provides for the election of a Clerk of the Hannibal Court of Common Pleas, and Section 14563 provides what salary said clerk shall receive. No provision is made for appointing a deputy clerk of said court or allowing any compensation for a deputy clerk.

Section 11812, Laws of Missouri, 1933, page 371, provides:

> "Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the circuit court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The circuit court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant, and shall designate the period of time such deputy or assistant may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may, at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the circuit court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

The above section refers specifically to every clerk of a Circuit Court and does not mention clerks of the Courts of Common Pleas. However, in this connection, we call your

attention to Section 656, R. S. Mo. 1929, which reads as follows:

> "Whenever the term 'circuit Court' is used in any law general to the whole state, the same shall be construed to include 'courts of common pleas', unless such construction would be inconsistent with the evident intent of such law, or of some law specially applicable to courts of common pleas."

Section 11812, supra, is a law general to the whole State. In our opinion, to include the words "Courts of Common Pleas" in said section would not be inconsistent with the evident intent of the law or in conflict with any law especially applicable to the Hannibal Court of Common Pleas.

It is therefore the opinion of this department that Section 11812, Laws of Mo. 1933, is applicable to the Hannibal Court of Common Pleas, and that the Clerk of said court is entitled to such number ofdeputies and assistants to be appointed by said clerk with the approval of the county court as such court shall deem necessary for the prompt and proper discharge of the duties of his office.

This office, in an opinion given Honorable Birt P. Bryant, Clerk of the Circuit Court, Dunklin County, Missouri, under date of March 7, 1934, ruled that the County Court shall fix the compensation of the deputy circuit clerks and that the County Court shall pay such deputy from the general revenue fund of the county. We are enclosing a copy of said opinion, same having been signed by Franklin E. Reagan, Assistant Attorney-General and approved by Attorney-General, Roy McKittrick.

Very truly yours,

APPROVED:

J. E. TAYLOR
Assistant Attorney-General.

ROY McKITTRICK
Attorney-General.

JET/afj

STATE BOARD OF HEALTH: FOOD AND DRUG: Every building or structure held out to public where sleeping accommodations are furnished for pay in which ten or more rooms are furnished shall pay hotel license inspection fees.

57

May 3, 1935.

FILED
64

Hon. Lee Montgomery
Chairman
State Committee of Y. M. C. A.
Sedalia Trust Building
Sedalia, Missouri

Dear Sir:

This will acknowledge your letter for an opinion as follows:

> "This morning Mr. A. C. Reibert, the Secretary of the State Committee of the YMCA, advised me that the State Board of Health had requested him to pay the hotel inspection fee upon the YMCA Camp at Hollister, Missouri, claiming that this camp was a hotel within the meaning of Section 13091. One of the deputies sent Mr. Reibert a letter quoting from your ruling that Young Men's Christian Associations in Missouri which are operating buildings in which more than ten rooms are furnished for sleeping accommodations for pay to transient or permanent guests, should pay the regular hotel license fees.
>
> "The Health Department seems to be of the opinion that under your opinion this would make the YMCA Camp liable to pay a hotel license fee.
>
> "I am quite sure that when the facts in relation to the YMCA Camp are presented to you, you will agree with me that the Camp is not subject to the hotel license fees.
>
> "The YMCA Camp is erected on a tract of land at Branson, Missouri. The camp consists of a central eating hall where campers may obtain food. If anyone sleeps

in that building, the number of such rooms to such uses would not be over three ~~or~~ four and therefore it could not be held that it was a building or other structure constituting a place where more than ten rooms are furnished for sleeping accommodations to guests. If anyone sleeps in the building at all they would be employees of the Camp.

"The rest of the Camp consists of an auditorium where meetings are held and of individual cottages which are rented by the day, week, or month to guests. While my memory regarding the size of these cottages may not be absolutely correct, I do know that no cottage contains over two or three sleeping rooms and no cottage is equipped or intended for occupancy by more than four or five people. There is absolutely no building upon the premises which provides sleeping accommodations for as many as ten people. This fact I know positively. It is therefore an absolute fact that the Camp does not have any building or other structure kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transients or permanent guests, in which ten or more rooms are furnished for the accommodation of such guests. Therefore, the Camp does not come within the letter or the spirit of Section 13091. I have sent a copy of this letter to Mr. Reibert and have requested him to inform you if the letter contains any misstatement of fact. I am very sure that it does not, but I want to be very sure that you get an exact statement of the material facts. If, for instance, the dining hall contains sleeping accommodations for less than ten servants or employees, or other persons, that fact would not be material because it would not bring that building within the terms of the statute.

"It will aid the State Board of Health if you will advise it and us whether, under the facts above stated, the Camp comes within the law."

Section 13091, R. S. Mo. 1929, provides as follows:

> "That every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests, in which ten or more rooms are furnished for the accommodation of such guests, whether with or without meals, shall for the purpose of this article be deemed a hotel, and upon proper application the food and drug commissioner shall issue to such above described business a license to conduct a hotel: Provided, that it shall be unlawful for the owner of any such building or other structure to lease or let the same to be used as a hotel until the same has been inspected and approved by the food and drug commissioner."

Section 13094, R. S. Mo. 1929, provides:

> "In all hotels within the meaning of this article the parlor, dining room, kitchen and office shall b e construed to mean guest rooms."

In construing the above statutes, it is our opinion that every building or other structure, kept, used, maintained, advertised, or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests in which ten or more rooms are furnished for accommodations of such guests whether with or without meals shall be deemed a hotel; that if any such building or structure comes within the purview of the above cited section of the statute, such owner shall pay a hotel inspection fee.

It is obvious that if any of the buildings or cottages mentioned in your letter, hereinabove set out, contain ten or more rooms that are kept, used, maintained or held out to the public where sleeping accommodations are furnished for pay to transient or permanent guests they shall be liable for such hotel inspection fees.

We are of the opinion from the facts stated in your letter, that such camp is not liable for a hotel inspection fee; on the other hand, should it be that any building or structure located in said camp have ten or more rooms under conditions set forth in Section 13091, supra, such building or structure shall pay a hotel inspection fee.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

RCS/JET:afj

CHARITABLE TRUSTS--TAXATION: Property located in a city used exclusively for charitable purposes, to the extent of one acre, is exempt from taxation for State, County or local purposes.

May 27, 1935.

FILED
64

Honorable Rex H. Moore
Prosecuting Attorney
Grundy County
Trenton, Missouri

Dear Sir:

Your request for an opinion, dated May 11, 1925, reads as follows:

> "I am enclosing herewith a certified copy of an irrevocable trust agreement executed by Dr. J. B. Wright, of this city, on September 20, 1932, together with a certified copy of a warranty deed executed by Dr. J. B. Wright on September 21, 1932, conveying the legal title to the property therein described to the Trenton Trust Company as trustee.
>
> "Under and by virtue of the provisions of the trust agreement, title to the property therein named is to be held by the trustee and the property maintained and operated by the general staff, to be appointed, to care for the poor and unfortunate of Trenton and Grundy County. The property is also to be operated as a hospital and patiients admitted from whom the staff may collect fees which, in turn, are to be used to maintain the buildings.
>
> "The grantor in the trust agreement is occupying a part of the premises described in the agreement and maintains his office in the hospital building.
>
> "The question which has arisen, and which we should like to have an opinion from your office on, is whether or not the

> property described in the trust agreement is taxable during the life of the grantor and during the period for which it is to be used thereafter for charitable purposes."

Article X, Section 6, Missouri Constitution provides:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the building thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

We take judicial knowledge that Trenton, Missouri, is an incorporated city.

Under the above constitutional provision we see that the Legislature is authorized to exempt lots in the City of Trenton, to the extent of one acre, with the buildings thereon, when the same is being used exclusively for purposes purely charitable.

Pursuant to the constitutional provision the Legislature passed Section 9743, R. S. Mo. 1929, exempting certain real estate from taxation and it provides in part as follows:

> "* * * *sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such

> cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempt from taxation for state, county or local purposes."

In the case of State ex rel. v. Powers, 10 Mo. App. 263, very similar facts were construed in the light of this constitutional provision, and the Court said at l. c. 268:

> "It appears from the pleadings in the present case, that the whole object of the institution is charity; nobody connected with it can derive any profit from the work carried on there; any profit derived from pay patients is applied exclusively to the charitable purposes of the institution; and every part of the building is used exclusively for a hospital. The object being clearly charitable, and exclusively so, and all ideas of private gain, profit, or advantage being excluded, we are unable to see any reason for holding that the purpose is not 'purely charitable' within the meaning of the law."

The above case was affirmed by the Missouri Supreme Court in 74 Mo. 476.

According to the trust deed attached to your request, the lots and improvements in the City of Trenton which were conveyed to the Trenton Trust Company, in trust, on September 21st, 1932, as recorded in Book 199, page 184, the terms of the trust are not set out in the recorded warranty deed, but are referred to in the warranty deed where it describes the grantee as a trustee "under trust agreement dated September 20, 1932." You have submitted a copy of a trust agreement of that date which is certified to by a notary as a true copy, but nothing on its face shows that it was ever recorded. For all the record shows, as per the trust agreement which you have exhibited, there may be some other trust agreement executed as of the same date which would be enforceable under the terms of the deed as a prior trust

agreement and at the same time not be a charitable trust agreement at all. The grantee, known as "The Trenton Trust Company," is incorporated with power to handle trusts which are not charitable and at no events are tax exempt. This trust agreement should be recorded and the recorded agreement should show that the terms of the trust agreement in force be not speculative and that The Trenton Trust Company is the trustee of what purports to be a charitable trust.

We are forced to assume that the trust agreement submitted is a copy of the trust agreement referred to in the warranty deed, and that no other trust agreements exist. There is no duty on the county assessor to make any such assumption and until it be recorded he should assess the property for taxation.

CONCLUSION

Under the provisions of the submitted trust agreement, if it be truly the trust agreement referred to in the submitted deed, certain of the patients receivable at the hospital are expected to pay for the hospitalization they receive, and the profit derived is to be applied exclusively to the charitable purposes of the hospital. With those patients whom the general staff, charged with the management of the hospital, determine to be deservingly poor there is no charge. No person connected with the hospital is to derive any profit from the work carried on there.

We are of the opinion that the property described in the trust agreement, to the extent of one acre, is not taxable during the period that it is actually being used as provided by the trust agreement.

The actual use of the property for the purposes and under the conditions described in the trust agreement is, in our opinion, a use which is exclusively for charitable purposes and as allowed by the Constitution and provided for by legislative act. When so used it is exempt from taxation to the extent of one acre.

The fact that the grantor be living does not have any bearing on the question as to whether the property, to the extent of one acre, be exempt from taxation as property being used exclusively for charitable purposes. The fact

that the grantor utilizes a portion of the building by occupying a small part of the premises and maintaining his office in the hospital building, does bring the use of the property without statutory exemption from taxation of property being used exclusively for charitable purposes. In the light of the Powers case, supra, the fact that patients with money are expected to pay for hospitalization they receive does not bring the use of the property without the statutory exemption from taxation of property being used exclusively for charitable purposes.

Respectfully sumbitted.

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED;

ROY McKITTRICK

WOS:H

MISSOURI OCCUPATION TAX: Water sold by City of Excelsior Springs subject to tax; mineral baths not subject to tax; receipts from operation of swimming pool not subject to tax.

June 28, 1935.

FILED
64

Mr. Robert Moore,
Special Counsel,
City of Excelsior Springs,
Excelsior Springs, Mo.

Dear Sir:

This department is in receipt of your letter of June 25 wherein you present the following statement of facts and request our opinion regarding the same:

> "The City of Excelsior Springs, under authority of Sections 6898-A to 6898-D, inclusive, as enacted by the Fifty-seventh General Assembly (extra session) has secured a loan and grant from the Public Works Administration and thereby is proceeding to purchase mineral wells in the city and to construct service buildings for the sale of these waters, giving of mineral water baths, operating a mineral water swimming pool, etc.
>
> "In setting up our accounting system for the operation of this mineral water system, which will not be opened for at least 30 days - we find it necessary to have some determination in relation to the new sales tax law. The provisions of Section 1-A of this Act might be interpreted to subject the City to the payment of such tax.
>
> "Our accountants are very anxious that this question be settled for them as soon as possible. * * * *"

We note that the activity about to be engaged in by the City of Excelsior Springs will not be in actual operation for at least thirty days. The 1935 Session of the Legislature passed a new sales tax act which goes into effect August 27, 1935.

It has been a mooted question, ever since the original Act was passed by the special session of 1933-34, as to whether or not municipalities were included in the word "person" as contained in the Act. The word "person" as defined in the Act is as follows: (Laws of Mo. 1933-34, Extra Session p.156)

> "'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

In a recent decision of the Circuit Court of Cole County, Missouri in the case of City of Webster Groves v. Forrest Smith it was ruled that municipalities were required to pay the tax under the Act of 1933-34.

In passing the new Occupation Tax Act the Legislature has seen fit to define the word "person" as follows:

> "'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal or private, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

Thus, it will be noted by the above definition as contained in Sec. 1 of the new Act, that there can be no doubt as to the intention of the Legislature to include municipalities therein. We shall therefore consider your question solely from the standpoint of the Act of 1933-34.

The State of Kentucky in its sales tax act defines the word "person" to include any individual, co-partnership, association, corporation, trust or other form of business organization not therein enumerated, regardless of whether or not similar to those enumerated. This definition is similar to the definition of the word "person" as contained in the Missouri Act of 1933-34.

The Supreme Court of Kentucky in the case of City of Covington v. State Tax Commission, 77 S.W. (2d) 386, in discussing the question of whether or not municipalities were embraced in the act, said (l.c. 390, 391):

> "* * *But it is insisted that the language of the statute itself is insufficient to embrace municipalities, or charitable and educational institutions when engaged in the business or activity of merchants or sellers of the commodities taxed. That position is put forward because it is argued that the word 'person' does not embrace municipal corporations, or the other institutions referred to, and therefore none of them may be made to account for the tax, nor are they required to collect it from their purchasers in transactions that they may make as sellers or merchants. As a general rule such contention is sustained by text-writers and opinions, but there are well-recognized exceptions thereto, one of which is that if the entire provisions of the statute being construed indicate that municipalities and other institutions were intended to be embraced, then courts should give the statute that construction, and it is argued that the definition given in the statute is itself broad enough to embrace them. The act under consideration (section 2) defines 'merchant' as 'a person regularly engaged in the vending of tangible personal property'. It then defines the word 'person' as 'including any individual, co-partnership, association, corporation, trust or other form of business organization, regardless of whether or not enumerated here and regardless of whether or not similar to those enumerated.'
>
> * * *
>
> "Summarizing, our conclusions are: (a) That the tax involved here creates a burden upon the purchaser, or buyer, and is not one borne by the seller or merchant;

> (b) that as merchant or seller municipalities, as well as charitable and educational institutions, are required to charge it and collect it from all customers who are not exempt from paying it, and to account therefor; (c) that municipalities, as buyers of the taxed commodities, must pay the tax as required by the statute upon all purchases made by them, upon the sale of which the levy is made, except those made exclusively for their educational and charitable institutions; (d) that the merchant or seller is exonerated from paying the tax on sales made to charitable and educational institutions, and other classes of buyers who may be exempt from paying it as purchasers; and (e) that such exempt purchasers are the state and its administrative institutions, and also purely educational, eleemosynary, and charitable institutions, as well as purely federal activities. The judgment appealed from harmonizes with our conclusions, with the single exception that it exonerated charitable, eleemosynary, and educational institutions from collecting or accounting for the tax when engaged in the activity of merchant or seller, but which we have herein determined was and is erroneous."

Other cases bearing on this question, but which we will not burden this opinion with quotations therefrom, are Orange State Oil Co. v. Amos, 100 Fla. 884, 130 So. 707; City of West Palm Beach v. Amos, 100 Fla. 891, 130 So. 710; United States v. Perkins, 163 U.S. 625, 16 S. Ct. 1073, 41 L. Ed. 287; Texas Company v. Brown, 258 U.S. 466, 42 S. Ct. 375, 66 L. Ed. 721; City of Portland v. Kozer, 108 Or. 375, 217 P. 833; Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S.W. 753; and Pierce Oil Corporation v. Hopkins, 282 F. 253.

CONCLUSION

It is the opinion of this department that water, constituting tangible personal property, when sold by the City of Excelsior Springs, a municipality, is subject to a tax of one-half of one per cent on the gross sales thereof. As to the mineral water baths, we are of the opinion that the gross receipts on this item are not subject to the tax for the reason that sales from same constitute sales of services, which is not specifically designated as taxable under Sec. 2-A of the Act. For the same reason we are of the opinion that the receipts from the operation of a mineral water swimming pool are not subject to the tax.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

SMALL LOAN LAW: Licensees under Small Loan Law permitted to accept real estate as security. Sections 5544 to 5564, R. S. 1929.

8-28

August 26, 1935.

FILED
64

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This is to acknowledge receipt of your letter of August 12, 1935, in which you request the opinion of this Department "as to whether or not licensees under Article VII, Chapter 34, Revised Statutes of Missouri, 1929, are prohibited from accepting mortgages on real estate as security for loans made under the provisions of said Article."

The "Small Loan Act" is found in Sections 5544 to 5564, inclusive, Revised Statutes of Missouri, 1929, and provides for the regulation of the small loan business.

Said act provides that those who are engaged in the making of loans of $300.00 or less are required to be licensed, bonded, examined and supervised by the Commissioner of Finance of the State of Missouri. Each licensee is required to keep records and to give borrowers receipts for payments and a clear statement of the terms of the contract; other regulatory features are contained in the act. The maximum rate of interest in Missouri is two and one-half per cent. per month on all outstanding balances. The act further provides for criminal penalties for any violations of same.

Section 5556, R. S. Mo., 1929, provides as follows:

> "Every licensee hereunder may loan money, not exceeding in amount the

> sum of $300.00, and may charge, contract for and receive thereon interest at a rate not to exceed two and one-half per centum per month. Interest shall not be payable in advance or compounded and shall be computed on unpaid balances. In addition to the interest herein provided for, no further or other charge or amount whatsoever for any examination, services, brokerage, commission or other thing or otherwise shall be directly or indirectly charged, contracted for or received, except the fees allowed by law actually and necessarily paid out by the licensee to any public officer for filing, recording or releasing in any public office any instrument securing the loan, which fee may be collected when the loan is made or at any time thereafter. No interest or charge in excess of those permitted by this article shall be made, contracted for or received, and if any such is charged, made, contracted for or received, the contract of loan and all evidence thereof and security and lien therefor shall be void and of no effect, and the licensee shall have no right to collect or receive any principal, interest or charge whatsoever of or for such loan."

Section 5557, R. S. Mo., 1929, provides in part as follows:

> "* * *; upon repayment of the loan in full mark indelibly every paper signed by the borrower with the word 'paid' or 'cancelled,' and release any mortgage, * * *."

It will be seen that the act contemplates that security may be given by the borrower, when required, for the loan of any money. Practically all states have adopted what is known as the "Small Loan Law", which has for its purpose the regulation of loans to people of small incomes, and we find upon investigation that in some states under this act it is provided that "no licensee shall take a lien upon real estate as security for any loan made under this act, except such lien as is created by law upon the recording of a judgment."

Nowhere in the act in Missouri is there any restriction that real estate may not be given as security for a loan under the "Small Loan Act." It is, therefore, our opinion that a licensee under the "Small Loan Act" is not prohibited from accepting mortgages on real estate as security for loans under the provisions of Article 7, Chapter 34, Revised Statutes of Missouri, 1929.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

CRH:EG

BANKS & BANKING:)
) Publication of unclaimed deposits, dividends and interest every five years
COMMISSIONER OF FINANCE:) by Commissioner of Finance, under Section 5304 R. S. Mo. 1929.

December 3, 1935.

12-4

FILED
64

Hon. O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This is to acknowledge receipt of your letter of November 25, 1935, in which you request the opinion of this Department on the questions therein submitted. Your letter is as follows:

> "I shall appreciate an opinion from you regarding the manner in which the unclaimed deposits, dividends and interest, reported to this Department by banks and trust companies in accordance with the provisions of Sections 5389 and 5460, Revised Statutes of Missouri, 1929 are to be published by this Department.
>
> "For your information this Department has heretofore, on the specified dates, published in a newspaper in the City of Jefferson in which notices by state officers are required by law to be published and in at least one daily newspaper published in each city of the first class within the state a list containing the full names of the persons entitled to receive such unclaimed deposits, dividends or interest and the names and addresses of the banks and trust companies reporting the unclaimed deposits, dividends or interest; whereas my construction of the provisions of Section 5304 is that this Department is

required to publish only the names of the going banks and trust companies which, according to their last reports, held unclaimed deposits, dividends or interest and the names of the liquidated corporations for the benefit of whose unlocated depositors, creditors, stockholders or shareholders I, as Commissioner, hold deposits, dividends or interest as trustee, together with the full names of the persons entitled to receive such unclaimed deposits, dividends or interest from me, as Commissioner.

"You will observe that under the provisions of Section 5389, applying to banks, and Section 5460, applying to trust companies, the going institutions have already published a list of the names of the persons entitled to unclaimed deposits, dividends or interest within the meaning of these sections and this would appear to justify my conclusion that I, as Commissioner, am now only required to publish the names of the institutions reporting unclaimed deposits, dividends and interest; but that I must publish a list of the names of the liquidated corporations for the benefit of whose unlocated depositors, creditors, stockholders or shareholders I, as Commissioner, hold deposits, dividends or interest as trustee, together with the full names of the persons entitled to receive such unclaimed deposits, dividends or interest from me, as Commissioner.

"Inasmuch as it is necessary to make this publication the second Wednesday in January, 1936, I shall appreciate an early response to this request."

Your request calls for a construction of Section 5304, R. S. Mo. 1929, as to what the duties of the Commissioner of Finance are in said section. It provides as follows:

> "On the second Wednesday in January, nineteen hundred and sixteen, and on the second Wednesday in January in each fifth year thereafter the commissioner shall cause to be published in a paper in the City of Jefferson in which notices by state officers are required by law to be published, and in at least one daily newspaper published in each city of the first class within the state, a list containing the names of the banks, trust companies and private bankers and savings banks which, according to their last reports to him, held unclaimed deposits, dividends or interest, and the names of the liquidated corporations and private bankers for the benefit of whose unlocated depositors, creditors, stockholders or shareholders, the commissioner holds deposits, dividends or interest as trustee, together with the full names of the persons entitled to receive such unclaimed deposits, dividends or interest from the commissioner."

This section provides that the Commissioner of Finance shall on the second Wednesday in January, 1916, and on the second Wednesday in January in each fifth year thereafter publish (1) a list containing the names of the banks, trust companies and private bankers and savings banks, which according to their last reports to him held unclaimed deposits, dividends or interest; and (2) the names of the liquidated corporations and private bankers for the benefit of whose unlocated depositors, creditors, stockholders or shareholders the Commissioner holds deposits, dividends or

interest as trustee together with the full names of the persons entitled to receive such unclaimed deposits, dividends or interest from the Commissioner.

This publication should be made in a paper in the City of Jefferson in which notices by state officers are required by law to be published, and in at least one daily newspaper published in each city of the first class within the State on the second Wednesday in January, 1916, and each fifth year thereafter.

Under the provisions of Section 5389 R. S. Mo. 1929 (applying to banks) and Section 5460 R. S. Mo. 1929 (applying to trust companies), referred to in your letter, reports have theretofore been made to the Commissioner of Finance that is before the publication under Section 5304, supra, and publication been made in the September previous in each fifth year in the county and in the village or city in which bank is situated, of all deposits made in the bank and all dividends declared and the interest accrued upon any of its stock, or other evidences of indebtedness which on the first day of the August preceding such report amounted to $50.00 or over.

According to Sections 5389 and 5460, supra, these unpaid credits in said banks and trust companies etc., having been published according to law, it is unnecessary for you to publish the names of the owners of such credits and it is only necessary for you to publish under the provisions of Section 5304, supra, the names of the banks and trust companies having such unlocated creditors. However, in the case of banks whose liquidation has been completed and reports made according to law to you, in that instance you are required to publish the names of the unlocated depositors, creditors, stockholders or shareholders whose moneys you hold as trustee in the manner provided in said section.

It is, therefore, our opinion that it is only necessary for you to publish the names of the going banks and trust companies, which according to their last reports to you hold unclaimed deposits, dividends or interest,

and in the liquidated corporations or private bankers reported to you it is necessary for you to publish the full names of the unlocated depositors, creditors, stockholders or shareholders for whom you hold deposits, dividends or interest as trustee, together with the names of the liquidated banks.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

CRH:EG

TAXATION: Refund to purchaser at void sale payable from County Treasury.

12-23

December 21, 1935.

FILED
64

Honorable Merrill E. Montgomery
Prosecuting Attorney
Milan, Missouri

Dear Sir:

Acknowledgment is herewith made of your request for an opinion of this office on the following matter:

> "In the fall of 1934 the County Treasurer of Sullivan County acting as Ex-Officio County Collector sold certain lands for delinquent taxes in accordance with the provisions of the Session Acts of 1933, Secs. 9945-9963e, pages 425 to 449. In one case it was later discovered that the Township Collector had by error marked one tract delinquent; in another instance a purchaser objects to his tax certificate some 12 months after the sale on the grounds that the description under which the lands were sold was so imperfect as to fail to describe the land or lots with reasonable certainty.
>
> Relying upon Sections 9958a and 9958b, p. 441, the County Court made an order to refund the bids to the holders of the above tax certificates. The Treasurer had distributed this money among the various funds, such as, road and bridge funds, county revenue fund, special road district and school funds to the particular districts. The County Court order did not instruct the Treasurer as to what fund or funds this amount should be taken from; the statute, sec. 9958b merely directs the county treasurer to refund the purchaser the amount of his bid, with interest in two instances, out of the county treasury, on order of the county court.

> The County Treasurer is at a loss to know where this money should be drawn from, i. e. should it come out of the general revenue fund, or should it be deducted in proportionate amounts from the various funds into which the original purchase money was distributed? If it is the latter plan, then the collector will have to show in his next settlement that certain funds are to be deducted from the various items to be distributed among his various funds among the various subdivisions. It has also been suggested that the county court set out of the county revenue fund an amount to pay these items, then next year when these land descriptions have been corrected and resold for taxes, this amount could be restored to the county revenue fund and thus avoid complications in the settlements. In the opinion of your office what would be the proper manner in which to handle this matter under the present law?"

Section 9958b, page 441, Laws of Missouri 1933, reads as follows:

> "No sale or conveyance of land for taxes shall be valid if at the time of being listed such land shall not have been liable to taxation, or if liable, the taxes thereon shall have been paid before sale, or if the description is so imperfect as to fail to describe the land or lot with reasonable certainty and for the first two enumerated causes, the money paid by the purchaser at such sale shall be refunded, with interest, out of the county treasury, on order of the county court."

The only direction provided for above is that the money should be refunded to the purchaser "out of the county treasury". There is no time limitation contained in the act limiting the time within which claims for refund must be made. It therefore appears that it was the intention of the legislature to insure any purchaser that in the event it was impossible for him to collect the tax from the taxpayer because the tax had theretofore been paid or because the description did not identify any tract of land, that the purchaser would receive a refund of the amount paid the county for such certificate with interest on his money.

There seems to be no similar provisions of any previous Missouri law which has been construed by our Appellate Courts. However, in the case of Spalding Manufacturing Company vs. Board of Commissioners of LaPlatta County, 168 Pac. 84, the Supreme Court of Colorado passed upon a similar provision of the Colorado law, Section 5750 Revised Statutes 1908, and held that the failure of the County Collector to pay the money over to the County did not defeat the right to a refund which was to be paid from the county treasury. In the case of Tisdale vs. Ward County, 127 N. W. 512, the Supreme Courtof North Dakota construed Section 1585 Revised Codes 1905, which provided for a refund out of the County Treasury of any amount paid on an order from the County Auditor, but also provided:

> "And a pro rata share of the money so refunded shall be charged to the State and to any incorporated city, town, village or school corporation which it may have received any part of such void tax."

Thus the Legislature of North Dakota gave specific and adequate instructions as to the manner in which the county was to obtain reimbursement for sums which might be advanced by the County and in equity and common justice should be paid by the other taxing districts. We cannot say what the Missouri Legislature may have had in mind by requiring the county to refund the sums paid as provided for in Section 9958b, but at any rate the Legislature has specifically directed that these sums be paid out of the County Treasury and has made no provision whatsoever for charging any proportionate part to school districts, road districts or other taxing bodies. No provision has been made for the charging of any proportionate part of this to the various districts involved.

We are of the opinion that it is proper for the County Court to refund the required sums from the County Treasury, which sums may later be repaid to the County in the event taxes are subsequently recovered by virtue of a sale of the land taxed by a proper description.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

COUNTY SUPERINTENDENT OF SCHOOLS: A person who has not taught or supervised schools as his chief work at least two or the eight years next preceding his election, or has not spent the two years next preceding his election as a regular student in a state teachers' college or university cannot qualify as County Superintendent of Schools.

3-27-35

March 25, 1935.

FILED
65

Hon. Arthur C. Mueller,
Prosecuting Attorney,
Gasconade County,
Hermann, Missouri.

Dear Sir:

This department is in receipt of your letter of March 12 wherein you request an opinion on the following question:

> "Can a person qualify if elected county superintendent of schools if he has not taught school for the past ten years? The party has had 27 years experience in teaching and supervising public schools and holds college degrees, also bearing a life certificate to teach in the public schools of the State of Missouri."

The statute in relation to the qualifications of a county superintendent of schools is Section 9454, R.S. Mo. 1929, and the pertinent part relating to your question is as follows:

> "There is hereby created the office of county superintendent of public schools in each and every county in the state; the qualified voters of the county shall elect said county superintendent at the annual district school meeting held on the first Tuesday in April, 1923, and every four years thereafter; said county school superintendent shall be at least twenty-four years old, a citizen of the county, shall have taught

> or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment; or shall have spent the two years next preceding his election or appointment as a regular student in a state teachers' college or university, and shall at the time of his election hold a diploma from one of the state teachers colleges or state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent; ****"

We construe the statute to compel every county superintendent of schools to be at least twenty-four years of age, a citizen of the county, and shall have taught or supervised schools as his chief work during at least two or the eight years next preceding his election or appointment, or shall have spent the two years next preceding his election as a regular student in a state teachers' college or university.

In addition to the above qualifications, a county superintendent of schools must possess one of the following three alternatives:

(1) He shall at the time of his election hold a diploma from one of the state teachers' colleges or state university;

(2) He shall hold a state certificate authorizing him to teach in the public schools of Missouri; and

(3) Shall hold a first grade county certificate authorizing him to teach in the county in which he is superintendent.

In the case which you present the party holds college degrees and possesses a life certificate to teach in the public schools of the State of Missouri. Undoubtedly this would qualify him under the three alternatives set out above as to educational qualifications.

A decision relating to a teacher's certificate as a qualification is discussed in the case of State v. Hollowell, 233 S.W. 405:

"**** The cause was submitted to the trial court upon an agreed statement of fact, from which it appears that respondent's only insistence is that appellant did not possess the statutory qualifications to hold the office because the certificate held by her did not comply with either of the three alternative qualifications prescribed in Acts of 1911, p. 404, as follows:

> 'And shall at the time of his election hold a diploma from one of the state normal schools or teacher's college or the state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade certificate, authorizing him to teach in the county of which he is superintendent.'

It is contended by respondent that said certificate, so issued to appellant by the board of regents of the state normal school, authenticated by the state superintendent of schools, is not a 'state certificate authorizing him to teach in the public schools of Missouri.' This contention presents the only question for decision.

* * *

The certificate held by appellant emanated from the state by statutory authority and authorized her to teach in the public schools of Missouri, and said certificate is therefore a state certificate, within the meaning of the qualifying statute. It follows that appellant at the time of her election was qualified to hold the office, and that the judgment of ouster rendered by the circuit court of Schuyler County should be and is reversed, and the cause remanded with directions to enter its judgment quashing the information."

CONCLUSION

As hereinabove stated, it appears that the person who is a candidate for County Superintendent of Schools, as mentioned in your inquiry, holds the necessary educational qualifications; also, the qualifications as to age and citizenship, but lacks the statutory elements of qualification in that he has not taught school or supervised schools as his chief work during at least two of the eight years next preceding his election or appointment, nor has he fulfilled the requirements of the other alternative, "shall have spent the two years next preceding his election or appointment as a regular student in a state teachers' college or university." Lacking such qualification, it is the opinion of this department that the person you mention in your letter could not qualify as County Superintendent of Schools in the event he is elected to that office.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

STATE TAX COMMISSION: Commission to assess busses of electric light and power company, operated in lieu of street cars as distributable property; also franchise of said electric light and power company.

5-7

May 3, 1935.

FILED
65

State Tax Commission of Missouri
Jefferson City
Missouri

Att: Hon. Andrew J. Murphy
Commissioner.

Gentlemen:

This is to acknowledge receipt of your letter which reads as follows:

> "The Tax Commission would like a ruling from you on the following question:
>
> "Does the State Tax Commission continue to assess the distributable property of the busses run by the Power Company here in Jefferson City in place of the former Street Railway Company?
>
> "Our understanding is that the Missouri Power and Light Company is operating these busses in lieu of street cars under their old street railway charter or franchise and we are inclined to believe that as long as it continues to operate under this corporation that the property of this company and franchise of the corporation should be re-reported to the Tax Commission for assessment.
>
> "There are a number of other companies in the State that have substituted busses for street railways and are operating in a similar manner.
>
> "Please advise us of your opinion of the law in the matter, and obliged."

We direct you to applicable statutes and authorities.

Section 9854, R. S. Mo. 1929, in subdivision 6, provides:

> "(6) The commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms now possessed and exercised by the state board of equalization. Said commission shall also have all powers of original assessment of real and personal property now possessed by any assessing officer, subject only to the rights given by the Constitution to the state board of equalization."

We contemplate from the above subdivision of the statute that the State Tax Commission shall have the power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, and express companies, and other similar public utility corporations, companies and firms now possessed and exercised by the state board of equalization. In light of this subdivision, we are of the opinion said tax commission has exclusive assessing power and having such power shall assess busses of electric light and power company as distributable property of said company.

Section 10009, R. S. Mo. 1929, provides:

> "The franchises (other than the right to be a corporation) of all railroad, street railroad, bridge, telegraph, telephone, conduit, water, electric light and gas companies, and of all other similar corporations owning operating and managing public utilities, and of all quasi public corporations

possessing special and peculiar privileges and authorized by law to perform any public service (except corporations formed for religious, educational and benevolent purposes) shall be assessed for the purpose of taxation at the same time and in the same manner as other property of such corporation is now or may hereafter be required to be assessed; and there shall be levied upon the assessed value of such franchise the same rate of taxation as may be levied upon other property of such corporation. Said tax shall be due and payable, and like proceedings may be had to collect the same, and when collected it shall be disposed of in the same way as the taxes imposed upon the other property of such corporation."

Section 10066, R. S. Mo. 1929, Laws of Mo. 1933, page 422, provides:

"All bridges over streams dividing this state from any other state owned, controlled, managed or leased by any person, corporation, railroad company or joint stock company, and all bridges across or over navigable streams within this state, where the charge is made for crossing the same, which are now constructed, which are in the course or construction, or which shall hereafter be constructed, and all property, real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state boards of equalization are hereby required to perform the same duties and are given the same powers in assessing, equalizing

> and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; and the president or other chief officer of any such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, or express company, or the owner of any such toll bridge, is hereby required to render statements of the property of such bridge, telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, or express companies in like manner as the president, or other chief officer of the railroad company is now or may hereafter be required to render for the taxation of railroad property.

It is obvious from the wording of the above two sections of the statutes that the franchise of said company mentioned in your letter or any companies coming within the purview of this section shall be assessed in like manner as the property of any railroad company is now assessed.

Section 10018, R. S. Mo. 1929, provides:

> "On or before the first day of January in each year, the president or other chief officer of every street railroad company in every city of this state whose line is now or shall hereafter become so far completed and in operation as to run horse cars, electric cars, cable cars or cars propelled by any other device for the transportation of passengers, shall furnish to the state auditor a statement, duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail the full length of the line, so far as completed, included branch or leased lines, the entire length in this state, the length of double or sidetracks,

> the length of such line located upon real estate to which such company may have title as right of way, the length of such line located upon the public streets or thoroughfares of any city, together with all cars, motors, grip cars, live stock, electric trolley wires, cables, cable conduits, power houses, stables and all other property, real personal or mixed, owned, used or leased on the first day of June, which may be used in or incident to the operation of such street railroad, the length of such line in each county, municipal township and city through or in which it is located, and the cash value of the several items embraced in the statement."

Section 10019, R. S. Mo. 1929, provides:

> "The said property returned to the state auditor, as by section 10018 required, shall be subject to taxation for state, county, municipal and other purposes to the same extent as the real and personal property of private persons, and the same shall be assessed, apportioned, certified and the taxes thereon levied and collected at the time and in the manner which is now or may hereafter be provided by law for the assessment and taxation of other railroad property.

Section 10020, R. S. Mo. 1929, provides:

> "It being the purpose of the two preceding sections to make the property of street railroads in cities assessable and taxable in the same manner which is now or may hereafter be provided by law for the assessment and taxation of other railroad property all laws and parts of laws inconsistent or in conflict therewith are hereby repealed."

In the case of State ex rel. School District v. Haddill, 330 Mo. 1118, loc. cit. 1123, the Court said in construing the above sections:

"(2) Under the provisions of the three sections just referred to and quoted in part, it is too plain to admit of controversy that all the property of a street railroad company, used in or incident to the operation of its street railroad, is to be assessed, apportioned, certified and the taxes thereon levied, in the manner provided by law for the assessment and taxation of other railroad property. *****"

Section 10012, R. S. Mo. 1929, provides:

"On or about the first day of January in each and every year, the president or other chief officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state auditor a statement duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, incbrporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of June in each year, and the actual cash value thereof."

The Court in State ex rel. School District v. Waddill, supra, in further construction of the statutes above cited, at pages 1125 and 1126, said:

"(4) A reading of the three sections

relating to the assessment and taxation of the property of street railroad companies in connection with those prescribing the method for the assessment and taxation of the property of other railroad companies leaves no doubt but that the property of the former, as described in said Section 10018, is required to be 'assessed, apportioned, certified and the taxes thereon levied' in the manner prescribed for the assessment and taxation of the distributable property of the latter. *****

CONCLUSION.

In light of all these statutes when read together, it is the opinion of this department that such of the properties of the electric light and power companies and particularly of the properties of the company mentioned in your letter as may be used distributably, including franchise of the company mentioned in your letter, or any company, shall be assessed by the state tax commission. It is our opinion that no electric light and power company or any company that is now operating busses in lieu of street cars shall escape assessment of such busses as distributable property.

Yours very truly,

APPROVED:

J. E. TAYLOR
Assistant Attorney-General.

ROY McKITTRICK
Attorney-General.

RCS/JET:afj

FRANCHISE TAX: Capital stock notes not exempted.

6-10

May 20, 1935.

FILED
65

State Tax Commission
Jefferson City, Missouri

Attention of Mr. A. J. Murphy;

Gentlemen:

This department acknowledges receipt of your request for an opinion of this office on the following matter:

> "The Corporation Franchise Tax law in Section 4641 levies a tax on corporations of 1/20 of one per cent of the par value of its outstanding capital stock and surplus, and the courts have construed 'surplus' to mean the difference between the amount of outstanding capital stock and amount of assets, excluding liabilities.
>
> There is a proviso in Section 4641 which says 'bank deposits shall be considered as funds of the individual depositor left for safe keeping, and shall not be considered in computing the amount of tax collectible under the provisions of this article.'
>
> We have interpreted the law to mean that all of a banks assets above deposit liabilities are capital and surplus.
>
> It is our opinion that no deduction can be made from such determined capital and surplus because of the preferred stock or capital notes issued by such banks and owned by the RFC.

> We would like very much to have an opinion from your Department as to whether or not preferred stocks and capital notes owned by the RFC corporation are deductible liabilities under the Corporation Franchise tax law."

Section 4641 Revised Statutes of Missouri 1929, provides in part as follows:

> "For the taxable year of 1929 and thereafter every corporation organized under the laws of this state shall, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its outstanding capital stock and surplus, * * * * * *"

A franchise is a right and a franchise tax is a tax on the right to do business. It is not a tax against the physical property but it is a tax or license exacted by the State because the State permits the party taxed to do business within the state. In the case of State vs. Pierce Petroleum Corporation, reported in 318 Missouri, 1020, the Supreme Court of Missouri says, l. c. 1027:

> "The tax is not a property tax, but an excise levied upon the privilege of transacting business in this state as a corporation. State vs. Tax Commission, 282 Mo. 213."

In the case of State ex rel. Marquette Hotel Investment Company vs. State Tax Commission et al., reported in 221 S. W. at page 721, the Supreme Court of this State in Banc discussed the question you inquire about. At page 722 the opinion therein states as follows:

"It clearly appears, by reference to sections 1 and 2, that the fundamental idea in the mind of the Legislature was that a corporation doing business wholly in this state should be taxed under the provisions of this act upon two things: First, upon the amount of its outstanding capital stock, regardless of the value of its assets, whether more or less than the amount of the outstanding capitol stock; and, second, upon any surplus property employed in its business in this state. The tax is levied not upon the property itself, but upon the right of the corporation to transact business in this state. The references to the amount of the authorized capital stock and to the amount of the surplus are made solely for the purpose of pointing out a method of determining the amount of the tax. It is, of course, obvious that a corporation may be authorized to issue a very limited amount of capital stock, and may, in fact, in the case of a domestic corporation, have outstanding only one-half of the capital stock which it is authorized to issue. But the amount of capital stock outstanding is by no means the measure of the amount of capital which the corporation may use in its business. It commonly happens that, upon the organization of a corporation, all or so much of its capital stock as is required by law to be paid up is paid up, and in addition thereto a sum is contributed by the stock holders as a means of establishing and reinforcing the credit of the corporation. There is no limit to the amount which may be so contributed. A corporation organized and authorized to issue capital stock in an amount not exceeding $2,000 may borrow and employ in its business any sum whatever. The result is that a corporation with a minimum stock subscription may actually employ huge sums of capital in its business. It might well happen that no part of this

> total employed in business, in excess of the amount of the outstanding capital stock, would be surplus in the ordinary acceptation of that term. If this excess were borrowed money, the amount so borrowed would constitute a liability; but the corporation would nevertheless be employing the amount of that liability in business. The money so borrowed, or the property purchased with that money, would be assets of the corporation. The corporation would have the right to use and actually would be using, under its franchise, not only the amount of its outstanding capital stock, but all of the money so borrowed. This it has a right to do, and it is that right which the General Assembly intended to tax by the enactment of the statute here in question."

Continuing, l. c. 723, the opinion says:

> "The Constitution thus declares that taxes shall be uniform and in proportion to the value of the property taxed. (note that it is the value of the property, not the value of the owner's interest therein, that is to be taxed.) These provisions are intended to secure uniformity and equality in taxation, so far as possible, and they apply to all taxpayers, both natural and corporate, and to franchise as well as to property taxes.
>
> Relator contends that its indebtedness should be deducted from its surplus assets for assessment purposes. But is any natural person allowed to deduct his indebtedness from his assets, before giving his property in for assessment for taxation? Not at all. It is well known that this has never been the policy of this state. Now a franchise may be granted to natural persons

> as well as to corporations, and may be taxed when owned by the one as well as when owned by the other. Why should the Legislature be supposed to have intended to depart from the constitutional rule of equality and uniformity merely because this is a franchise tax? It cannot be presumed that the law intends in matters of taxation, to extend to corporations a favor which it denies to natural persons."

At page 726 thereof, on Motion for Rehearing, the Court speaks as follows:

> "A franchise tax is not one levied upon property, but one placed on the right to do business. It may be graduated according to the extent of the business done. The act before us contemplates a tax upon the right to do business in accordance with the property actually used in the business.
>
> Franchise taxes, to be fair, should be measured by the volume of business. The volume can best be measured by the property used in the business. To illustrate, one corporation has $1,000 of its own, and starts a business with it as its capital stock. It keeps within its capital stock. The volume of its business necessity is small. On the other hand, another corporation has $1,000 of its own (in capital stock) and borrows $49,000, and with the $50,000 starts the same kind of business. It should do many times the business of the other, and its tax upon the right to do business should be proportionately greater."

We think the Supreme Court of this State in Banc, in the above case has answered your inquiry to the effect that the Mississippi Valley Trust Company is not entitled to have deduction in the payment of its franchise tax by reason of or on account of the fact that it has as a part of its capital structure $500,000 of capital stock notes held by the Reconstruction Finance Corporation.

The franchise tax is not a tax on the capital stock notes but is a tax on the right of the Mississippi Valley Trust Company to do business, and as is stated in the above opinion, the corporation which only has $1,000 of capital stock and keeps within its capital stock, does a smaller business than the other corporation therein mentioned which has a capital stock of $1,000 and borrows $49,000 and uses the $50,000 with which to operate its business. Likewise, the Mississippi Valley Trust Company in the eyes of reason, and we think the law, by reason of expanding its capital with this $500,000 of capital stock notes does a greater business just as the above corporation who borrows $49,000 would do a greater business. The Supreme Court in the above case says that the corporation which has the larger assets should do many times the business of the other and its tax upon the right to do business should be proportionately greater. As stated in the case of Title Guarantee Loan and Trust Company vs. State, 155 So. 305, by the Supreme Court of Alabama, l. c. 307:

> "In fixing the measure of the excise tax the legislature may and should have regard to the value of the privilege to the taxpayer."

We think that it is immaterial as to who owns the $500,000 capital stock notes, as it is not the capital stock notes which are taxed or upon which a franchise tax is collected, but it is the right of the corporation to do business that is taxed: The value of that right to be measured by the corporation's capital and surplus. The $500,000 of capital notes are a part of the capital structure and should be considered as such in the assessment of the tax. While we do not pass upon the problem as to whether or not the notes themselves are taxable, for the purpose of your inquiry we deem that issue immaterial, for even though a tax might not be levied directly against them it is proper to use and consider them as a part of the capital structure in measuring the amount of tax to be paid by the Trust Company.

The State of Massachusetts exacts a franchise tax somewhat similar to the tax required by the State of Missouri. The question was presented to the Court as to whether it was proper to consider shares of stock of a national bank in measuring the amount of franchise tax. In the case of A. J. Trower Company vs. Commonwealth, 111 N. E. 966, the Supreme Judicial Court of Massachusetts, passing upon this question stated, l. c. 968:

> "The tax levied upon the plaintiff in determining the amount of which these shares were considered is strictly an excise and not a property tax. It is an excise upon the privilege or commodity or franchise of existing and doing business as a corporation* * * *It is no objection to the validity of such an excise tax that in measuring its amount consideration is given to property which could not be taxed, such as government bonds. Com. vs. Hamilton County, 12 Ala. 298. Affirmed in 6 Wahl, 611, 18 L. Ed. 907."

And at l. c. 969 it is held:

> "The franchise tax upon the plaintiff not being a tax upon property is not taxation upon its shares of national bank stock."

In order to avoid misunderstanding that might arise we call attention to the fact that this opinion is written concerning the Franchise Tax and the opinion written by this Department on February 19, 1935 to your Commission, concerned the Ad Valorem Tax.

Our conclusion is that preferred stocks and capital notes owned by the Reconstruction Finance Corporation are not deductible liabilities under the corporation franchise tax law and that in the instant case no deduction should be made on account of the $500,000 capital stock notes held by the Reconstruction Finance Corporation in assessing and collecting the corporation franchise tax.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:MM

JUSTICE OF THE PEACE: Transcript in criminal case may be filed with Circuit Clerk as in civil cases.

6-15

June 6, 1935.

FILED
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Hon. Joseph W. Myers,
Justice of the Peace,
Sikeston, Missouri.

Dear Sir:

This will acknowledge receipt of your request for an opinion of this office reading as follows:

"I am enclosing herewith, a transcript of judgement for cost, renderd in a criminal case, Also the Circuit Clerks' letter.

"I filed the transcript with the Circuit Clerk, and asked for a execution to Dunklin County, See Clerks reply.

"On the advice of H. C. Blanton, U. S. Atty, I am refering this to you as the Attys here are unable to find a specific instruction in the Law for such cases made and provided. Mr. Blanton says your opinion wil prevail in the matter.

"You wil understand, The Pros. witness against whom the Judgement is renderd, J. Mott Douglass lives at Kennett, Dunklin County, Missouri, and out of the jurisdiction of the Scott, J. P. Court.

"I thank you in advance for your kind consideration in the interest you wil take in assisting us Petty Officers in collecting our cost."

You do not state whether the charge lodged against the defendant involved property of the value of more than Thirty Dollars, and so far as your statement of facts indicates we are unable to determine whether it is a misdemeanor or a felony charge.

Section 3444, R. S. Missouri 1929, provides, among other things, as follows:

> "In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint."

Your records indicate that the prosecution was instituted on complaint of the prosecuting witness J. Mott Douglass, and that the proceedings were dismissed on January 17, 1935, and that the costs were adjudged and taxed against said prosecuting witness Douglass.

In the case of State ex rel. vs. Justices of Buchanan County Court, 41 Mo. 254, the Supreme Court of this State stated:

> "The judgment for costs in every criminal case when there is a conviction, necessarily follows as a part of the punishment inflicted."

Section 11809 R. S. Missouri 1929, provides:

> "Justices of the peace may issue fee bills for all services rendered in their courts, and if the person chargeable shall neglect or refuse to pay the amount thereof to the constable or proper officer, within twenty days after the same shall have been demanded by such officer, he may and shall levy such fee bills on the goods and chattels of such person, in the same manner and with like effect as on a fieri facias."

"Fieri facias" is defined in Bouvier's Law Dictionary as:

> "A writ directing the sheriff to cause to be made of the goods and chattels of the judgment debtor the sum or debt recovered. It is the form of execution in common use in levying upon the judgment debtor's personal property."

Section 3446, R. S. Missouri 1929, provides:

> "All proceedings upon the trial of misdemeanors before justices of the peace shall be governed by the practice in criminal cases in courts of record, so far as the same may be applicable, and in respect to which no provision is made by statute."

Section 3829, R. S. Missouri 1929, provides that every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be adjudged to pay all costs if the defendant is acquitted although he may not be entitled to any part of the same. This latter section, we think, does not apply to the matter about which you inquire.

Section 3510, R. S. Missouri 1929, states:

> "When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in Section 3505, the person who made such affidavit shall be deemed the prosecuting witness * * * and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for costs in the case not otherwise adjudged by the court, * * *"

This last section applies to felonies.

Section 4471, R. S. Missouri 1929, defines a felony and says that it is:

> "* * * any offense for which the offender, on conviction, shall be liable by law to be punished with death or imprisonment in the penitentiary, and no other."

Section 4473, R. S. Missouri 1929, states:

> "The term 'misdemeanor', as used in this or any other statute, shall be construed as including every offense punishable only by fine or imprisonment in a county jail, or both."

A person may sue on a domestic judgment against the judgment defendant within the time it is enforceable by execution. See Sheehan & Loler Transp. Co. v. Sims, 28 Mo. App. 66, and 25 Mo. App. 12.

The chapter on executions under the justices of the peace statute limits the right of an execution issued from the justice of the peace court to levies within the County. (Article V of Chapter 10.)

Section 1144, R. S. Missouri 1929, provides:

> "When a transcript of a judgment rendered by a justice of the peace shall have been filed in the office of the clerk of the circuit court of the county where such judgment was rendered, a transcript of the record thereof, certified by the clerk of such court * * * may be filed, docketed and recorded in the office of the clerk of the circuit court of any other county, in the same manner as is provided in this article for filing, docketing and recording judgments of courts of records; and upon such filing, the judgment shall be a lien upon the real estate of the person against whom the judgment was rendered, situate in the county where such certified transcript is filed."

Section 1145, R. S. Missouri 1929, provides:

> "The lien created by this article shall exist to the same extent and for the same

> time only as the lien of the judgment or decree in the county where the same was rendered; and a transcript of a judgment or decree reviving a judgment or decree, or the lien thereof, may be filed, docketed and recorded in the same manner and with like effect as an original judgment or decree."

Section 1152, R. S. Missouri 1929, provides:

> "The party in whose favor any judgment, order or decree is rendered, may have an execution in conformity therewith."

Section 1153, R. S. Missouri 1929, provides:

> "Such execution shall be a fieri facias against the goods, chattels and real estate of the party against whom the judgment, order or decree is rendered * * *"

Section 1157, R. S. Missouri 1929, provides:

> "Any party entitled to an execution from a court of record may have it directed as provided in the preceding section, or, at his option, he may have it directed to any sheriff in the state of Missouri; * * *"

Section 1156, R. S. Missouri 1929, also bears on the same question.

A judgment is a contract and so regarded in the law, and a judgment for costs in a criminal case is a debt and collection thereof is governed by the rules pertaining to the collection of civil matters.

In 33 Corpus Juris, 1056, the law is stated as follows:

> "The cases are numerous in which judgments have been declared to be contracts or debts of record, or specialties. It is only by a legal fiction, however, and for the purpose of enforcing the obligation by contractual remedies, that judgments can be

> considered as contracts. Thus an action on a judgment is an action on a contract, irrespective of the nature of the original transaction on which the judgment was founded, and the same provisional remedies may be had as in an action upon an express contract." St. Louis Type Foundry Co. vs. Jackson, 128 Mo. 119; McElroy vs. Ford, 81 Mo. App. 500.

In the case of Lawrence vs. Martin, 22 Calif. 173, it is held that a judgment rendered upon an unassignable cause of action for a tort is a debt, and in the Alabama case of Anniston v. Hurt, 140 Ala. 394, 37 S. 220, 103 Am. St. Rep. 45, it is held that a judgment is a debt although it was obtained in an action for a personal injury.

In the case of Gray vs. Ferreby, 35 Iowa 146, and also of Blose v. Smith, 14 Pa. Dist. 75, it is held that a judgment for costs is a debt.

Section 2300, R. S. Missouri 1929, provides for the procuring of a transcript from the Justice Court of a judgment.

In the case of Carter vs. Exposition Company, 124 Mo. App. 530, it is held that the transcript when filed with the Circuit Clerk for many purposes has the same dignity as that of the court's own judgment and is under its control.

CONCLUSION

We think that if a certified copy of the judgment is filed with the Clerk of the Circuit Court of the County in which the judgment was rendered in the Justice Court and the proper fee is tendered him, that it is his duty to file and record the judgment in his records and that thereupon the interested party may have a certified copy thereof

filed in the office of the Clerk of the Circuit Court of the County where the judgment debtor resides, and that thereupon it becomes a lien against his real property and may be enforced by execution.

Respectfully submitted,

DRAKE WATSON
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

DW:MM

COUNTY BOUNDARIES: Not changed by avulsion.

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FILED
65

June 10, 1935.

Mr. Arthur C. Mueller,
Prosecuting Attorney,
Gasconade County,
Hermann, Missouri.

Dear Sir:

This will acknowledge receipt of your letter which is as follows:

"Pursuant to our conversation with you on Thursday, May 9, relative to the Mr. Sam Heckmann's Island located in the Missouri River between Gasconade and Montgomery counties desire to have you give me your opinion on the question: In what County is this island located and which county is entitled to the taxes for said Island?

"The facts are:

"Mr. Heckmann purchased the island from the Gasconade County Court in 1922 and has paid his taxes to Gasconade County up to and including 1933. He has the signatures of 15 competent rivermen including licensed pilots that 5 years previous to his purchase the thread of the channel of the Missouri River was on the north side of this island. He has maps to show that the channel had not changed in 1926, also a letter from a licensed pilot of an official channel forcasters the U. S. Snagboat, Missouri, that the channel was still on the north side of said Island in the fall of 1927.

"The U. S. Eng. Dept. built a system of Dikes west and across the head of this

> Island in 1928, and since had dredged the south side on three different occasions. During the period of construction, gaps were left in two dikes immediately west of the island, due to lack of water on the south side. Due to this Government construction work the channel has changed to the south side.
>
> "With the river at an 8 ft. stage on the gauge at Hermann, Missouri, water still courses through between the north side of the island and the Montgomery County shore.
>
> "I am enclosing herewith an official Government survey of this island and the river, which may assist you in this matter."

We construe your inquiry to be that, assuming that no change has been made in the county boundaries except by the actions of the Missouri River, has such disputed tract been transferred from Gasconade to Montgomery County.

Land formed by accretion belongs to the riparian owner against whose bank it is deposited and is governed by the same rights of ownership that pertain to the mainland of such riparian owner.

> Benne v. Miller, 149 Mo. 228;
> Widdecombe v. Chiles, 173 Mo. 195;
> McCormack v. Miller, 239 Mo. 463.

The latter case was in ejectment involving fifteen acres of land on Salt River which formed the northern boundary. The channel of the river moved to the south, forming land on the other side of the river. The fifteen acres were formed over a period of seventeen years. The court said:

> "A running stream, forming the boundary line between contiguous lands, continues to be such boundary line, although the channel may change, provided the change is by the gradual erosion and cutting away of its banks and not by a sudden change leaving the old channel and forming an entirely new and different channel. (Cases cited.) In determining whether a riparian owner has title to land in controversy by

> accretion, the length of time in which it is in course of formation is of no importance. If it is formed by a gradual, imperceptible deposit of alluvion, it is accretion; but if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not accretion and the boundary line remains the same as before the change of the channel."

The statutes in force at the time of the adoption of the Constitution of 1875, now Sections 11919 and 11955, R. S. Mo. 1929, made "the middle of the main channel of the Missouri River" the boundary between Montgomery and Gasconade Counties.

As affecting county boundaries, the Constitution, Article IX, contains these provisions:

> "Section 1. The several counties of this State, as they now exist, are hereby recognized as legal subdivisions of the State.
>
> "Section 3. No county shall be divided or have any portion stricken therefrom without submitting the question to a vote of the people of the county, nor unless a majority of all the qualified voters of the county or counties thus affected, voting on the question, shall vote therefor; * * *"
>
> "Section 4. No part of the territory of any county shall be stricken off and added to an adjoining county without submitting the question to the qualified voters of the counties immediately interested, nor unless a majority of all the qualified voters of the counties thus affected, voting on the question, shall vote therefor. * * *"

It will be noted that the north boundary of Gasconade County and the south boundary of Montgomery County are one and the same line, to-wit, the middle of the main channel of the Missouri River.

Section 12005, R. S. Mo. 1929, is as follows:

> "Whenever a county is bounded by a water-course, it shall be construed to be the middle of the main channel thereof; and range, township and sectional lines shall be construed as conforming to the established surveys."

In the case of State ex inf. Mansur v. Hoffman, 318 Mo. 991, the Supreme Court had under consideration a set of facts and a controversy very similar to your inquiry. In discussing where the middle of the main channel of the Missouri River was with reference to fixing or ascertaining the line between two counties in that case, the court said, l. c. 994:

> "For there is nothing in the language of either the statute or the Constitution to indicate that the framers in the one case or the Legislature in the other intended to alter or abolish the rules of the common law relating to running water as a boundary. In dealing with questions touching such a boundary, the Supreme Court of the United States has uniformly applied those rules (which are the same as those of the civil law and the law of nations), whether the boundary was one fixed by treaty or by Act of Congress. (Missouri v. Kentucky , 11 Wall. 395; Nebraska v. Iowa, 143 U. S. 359; Missouri v. Nebraska, 196 U. S. 23; Washington v. Oregon, 211 U. S. 127.)
>
> "For a statement of the rules referred to in the preceding paragraph we cannot do better than quote from the opinion of Mr. Justice Brewer in Nebraska v. Iowa, supra, at page 360:

"'It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. In New Orleans v. United States, 10 Pet. 662, 717, this court said: "The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." (Citing cases.)

"'It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said: "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates." (Citing cases.)

"'These propositions, which are universally recognized as correct where the boundaries of private property touch on streams are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the centre of the channel. Avulsion has no effect on

boundary, but leaves it in the centre of the old channel.'

"After quoting in part an opinion of Attorney-General Cushing in which were reviewed the authorities not only of the common law but of the civil law and the law of nations as well, the opinion proceeds:

"'The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying centre of the channel, and that avulsion would establish a fixed boundary, to-wit: the centre of the abandoned channel. It is contended, however, that the doctrine of accretion has no application to the Missouri River on account of the rapid and great changes constantly going on in respect to its banks; but the contrary has already been decided by this court in Jefferis v. Land Company, 134 U. S. 178, 189. A question between individuals, growing out of changes in the very place now in controversy, was then before this court; and in the opinion, after referring to the general rule, it was observed: "It is contended by the defendant that this well settled rule is not applicable to land which borders on the Missouri River, because of the peculiar character of that stream and of the soil through which it flows, the course of the river being tortuous, the current rapid, and the soil a soft, sandy loam, not protected from the action of water either by rocks or the roots of trees; the effect being that the river cuts away its banks, sometimes in a large body, and makes for itself a new course, while the earth thus removed is almost simultaneously deposited elsewhere, and new land is formed almost as rapidly as the former bank was carried away. But it has been held by this court that the general law of accretion is applicable to land on the Mississippi River; and, that being so, although the changes on the Missouri River are greater and more rapid than on the Mississippi,

> the difference does not constitute such a difference in principle as to render inapplicable to the Missouri River the general rule of law."'
>
> "For a further review of the common law authorities see Fowler v. Wood, 73 Kan. 511, and Bellefontaine Co. v. Niedringhaus, 181 Ill. 426.
>
> "The rules of law which fix the rights of the parties where a river changes its course by gradual, insensible accretions, and those which obtain in cases where, by what is called avulsion, the course of a river is materially and permanently changed, as laid down by the authorities cited and quoted from, have always been given recognition by this court."

To the extent that the case of Northstine v. Feldmann, 298 Mo. 364, conflicts with the views in the case of State ex inf. Mansur v. Hoffman, supra, the court overrules the Northstine case.

Continuing, l. c. 996, the court says:

> "At common law such a boundary is more or less migratory, in that it may shift with the gradual shifting of the stream due to imperceptible changes occasioned by accretion and reliction on its banks, as has been heretofore pointed out. Now the boundary between Franklin and Warren counties was originally fixed by statute. The Constitution merely confirmed the boundary as defined by the statute and made it impossible for the Legislature to change it without the consent of the people of the two counties. But the statute must be construed agreeably to the principles of the common law, nothing appearing in its context or otherwise to indicate the contrary.
>
> "'Statutes are but a small part of our jurisprudence. The principles of the common law pervade and permeate everything which is subject to legal regulation. Such law defines

> rights and wrongs of every description and the remedies for public and private redress. By its principles statutes are read and construed. They supplement or change it, and it adjusts itself to the modification and operates in conjunction and harmony with them. If words from its vocabulary are employed in them it expounds them. If the statutes are in derogation of it, it yields and bides its time; if they are cumulative, it still continues. Rules of interpretation and construction are derived from the common law, and since that law constitutes the foundation and primarily the body and soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles.' (2 Lewis-Sutherland on Stat. Cons. (2 Ed.) sec. 453.)
>
> "The Northstine case, to the extent of the holding just referred to, should be and is overruled."

See, also, the case of Randolph v. Moberly Hunting & Fishing Club, 15 S. W. (2d) 834.

CONCLUSION

If the thread of the stream was at a given time north of the land comprising McGirk's Island and was suddenly by high waters, or by the work of engineers or others, caused to run south of said land (said land or substantial portions thereof remaining intact and not being washed away by the gradual and imperceptible cutting and depositing of particles of soil, sand, gravel, etc.), then the jurisdiction of Gasconade County over said land continues as though the river continued to run north of the said land.

Yours very truly,

DRAKE WATSON
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

DW:HR

PROBATE COURT: Probate judge may sit in case in which he is witness to will unless there be objection in writing, verified by affidavit filed on behalf of any party in interest.

6-21

June 21, 1935.

FILED
65

Hon. Lee Mullins,
Prosecuting Attorney,
Atchison County,
Rockport, Missouri.

Dear Sir:

This department is in receipt of your letter of May 25 requesting an opinion as to the following state of facts:

> "Our Probate Judge, Mr. S.F. Weir, has asked me to request that you give him an opinion, (or may be a better term would be to say directions) on just how to proceed in the situation here detailed, viz:
>
> "Several years ago Mr. Weir was asked to sign a man's will as witness to its execution, which he and one other person signed as such witness; just a few days ago, and since he became Judge of Probate in this county, said will was presented for probate. Now the Judge being called upon to pass upon the matter of the admitting same to probate, he believes that he, being a material witness, would not be qualified to make any order in the matter - rather that the provisions of Sec. 2053, 1929 Statutes would disqualify him. This is the reason for his request.
>
> "While I advised him as to what I think he should do in the matter, he insists that I get your opinion."

Section 2053, R.S. Mo. 1929 provides in part as follows:

> "* * * but no judge of probate shall sit in a case in which he is interested, or in which he may have been counsel or a material witness, or related to either party, or in the determination of any cause or proceedings in the administration and settlement of any estate of which he is or has been executor, administrator, guardian or curator, when any party in interest shall object in writing, verified gy affidavit; * * * "

This section of our statutes was construed in the case of In re Estate of Albert, 80 Mo. App. 557, wherein the Court, at page 561, said:

> "No formal objection was made in this case either in writing or otherwise to the newly elected probate judge acting on the report of sale, but the record shows that all the parties, the executor and heirs and legatees appeared and consented to the certification of the case to the circuit court. The statute is that no such disqualified judge of the probate shall determine any matter in the settlement of an estate, provided a party in interest objects in writing, verified by affidavit, etc., but the statute does not in terms prohibit the judge from so certifying such a case on his own motion. By fair and reasonable implication it recognizes this inherent right, for a disqualified judge ought not to be compelled to violate his judicial conscience by deciding a cause in which he is personally interested or has been of counsel. We therefore overrule the assignment of error that the circuit court was without jurisdiction to decide the matters in controversy."

CONCLUSION

In view of the foregoing, it is the opinion of this department that under the facts as submitted in your letter, the Probate Court has authority to pass upon the matter of admitting the will in question to probate in the absence of any objection in writing, verified by affidavit duly filed on behalf of any party in interest.

This, however, does not mean that the Court may not, because of being a material witness to the will, on its own motion certify the case to the Circuit Court as provided in Section 2053, supra.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH

OLD A[illegible] **ISION:** County Old Age Assistance Board entitled to necessary expenses for meals not to exceed the amount fixed by Old Age Assistance Division.

10-11

October 10, 1935.

FILED
65

Mr. Arthur C. Mueller
Prosecuting Attorney
Gasconade County
Hermann, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "According to Bulletin #4 dated September 21, 1935, issued by the Old Age Assistance Division at Jefferson City, the members of the County Old Age assistance board are allowed only $1.00 per day for meals, which of course is inadequate. Section 3 of the law provides for the payment of the necessary expenses.
>
> "Will you kindly give me your opinion in this matter as to whether the $1.00 ruling or actual expenses incurred will be taken as the basis for payment to the members of the County board."

Section 3 of the Old Age Assistance Act, Laws of Missouri, 1935, page 309, reads as follows:

> "In every county there shall be established a County Old Age Assistance Board, to consist of three persons domiciled in the county, each of whom shall have been a resident taxpaying citizen of the county for a period of five years prior to his or her appointment at least one of whom shall be a woman, who shall be appointed by the county court for a term of four years, except that of the members

first appointed, one shall be appointed for a term of two years and one for a term of three years. Vacancies shall be filled in the same way in which the original appointment was made. The members of the county board shall serve without compensation, except that the necessary expenses incurred while in the performance of their duties shall be paid to them."

It is plain from the above section that members of the county board serve without compensation except that the necessary expenses incurred while engaged in the performance of their duties are to be paid them. The Old Age Assistance Division, in limiting the members of the county board to $1.00 per day for meals, undoubtedly took into consideration the fact that it would be unnecessary for the members of the board to be away from home for more than one or two meals a day. Undoubtedly, they also took into consideration the fact that the appropriation for administering this Act is very limited. Regardless, however, of their reason for limiting the members to $1.00 per day for meals, we think under the provisions of Section 11405, R. S. Mo. 1929, they had full authority to do so. Section 11405, supra, reads as follows:

"Whenever any official, employe or any other person shall travel at the public expense of the state and is paid or reimbursed from any public funds derived from taxes, fees, licenses, or in any other manner prescribed by law, the provisions herein set forth shall govern and no other.

"(a) Before any person shall travel at the public expense as herein provided, such person shall have from the head of the department on whose account the travel is made a written authority stating the nature of the duty to be performed and the counties or places to be visited, provided that in the case of a person whose general duties require traveling a general authority for one year may be issued stating the general duties of such employe.

"(b) This written authority shall state the maximum amount per diem that may be

> expended for board and lodging. The head of the department shall fix this amount at a just and reasonable figure based upon the duties of the person traveling and the nature of the duties to be performed and the state auditor in auditing such an account is hereby authorized to pass upon the reasonableness of the amount allowed by the authority."

Under the above section, the head of a department has the right to fix the amount a person traveling at public expense may expend for board and lodging. The amount, of course, should be just and reasonable and the State Auditor is authorized to pass upon the reasonableness of the amount allowed by the head of a department.

CONCLUSION.

In view of the above, it is the opinion of this department that the members of the County Old Age Assistance Board are only entitled to the necessary expenses incurred for meals while performing their duties not to exceed the maximum amount fixed by the Old Age Assistance Division.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(acting) Attorney-General.

JET/afj

BOARD OF HEALTH: Power of Board of Education to require vaccination of pupils.

Schools-

10-29

October 29, 1935.

FILED
65

State Board of Health
Jefferson City, Missouri

Attention Doctor E.A. Musson.

Gentlemen:

We acknowledge receipt of your request for an opinion of this office reading as follows:

> "Enclosed please find the copy of a letter from Mr. Harry B. Hulett, Secretary of the Webb School District and the copy of a letter which Mr. Hulett sent us.
>
> Will you please give us an opinion in regard to compulsory vaccination and medical inspection as requested by Mr. Hulett. I presume he refers to vaccination against smallpox."

Enclosed was a letter from Harry B. Hulett, Secretary of the Webb School District, reading as follows:

> "We are inclosing herewith a copy of letter we have received from the parents of pupils in one of our grade schools, and we are asking how far can we go legally with compulsory vaccination. We shall be pleased to have your reply in detail."

The problem presented is the extent of the power of the Board of Education to require vaccination of pupils.

Section 9207 R. S. Missouri 1929, one of the Sections applicable to all classes of schools, provides in part:

> "The Board shall have power to make all needful rules and regulations for the organization, grading and government in their school district--said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner." * * * *

The foregoing section has been construed as being sufficient to authorize a board of education to make a rule excluding all pupils who have not been vaccinated. In the case of State ex rel. O'Bannon vs. Cole, 220 Mo. 697, the Supreme Court had before it a mandamus suit wherein it was sought to require admittance of unvaccinated pupils regardless of the School Board's rule requiring vaccination, in view of the existence of a threatened epidemic of smallpox. The Court on this proposition stated, l. c. 706:

> "We have no doubt that in the event of a threatened epidemic of smallpox such boards can pass a rule excluding all pupils who have not been vaccinated. That a person who has never been vaccinated is subject to the contagion of smallpox is general knowledge. That vaccination has reduced the ravages of this disease is also general knowledge. That the appearance of unvaccinated pupils in a public school at a time of a smallpox epidemic, would tend to break up and disorganize a public school, is unquestioned. That the school board has the power to absolutely suspend the school during epidemics of contagious or infectious diseases, we think can hardly be questioned. No court would compel the opening of a school under such circumstances. The power here exercised was a very similar power, and if these rules are reasonable, we see no reason why their enforcement should be prohibited."

The facts were that smallpox had been prevalent in the City of Sedalia for some eight years previous to the making of the order and that at the time the order was made there were some twenty-seven cases in the city and by the time the case was tried there were still several cases of this disease reported to the local Health authorities. The Court held that the rule of the school board was reasonable, but stated that they were passing on the facts in the particular case. On the other hand, the Court did not criticize the earlier case of In The Matter of Rebenack, 62 Mo. App. 8, in which case it did not appear that there was an epidemic existing or threatened. The communications received from you do not indicate the facts existing in the Webb School District. However, let it be said that the Board of Education is authorized to make any reasonable rule by virtue of the provisions of Section 9207 supra, and that the reasonableness of the rule is to be first determined by the school board itself. This does not mean that the school board may act arbitrarily or without reason. In viewof the Supreme Court decision aforesaid, it cannot be doubted that a rule compelling vaccination when there are cases of smallpox in the district at the time, is reasonable and enforceable.

Insofar as medical examination is concerned Section 9208 specifically authorizes medical examinations for the purpose of determining the existence of contagious or infectious diseases. This section reads in part as follows:

> "It shall be unlawful for any child to attend any of the public schools of this state while afflicted with any contagious or infectious disease, or while liable to transmit such disease after having been exposed to the same. For the purpose of determining the diseased condition, or the liability of transmitting such disease, the teacher or board of directors shall have power to require any child to be examined by a physician or physicians, and to exclude such child from school so long as there is any liability of such disease being transmitted by the same." * * * *

CONCLUSION.

It is therefore the opinion of this office that the Board of Education of the Webb School District is authorized to make reasonable rules and regulations respecting compulsory vaccination and medical inspection and that the reasonableness of such rules and regulations are to be determined by the facts existing at the time the rules are made and that without question a rule providing for a compulsory vaccination without expense to the pupil , when smallpox is prevalent within the district would be reasonable, as would a rule providing for medical inspection for the purpose of determining the existence of contagious or infectious disease or the liability of transmitting the same.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

SALARIES AND FEES: Circuit clerk and ex officio recorder is not entitled to retain fees for issuance of marriage licenses if by so doing he receives in compensation more than the annual salary as defined in Sec. 11786, R. S. Mo. 1929.

11-13

November 7, 1935.

FILED
65

Honorable Lee Mullins,
Prosecuting Attorney,
Atchison County,
Rock Port, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "The County Court of my County have asked me to write to you for an opinion in regard to Recorder's Fees for issuing marriage licenses, and the recording of the marriage certificate returned to his office.
>
> "It seems that formerly the Recorders were permitted to retain all such fees as thereon and did not account to the County Court for any such.
>
> "Our present Recorder, who by reason of the recent consolidation act, is also the Circuit Clerk, is contending that he should be permitted to retain all fees collected connected with marriage licenses.
>
> "The County Court is asking your opinion upon this proposition, which they hope to receive soon."

Section 2979, R. S. Mo. 1929, provides:

> "The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return

thereon, for which he shall receive a fee of one dollar, to be paid for by the person obtaining the same."

The Legislature has passed a law consolidating the office of circuit clerk and recorder in certain counties. The section relating to fees, being Section 11786, Laws of Missouri, 1935, page 369, is as follows:

"The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. In counties having a population of less than 7,500 persons, the sum of $1000.00; in counties having a population of 7,500 and less than 10,000 persons, the sum of $1100.00; in counties having a population of 10,000 and less than 12,500 persons, the sum of $1300.00; in counties having a population of 12,500 and less than 15,000 persons, the sum of $1500.00; in counties having a population of 15,000 and less than 17,500 persons, the sum of $1700.00; in counties having a population of 17,500 and less than 20,000 persons, the sum of $1900.00; in counties having a population of 20,000 and less than 25,000 persons, the sum of $2100.00; in counties having a population of 25,000 and less than 30,000 persons, the sum of $2300.00; in counties having a population of 30,000 and less than 70,000 persons, the sum of $2500.00; in counties having a population of 70,000 and less than 80,000 persons, the sum of $3000.00; provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be considered as one for the purpose of this section; provided, further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees

> earned by them in cases of change of venue from other counties; provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

Section 11808, Laws of Missouri, 1933, page 370, provides:

> "The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, * * *."

Section 11804, R. S. Mo. 1929, sets out the items of charge for recorders for their services.

Section 11785, R. S. Mo. 1929, sets out the charges permitted to the clerks of circuit courts and of courts of common pleas.

The charges authorized in Sections 11785 and 11804 are permitted and required to be paid and collected by the official. However, the amount of money collected by the official is not necessarily the amount of money that shall be paid to the official as compensation.

In the case of State ex rel. Troll vs. Brown, 146 Mo. 401, l. c. 406, the Supreme Court of this State says:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed vs. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform as such

> officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

In the case of State ex rel. vs. Gordon, 245 Mo. 12, l. c. 27, the Supreme Court of this State says:

> "Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.
>
> "Throop on Public Officers (Sec. 443) says: 'It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the State. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract but because the law attaches it to the office.'
>
> "Mechem on Public Offices and Officers says: 'Sec. 856. Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth,' * * *
>
> "In Bank v. Refrigerating Co., 236 Mo. 414, Brown, J., speaking for the court says: 'When the law requires a specific service to be performed by a public officer, he must perform that service regardless of whether any provision has been made to pay him for same.'

> "Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same.' * * *"

And at page 29 the Court says:

> "As the Legislature may fix such compensation to a public office as it sees fit, or none at all, we can see no constitutional objection to its attaching such conditions as it deems proper to the payment of the compensation, such conditions to be binding upon any one who thereafter enters upon such office and performs its duties. As stated above, the compensation has no relation to the amount or value of the service. There can be no application of the doctrine of quantum meruit. The officer takes the office cum onere. Having accepted it with the conditions imposed by the Legislature, upon whose will he must depend for any compensation at all, he cannot afterwards challenge the power of the Legislature to impose such conditions. * * * *"

In the case of King vs. Riverland Levee District, 279 S. W. 195, the Court says, l. c. 196:

> "It is no longer open to question but that compensation to a public officer

> is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. * * * * * Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking vs. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

It will be noted that Section 11786, supra, has the provision "that in any county wherein the clerk of the circuit court is ex officio recorder of deeds, said offices shall be considered as one, for the purpose of this section."

Section 11814, Laws of Missouri, 1933, page 372, provides as follows:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices under the provisions of sections 11785, 11787, and 11788, or of any other statute, except such fees as are chargeable to the county, and if such fees be not paid when due by the party liable for the payment, it shall be the duty of the clerk to forthwith issue a fee bill for same and place such fee bill in the hands of the sheriff of the proper county, who shall forthwith levy same on the persons liable therefor, or their sureties, as authorized and provided by section 11776. Such clerk shall, at the end of each quarter, file with the county clerk a report of all fees paid and accruing to his office during such quarter, stating the title of the case or on what account such fees

> were charged, together with the names of the persons paying or who are liable for same, with the names of all sureties, where security for costs has been required, and which report shall also show which of such fees have been paid and the total amount thereof, and what fee bills, if any, have been issued and for what fees and when placed in the hands of the sheriff for collection, and further stating that, after due diligence, he has been unable to collect the fees reported unpaid, and which said report shall be verified by the affidavit of such clerk. And quarterly such clerk shall pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law. It shall be the duty of the county court to examine such quarterly report and to require of the prosecuting attorney to enforce payment of all fees therein shown to be unpaid in any manner now or hereafter provided by law, and, to that end, such prosecuting attorney shall have authority, at any time, to direct the issuance of any execution or fee bill for costs in any case in which any costs accruing to the county are unpaid."

It will be noted that this last section requires that the clerk shall quarterly pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, and that the clerk shall be liable on his official bond for all fees collected and not accounted for by him.

The fees collected for the issuance of marriage licenses and the recording of the marriage certificate are official fees and would not and could not be collected by any other person than the person who at the time is the official.

Section 11786, supra, uses definite terms in stating that the aggregate amount of fees that any clerk of the circuit court shall be allowed to retain for any one year's services shall not in any case exceed the amounts in said section set forth. This section is the yardstick and measure by which the fees of the circuit clerk and ex officio recorder are gauged.

CONCLUSION

It is our opinion that the circuit clerk and ex officio recorder is not permitted under the law to retain fees collected by him for the issuance of marriage licenses, nor for the recording of the marriage certificate, if the retention thereof would enable such official to receive a greater amount of salary for the year than is set forth in Section 11786, supra.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

FERTILIZER * - State Fertilizer Law does not apply; fertilizer used in Missouri by U. S. Dept. of Agriculture not offered for sale.

November 22, 1935

11-25

FILED
65

Honorable F. B. Mumford
Dean and Director
College of Agriculture
University of Missouri
Columbia, Missouri

Dear Sir:

Your request of November 11, 1935 for an opinion has been referred to me. Your request is as follows:

> "The Soil Conservation Service of the United States Department of Agriculture shipped into Missouri 200 tons of commercial fertilizer during the season of 1935. This fertilizer was not registered or labeled in accordance with the Missouri fertilizer law. It is the contention of the officers of the United States Department of Agriculture that 'the fertilizer after becoming the property of the U S D A was not subject to any local or State regulations'.
>
> "I am writing to request your opinion on the following points:
>
> 1. Does the Missouri fertilizer law apply to goods purchased by the U. S. Department of Agriculture and shipped into the State for use in connection with the Soil Conservation program?
>
> 2. Does the Director of the Agricultural Experiment Station have

> the authority to exempt these fertilizers from the provisions of the law on the grounds that the materials are used for demonstrational or educational purposes by the Soil Conservation Service of the Federal government?
>
> If your ruling on the second question is in the affirmative it is my present intention to exempt these fertilizers from the provisions of the Missouri law."

From your communication, we assume that the fertilizer was used by the United States Department of Agriculture, and was not sold or offered for sale in Missouri. A reference to Article 14 of Chapter 87, R. S. Mo. 1929, and in particular to Sections 12588, 12589, 12591 and 12595, at once reveals that commercial fertilizer must be sold or offered for sale in this state at a price of more than $5.00 per ton before it comes within the provisions of the fertilizer law requiring labeling and registering.

Section 12591, R. S. Mo. 1929 in part provides:

> "Every person, * who shall sell, offer or expose for sale in this state any commercial fertilizer, the selling price of which exceeds five dollars per ton, shall stamp or affix to each package * the matters and things required * in section 12589. * Every person, * selling or exposing for sale such fertilizer shall, * attach to every package * sold or exposed for sale * a label or tag * * "

The printed matter referred to in Section 12589, R. S. Mo. 1929 relates to the name, address and manufacturer, chemical composition, etc. The label or tag referred to is acquired by the payment of fees set out in Section 12592, R. S. Mo. 1929, which section in part provides:

#3 - Honorable F. B. Mumford

"Every manufacturer, importer or person shall pay to said experiment station for the labels or tags required by them under section 12591 * "

The only tags required under Section 12591, R. S. Mo. 1929 is where the fertilizer is sold or offered for sale in this state. Under the facts stated in your letter, we understand that the United States Department of Agriculture ships into Missouri a fertilizer to be used by it in carrying out the functions of certain governmental projects in this state.

It is, therefore, the opinion of this office that such fertilizer, shipped into this state as a property of the United States Department of Agriculture and used by it in soil conservation work, is not subject to the Missouri fertilizer law.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

TAXATION: Leasehold interests, if of any value, assessable.

November 22, 1935. 11-23

FILED
65

Hon. Andrew J. Murphy
Commissioner
State Tax Commission
Jefferson City, Missouri

Dear Mr. Murphy:

This is to acknowledge your letter as follows:

"Enclosed please find an inquiry from the St. Louis Union Trust Company as to the assessability of certain kinds of leases.

"As the questions asked involved an interpretation of our assessment laws, we respectfully ask for an opinion on these questions.

"This Commission has been unable to find any definite law on the subject of leases; neither have we been able to locate a court decision covering the matter. It is our opinion, however, that some leases are subject to assessment.

"It is also apparent that some leases have a value. As for instance, the third example in this inquiry under question, where a purchaser pays a large sum of money for a lease.

"The payment of the considerable sum of money for a lease definitely establishes the fact that said lease has a value, and if it has a value it is assessable in our opinion.

"If some leases are construed to have a value, then the question will arise as to the proper method of determining such value for assessment.

"It is our opinion that the only value that a lease can have, under example No. 1, is the excess payments provided for in the lease, above a fair rental on the property. Or in example No. 2, the amount the rental, provided for in the lease, is under a fair return on the value of the property leased.

"In example No. 3, the initial value of the lease would be the amount paid for the lease; decreased each year thereafter by the shortening of the unexpired time to run, and further lessened, or increased, by any change in the value of the property.

"In the first two examples the assessable value of the lease would be determined by taking the annual profits under the lease and capitalizing same at a fair rate of return, say 6, 7 or 8%, and valuing the lease at the capitalized value, thus obtained.

"As for example, if property on which a fair return would be $1,000, per year, is leased for $2,000, per year, the value of the lease would be the $1,000, excess earning, capitalized at, say 8%, or $12,500.

"Our answer under all three questions, 1 (a), 2 (a) and 3 (a) would be 'yes'. Our answer to 1(b), 2(b) and 3(b) would be the estimated value or the capitalized earning value."

The sole question presented in your inquiry for our opinion deals with the legal proposition as to whether

or not a leasehold interest may be assessed for taxation purposes. If a leasehold is assessable the mode or manner that the "value of said property" is determined is purely administrative and arrived at by calculation. Therefore, in this opinion, we direct our conclusion to the narrow proposition of whether or not a leasehold is taxable, as the method exmployed in arriving at its value would be determined by the Tax Commission.

Section 9742, R. S. Mo. 1929, provides as follows:

> "For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9746, R. S. Mo. 1929, provides as follows:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

The court in State ex rel. v. Haphe, 31 S. W. (2d) 788, l. c. 790, said the following concerning Section 9746, supra:

> "From the foregoing it appears that every person owning or holding property on the 1st day of June is liable for the taxes thereon for the ensuing year, that it is the duty of every person to list with the assessor all taxable property owned by him, or under his care, charge, or management, and that personal taxes constitute a debt against the person assessed with such taxes, the person named in the tax bill. If

> the person who holds or has under his care, charge, and management personal property is liable for the taxes thereon, such taxes may be assessed against him or in his name; and, when so assessed, they constitute a personal debt for which a personal judgment against him may be recovered. Whether the care, charge, and management of personal property devolves upon one as trustee, administrator, executor, or curator, or as agent of a nonresident principal, is of no consequence; he is made liable for taxes on the property simply because he has charge and control of it, and not because of the capacity in which he holds it."

Corpus Juris, Vol. 35, page 1141, Paragraph 384, defines "leasehold" as follows:

> "A 'leasehold' has been defined as an estate in realty held under a lease, and as the right to use property upon which a lease is held for the purposes of the lease. It is intangible property, which the law recognizes as having value, but which is incorporeal in its nature. It is not the property upon which the lease is held, nor the property used in its exercise, nor the property produced under the lease. The leasehold is an entity in itself distinguishable from the fee out of which it issues. A leasehold interest is not necessarily included within the meaning of the term 'title.' While a leasehold estate is an interest in or concerning lands, it is generally regarded as a chattel real."

If as stated by Corpus Juris in the paragraph above quoted, that a leasehold "is intangible property, which the law recognizes as having value," then, unless the Constitution of Missouri and statutes exempt said leasehold from

taxation it necessarily follows that a leasehold having value would be assessable for taxation, in view of the court's decision in State ex rel. v. Gehner, 8 S. W. (2d) 1057, l. c. 1065, wherein the Supreme Court of Missouri, en Banc, after reviewing the many tax statutes, said the following:

> "Thus we have statutes assessing every form of property which can be owned by a corporation and which is constitutionally taxable in this state." (Underscoring ours)

Section 9743, R. S. Mo. 1929, provides for the exemptions of property from taxation and nothing therein is found which exempts a leasehold.

We have been unable to find a decision of the Missouri Courts to the effect that a leasehold is or is not assessable. However, in State ex rel. v. Springfield Convention Hall Association, 301 Mo. 663, the court, while specifically stating that it was not passing on the question of whether a leasehold was assessable, took occasion to point out that the assessor did not attempt to assess the leasehold interest, and further remarked that when a case involving the question as to whether a leasehold interest could be assessed was properly placed before it, would be the time for it to decide the issue. We quote from the courts opinion, page 672 et seq.:

> "The tax bill introduced in evidence shows that the assessment (which was for $21,250) was made against the 'building only.' There was no attempt to assess the leasehold estate of the defendant. * * * * * * * * * * * * * * In simple terms the assessment was against the 'building only' as the property of the defendant. It will be time enough for us to pass upon the question as to whether or not the leasehold estate is taxable, under the law, when a case of that kind reaches us.
>
> * * * * * * *

> "The defendant says it does not own this building, and that the taxes against it should not be charged to or collected from defendant. The City of Springfield is not sued, and for that reason the question of exemptions from taxation is not in this case. The force of appellant's brief is spent upon questions not in the case at all. In such brief much is said of tax exemptions. This is not in the case. Something is said in both briefs upon the question as to whether or not a leasehold is taxable. This is not in the case. No leasehold has either been assessed or taxed so far as we are advised. * * * * * * * * * * *
>
> * * * * * * *
>
> "* * * The property itself should have been assessed (if subject to assessment and taxation) to the owner, the city of Springfield. The leasehold estate (if subject to assessment and taxation at all) should have been assessed to defendant, unless the terms of the lease precludes this view. The assessment here is not upon the leasehold and hence not upon anything owned by the defendant. This suffices for an affirmance of the judgment."

We can only speculate as to what the court would have said if the leasehold in that case would have been assessed instead of the building. While the court's remarks concerning the leasehold interest in the above case are purely obiter dictum, yet, to our mind, it strongly indicates that the court was suggesting to the tax officials that leasehold interests were proper subjects of assessment when assessed as a leasehold.

From the above and foregoing it is our opinion that a leasehold is intangible property which may have a value and if it has a value such should be assessed to the owner. The assessment against the owner should be on the leasehold. If a leasehold has no value, then, of course, it would not be assessable as assessments only are placed against property having a value. We are of the opinion that the value of a leasehold to a lessee would be the difference between what is paid under the lease to what a fair rental of the property would be.

Having concluded that a leasehold interest, if of value, should be assessed for taxation purposes, it follows that the determining of the value of any lease is a question of fact and purely administrative. Therefore, we do not in this opinion write on the method of arriving at the true value of any lease. It suffices to say, however, that your conclusion concerning the three illustrations given in your letter is correct. In other words, we adopt this paragraph contained in your letter: "Our answer under all three questions, 1(a), 2(a) and 3(a) would be 'yes'. Our answer to 1(b), 2(b) and 3(b) would be the estimated value or the capitalized earning value."

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

STATE TREASURER: ESCHEATS: State Treasurer has no authority to receive intangible personal property which has escheated to the State.

1-14

January 8, 1935

FILED
66

Honorable Richard R. Nacy
State Treasurer
Jefferson City
Missouri

Dear Mr. Nacy:

Receipt of your letter dated January 7, 1935 is acknowledged. Your letter follows:

"I am enclosing herewith letter from Mr. B. C. Howard, Attorney, of Kansas City, Missouri, in accordance with our telephone conversation of this date.

Will you kindly return the letter along with your opinion."

The letter inclosed from Mr. B. C. Howard is as follows:

"I am representing an estate, in which the present whereabouts of one of the heirs is unknown, and it may become necessary to turn over his share of said estate to the State Treasurer, and in connection therewith will suggest that the missing heir's share will consist of some cash and certificates of stock in a number of different corporations.

I would, therefore, be glad if you would advise me as to what name the shares of stock shall be issued in,

should it become necessary to turn the same over to the State Treasurer.

I would also be glad if you would advise me as to whether the State Treasurer would hold the stock and receive the dividends thereon and otherwise exercise control over the same during the period it is held by the state of Missouri, and also whether the state will account to the heir for the income derived therefrom."

While the letter inclosed by you does not appear to present a problem confronting you at the present, yet we will answer the same as if it did.

Section 620 Revised Statutes Missouri 1929, in part provides:

"If any person die intestate, seized of any real or personal property, leaving no heirs or representatives capable of inheriting the same; or, if upon final settlement of an executor or administrator there is a balance in his hands belonging to some legatee or distributee, who is a non resident, or who is not in a situation to receive the same and give a discharge thereof or who does not appear by himself or agent to claim and receive the same* * * * in each and every such instance such real and personal estate shall escheat and vest in the state, subject to and in accordance with the provisions of this chapter."

Section 621 provides as follows:

> "Within one year after the final settlement of any executor or administrator,assignee,sheriff or receiver, all moneys in his hands unpaid or unclaimed,as provided in section 620,shall,upon the order of the court in which such settlement is made,be paid into the state treasury. And the state treasurer shall issue to him a duplicate receipt therefor,one of which shall be filed with the state auditor,who shall credit him with the amount thereof and charge the state treasurer therewith. All such moneys so received into the state treasury shall be credited into a fund, to be known and designated as 'escheats'. "

Section 622 provides that if said moneys, as aforesaid, are not paid into the state treasury the prosecuting attorney of the county may move for judgment against the administrator or executor on account thereof.

Section 623 provides that within twenty-one years after any money has been paid into the state treasury by an executor or administrator any person who appears and claims the same may file his petition therefor and praying that the money be paid to him.

Section 624 provides that if the court finds that such person is entitled to any money so paid into the state treasury it shall order a warrant to issue for the amount of the claim.

Section 639 provides for the sale of real estate under the order of circuit court when such real estate may have escheated to the state. Section 642 provides as follows:

> "All moneys paid into the state treasury under the provisions of this chapter, after remaining therein unclaimed for twenty-one years, shall escheat and vest absolutely in the state and be,on the order of the board of fund commissioners,transferred to the

public school fund."

Section 620, above quoted from, provides that personal property, under the circumstances set out, shall escheat and vest in the state,but neither in section 620 nor in any other section of Article I of Chapter 3 is it provided what state officer or representative of the state shall receive and hold such personal estate, unless the personal estate consists of money, then under section 621 the money shall be paid into the state treasury and credited into a fund to be known and designated as "escheats". Personal property mentioned in section 620 not only includes money and other tangible personal property but intangible personal property as well, such as stocks, bonds, promissory notes and such like. It appears from the letter of Mr. Howard that a portion of the personal property that may escheat to the state consists of certificates of stock. Not only is no one designated to accept intangible personal property for and on behalf of the state, nor is there any provision in Article I of Chapter 3 authorizing the sale and conversion of same into cash when such personal property shall have escheated to the state. All of the sections above mentioned, except those dealing with escheated real estate, have to do with the receipt by the state treasurer of moneys ;for the payment of moneys out of the state treasury and such sections do not contemplate any other character of personal property than money.

Section 11388 provides that:

"A separate department is hereby established, to be known as the treasury department, which shall embrace the offices of state treasurer and state auditor."

Section 11425 in part provides:

"The state treasurer shall receive and keep, as provided by law, all the moneys of the state

not expressly required by law
to be received and kept by
some other person * * * * *."

Nothing is said in the last foregoing section about receiving any other personal property than money. In the absence of express statutory authority to receive and sell property belonging to the state, we do not believe the state treasurer would have such authority, and we find no such authority in the statutory laws of this state.

CONCLUSION.

We are of the opinion that the State Treasurer of Missouri has no authority to receive the intangible personal property mentioned in the letter attached to your letter if, as and when the same escheats to the State of Missouri.

We are further of the opinion that the administrator or executor of the estate involved should procure a proper order from the probate court wherein such estate is being administered, and sell such intangible personal property so that the proceeds thereof may be paid into the state treasury.

Yours very truly,

GILBERT LAMB
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GL:LC

INHERITANCE TAX: Failure to make application for refund within two years from date of accrual of right to such refund bars claimart from making such application.

1-21

January 14, 1935.

FILED
66

Hon. Richard R. Nacy,
State Treasurer,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

> "On May 25, 1926, Bertha Wood, General Delivery, Kirksville, Missouri, was appointed Administratrix of the estate of Frank Munn, deceased. The inventory shows that the estate had $7,095.00 in money. This came from the United States Veterans Bureau. Frank Munn, the deceased, had been a soldier in the World War and this was insurance money his estate received after the death of the beneficiary. Paul D. Higbee was appointed Inheritance Tax appraiser and each of the six brothers and sisters was assessed $18.00 Inheritance Tax, making a total of $108.00.
>
> I am informed that any estate that receives money from the Veterans Bureau is not subject to Inheritance Tax on that money. Do you know when this ruling was made?
>
> Will you please let me know whether or not this money could be refunded to the heirs?"

It appears from the records submitted to us in this estate that the payment of this tax was made on or about January 15, 1927. Section 584, R.S. Mo. 1929 makes provision for a refund of any inheritance tax paid erroneously. This section provides as follows:

> "When any tax shall have been paid erroneously to the state treasurer it shall be lawful for him, on satisfactory proof of said erroneous payment, to refund and pay to the executor, administrator, or trustee, person or persons who paid the same the amount of such tax so erroneously paid: provided, that all applications for the refund of said tax shall be made within two years from the date of the accrual of the right to such refund."

It will be noted that the statute expressly requires all applications for refund to be made within two years. Judge Graves, in passing upon this identical point in the case of State Treasurer v. Trust Co., 293 Mo. 545, l.c. 560, said:

> "Section 12, supra, clearly has reference to an erroneous payment of a tax as a whole, and not to an excess payment provided for by Section 25 for the emergencies of that section. The parties named in Section 12, to whom re-payment is to be made, are all in esse, and can make their application within two years. This two-year provision in said Section 12 is in the nature of a statute of limitations. The parties must proceed within two years or be barred. The two years begins from the time they were entitled to the refund. If it was an erroneous payment they were entitled to an immediate refund. In other words, their claims for refund arose immediately upon the payment of the erroneous tax."

CONCLUSION

In view of the foregoing, it is the opinion of this department that more than two years having elapsed since the payment of the inheritance tax in the Estate of Frank Munn, deceased, no refund

can now be made of the inheritance tax paid in said estate by reason of the statute of limitations provided in Section 584, R.S. Mo. 1929.

The parties having failed to make application for a refund within two years from the date of the accrual of the right to such refund, they are now barred by reason of the Statute from making such application.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

LIQUOR CONTROL ACT: Moneys received by reason of county liquor license fees should be placed in county treasury and disbursed according to classification of expenditures as provided by county court under County Budget Act.

March 27, 1935.

FILED
66

Hon. Ralph B. Nevins,
Prosecuting Attorney,
Hickory County,
Hermitage, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

> "In Section 24 of the Liquor Control Act, page 87 of the Laws of Missouri, Extra Session, 1933-1934, provision is made for the issuance of liquor licenses by the County Court, but I find no statute directing the disposition of money procured from the sale of such licenses.
>
> Into what fund should the County Treasurer place the money coming from the sale of liquor licenses?"

Section 24 of the Liquor Control Act of Missouri (Laws of Missouri, Extra Session 1933-34, page 87) provides:

> "The County Court in each county is hereby authorized to make a charge for licenses issued to retail dealers in all intoxicating liquor, the charge in each instance to be determined by the County Court, by order of record, but said charge shall in no event exceed the amount provided for in Section 22 of this act, for state purposes."

This department has ruled in an opinion dated August 24, 1934 that in the absence of any specific direction on the part of the Legislature of the State of Missouri, the collection of the county liquor license fees is properly the duty of the county collector.

Section 9927, R.S. Mo. 1929 provides:

> "Every county collector and ex-officio county collector, except in the City of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively. It shall be the duty of the county clerk, and he is hereby required, to forward immediately a certified copy of such detailed statement to the state auditor, who shall keep an account of the state taxes with the collector."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the moneys received by reason of the county liquor license fees should be placed in the county treasury and disbursed according to the classification of expenditures as provided by the county court under the County Budget Law, as found in Laws of Mo. 1933, page 340.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

TWIT-AW

STATE TREASURER: Federal Housing Administration first deed of trust notes do not of themselves become legal collateral for state moneys deposited.

6-19

June 18, 1935.

FILED
66

Honorable Richard R. Nacy
State Treasurer
Jefferson City, Missouri

Attention of Mr. H. S. Johnson,
Chief Clerk.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "I am enclosing herewith letter from the Merchants Bank, Kansas City, Missouri, and wish you would give me your official opinion as to whether first mortgages, insured by Federal Housing Administration under Title II, are eligible to be deposited with the State as collateral on bank deposits."

Section 15 of Article X of the Constitution of Missouri reads as follows:

> "All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney General, select, the said bank or banks giving security, satisfactory to the Governor and Attorney-General, for the safe-keeping and payment of such deposit, when demanded by the State Treasurer on his check - such bank to pay a bonus for the use of such deposits not less than the bonus paid by other

> banks for similar deposits; and the same, together with such interest and profits as may accrue thereon, shall be disbursed by said Treasurer, for the purposes of the State, according to law, upon warrants drawn by the State Auditor, and not otherwise."

Section 2 of Chapter 847, page 1246-7, of the Federal Housing Administration Act, Volume 48, Part 1, United States Statutes at Large, provides, among other things as follows:

> "In no case shall the insurance, granted by the Administration under this section to any such financial institution, exceed twenty per centum of the total amount of the loans, advances of credits and purchases made by said financial institution for such purpose, and thetotal liability incurred by the Administrator for such insurance shall in no case exceed in the aggregate two hundred million dollars. No insurance shall be granted, under this section, to any such financial institution with respect to any obligation representing any such loan, advance of credit or purchase by it, the face amount of which exceeds $2,000.00 nor unless the obligation bears such interest, has such maturity and contains such other terms, conditions and restrictions as the Administrator shall prescribe."

Sections 11388 to 11477 Revised Statutes 1929, set forth the duty of the State Treasurer, and Section 11469 prescribes "for the security of the funds deposited by the treasurer under the provisions of Articles I and II of this chapter the governor, attorney-general and the treasurer shall require of said selected and approved banks or banking institutions giving security for the safekeeping and payment of said deposits a bond equal to at least twenty-five per cent of the amount of the accepted bid or bids, to be approved by the governor and attorney-general, and in addition thereto bonds of the United States, the state of Missouri, or in their discretion, * * * *"

Continuing, said section reads:

> "Which bond shall be delivered to the state treasurer, and receipted for by him and retained by him in the vaults of the state treasury of this state, or in the vaults of such banks or safe depository as the governor, attorney-general and treasurer may agree upon; and if in any case, or at any time, such bonds are not satisfactory security to the governor and attorney-general, for deposits made under articles 1 and 2 of this chapter, they may require such additional security to be given as shall be satisfactory to them, which said bonds or any part thereof, may from time to time be withdrawn on the written consent of the governor, attorney general and treasurer; and the governor, attorney-general and state treasurer shall, from time to time, inspect such bonds and see that the same are actually kept in the vaults of the state treasury, or in the vaults of such bank or banks other than the bank or banks selected as the state depository, as the governor, attorney-general and state treasurer may have duly agreed upon; provided, that a sufficient amount of said bonds to secure said deposits shall always be kept in the treasury or in such selected depository, and in the event that such bank or banks or banking institutions of deposit shall fail to pay such deposits, or any part thereof, on the check or checks of the state treasurer, then it shall be the duty of the state treasurer to forthwith convert such bonds into money and disburse the same according to law, upon the warrants drawn by the state auditor upon the funds for which said bonds are security. Any bank making deposits of bonds with the state treasurer under the

> provisions of articles 1 and 2 of this chapter may cause such bonds to be endorsed or stamped, as they may deem proper, so as to show they are deposited as collateral, and are not transferable, except upon the conditions of articles 1 and 2 of this chapter; Provided, however, the governor, attorney-general and treasurer, in their discretion, may allow said selected banks to deposit as security for the safe-keeping of said funds, in lieu of the above mentioned bonds, the notes held by said banks or banking institutions, secured by first deeds of trust on Missouri real estate, which notes and deeds of trust shall not exceed 50 per cent. of the actual value of said real estate, which security shall also be accompanied by an abstract of title certified to date by a competent abstractor and the written opinion of some reputable lawyer to the effect that the title to the lands covered by such deeds of trust is well vested inthe grantors of such deeds, and said bank or banking institutions shall be required to furnish a personal bond equal to at least 75 per cent. of the amount of the accepted bid or bids;**********"

In 1931 a law was passed amending the above section (1931 Session Acts, page 378), which now permits federal land bank bonds as security also.

It will be noted that said statute places the discretion in three elected state officers, the Governor, Attorney General and State Treasurer, to allow selected banks to deposit as collateral security "notes held by said banks or banking institutions secured by first deeds of trust on Missouri real estate, which notes and deeds of trust shall not exceed fifty per cent of the actual value of said real estate, which security shall also be accompanied by an abstract and an opinion from a lawyer as to the title," and said bank, if it takes advantage of the method provided for putting up notes secured by real estate first mortgages in Missouri, is required to furnish a personal bond equal to at least seventy-five per cent of the amount of the accepted bid or bids.

In the case of In re: Holland Banking Company, 313 Mo. 307, it was held that Article II of Chapter 72 comprises a scheme complete within itself for protecting the deposits of the State.

In this case the history and development of this law is traced; enacted first in 1889 it required the highest quality of bonds as collateral, and later the field was widened so that now not only bonds of the United States and the State of Missouri, but also those of the smaller cities and other political subdivisions are acceptable. Likewise, in more recent years, the latitude of acceptable security was widened to take in notes of the qualifications set forth in the present statute. Quoting from said case of In re: Holland Banking Company, supra, l. c. 321, the court says:

> "Thus it is seen that, as securities of less absolutely certain value were authorized to be accepted as security, additional safeguards through the means of personal bonds were exacted. Although bonds of cities, school districts, drainage and levee districts and of other states, are everywhere regarded as high grade securities, a bond of twenty-five per cent of the accepted bid or bids was required. The Legislature only authorized the acceptance of notes secured by deeds of trust on real estate and bonds of cities of two thousand population when it supposedly made the State's deposit sufficiently safe by exacting personal bonds in addition equal to at least seventy-five per cent of the accepted bid or bids.
>
> The history of the original Act of 1879 (now Section 11469) cannot be studied without reaching the conclusion that it has been the legislative policy of this State so to safeguard the deposits of the state's money by exactions of collateral security and personal bonds of such amount as ample to protect the State against loss occasioned by failure of depositories to pay its deposits, regardless of the common-law priority attaching to claims due the State and regardless of our statute of

> 1881, (now Section 7212) which is simply declaratory of the common law on the subject. In other words, Article II, Chapter 123, and particularly Section 13379, comprise a complete and supposedly all-sufficient separate scheme for protecting the deposits of the State. It was entirely unnecessary for the Legislature to go to the full extent it did in exacting both bonds and secured notes of value equal to the deposits and personal bonds in addition thereto, if it was its intention to rely upon general priority rights afforded by the common law or the statute of 1881."

At page 323 thereof the Court says:

> "Another and seemingly just as cogent reason given was that the act comprised a complete and separate scheme in itself for protecting deposits of the Government."

Quoting from the case of Cook County National Bank vs. United States, 27 L. Ed. (U. S.) 537, said opinion continues:

> " 'In the second place, when the banks are made depositaries of public moneys, and employed as financial agents of the Government, it is the duty of the Secretary of the Treasury to require them to give satisfactory security, by the deposit of United States bonds or otherwise, for the safekeeping and prompt payment of the public money deposited and for the faithful performance of their duties as financial agents. The amount of security which the Secretary may thus require has no limit but his own judgment as to its necessity. Every officer of a bank which is not an authorized depositary, and which has not therefore given the required security, who knowingly receives any public money on deposit, is liable for embezzlement. (R. S. Section 5497). The Government can thus alwayshave security, limited in amount only by the judgment of the Secretary of the Treasury, for public moneys deposited with any national bank.

With these provisions for security against possible loss for moneys deposited, it would seem only equitable that the Government should call for such security, and, if it prove insufficient take the position of other creditors in the distribution of the assets of the bank in case of its failure.'

Section 13379 of our statute does not leave either the value or the character of the security for the State's deposits to the discretion of the Treasurer and the other state officers. It fixed a minimum of security which must be exacted. The bonds and notes taken as such security must be of a value of least equal to the deposit, with the additional requirement of personal bond of twenty-five per cent of the bid accepted, where certain bonds are put up, and personal bond of seventy-five per cent of such accepted bid when notes secured by real estate are put up as security. If such minimum requirements are faithfully observed and solvent personal bonds taken, no loss can accrue to the State on account of such deposit.

The rule that the State will be deemed to have waived its general common-law or statutory priority where it exacts security for its deposits was declared by the Supreme Court of Utah in National Surety Company vs. Pixton, 808 Pac. 878. It was there said:

'Under the banking laws of this State, the State, by its acts and conduct, has clearly indicated that it claims no preferential rights over other depositors. While the law authorizes the State Treasurer to deposit the funds of the State in certain banks, it also compelled him to require the bank to secure the repayment of the funds so deposited. If the State were relying upon

> its preferential right, its funds would be amply secured without requiring any security of that nature. . . . . True, the rights of the sovereign State are not deemed lost or waived unless the waiver is in express terms, yet we cannot see, in so far as the deposit of public funds is concerned, in view of the laws of this State, and especially in view of the State's conduct in the matter before us, how it can be held otherwise than that the State did not intend to assert its preferential rights in those matters, regardless of what its rights in that regard may be, by authorizing the making of a deposit of public funds.' "

Continuing, l. c. 326:

> "It will be seen that the Legislature has devised a plan or scheme quite comprehensive and complete by which the public moneys of the State may be loaned at interest, and has with care and propriety conferred upon three of its highest administrative officers the power and duty to select and qualify state and national banks as such depositaries. The Treasurer is forbidden to deposit with any depositary any excess over the amount of the bond or security furnished."

At page 331, continuing, the Court says:

> "We are satisfied that the decided trend of the better reasoned cases is to the effect that where a State has a general statute giving priority to the debts due the State, or where the common law to the same effect is recognized and where such state also has a depository law directing the deposit of the state's funds in selected depositories which are required to give full and adequate security equal to or in excess of such deposits as may be lawfully made therein, and where no preference over

> and above the protection of such security is specifically provided for in such depository law, the State will be deemed to have waived its priority rights under the general priority statute or the common law as the case may be, and will be required to look to the security taken by it for the repayment of such deposits and can only come in on a parity with general creditors for the distributive share of the unpledged assets of the insolvent depository after it has exhausted the security taken by it and applied same upon its debt.
>
> This is especially true where the statutes of such State, regulating the course of procedure for widding up the affairs of an insolvent state bank, make specific provision for priority in certain instances and make no provision for priority as to debts due the State on account of unpaid deposits. Where depository laws of the character described are in existence and the State reserves full powers of visitation of such banks and can make unlimited inquiry into its affairs, the State is in a positionto protect its deposits fully, and loss can only be incurred where there is a failure to take advantage of such powers. To hold that the State, under such circumstances, has the right to assert priority in the unpledged assets of such a bank is inequitable and tends to make state depositories undesirable as depositories for the ordinary depositor."

Nowhere in the statute is a provision found requiring that the collateral note security shall be or shall not be insured by the Federal Housing Administration.

Of course, "firstmmortgages" in themselves regardless of whether they are insured, are not alone proper security in the attempt to comply with said statute, as the note secured by said mortgage is the thing of value and the holder of the note, by

virtue of being such, has the right to enforce the lien of the deed of trust securing the note.

We construe your inquiry to be as follows:

Are notes which are secured by a first mortgage lien on real estate which is located in the State of Missouri, and which are insured under the terms of the Federal Housing Administration Act, such collateral as may be accepted under the provisions of Section 11469 Revised Statutes 1929 as proper statutory security for the deposit, in state depositories, of the State's money?

CONCLUSION.

If the Governor and Attorney General and State Treasurer of Missouri, using their discretion as provided by Section 11469, think it is not inconsistent with sound business to permit banks which have been selected as depositories of State money to deposit as security for the safekeeping of said funds, in lieu of the other collateral described in said section, the notes held by said banks or banking institutions secured by first deeds of trust on Missouri real estate, which notes and deeds of trust shall not exceed fifty per cent of the actual value of said real estate, which security shall be accompanied by an abstract of title certified to date by a competent abstracter and the written opinion of a reputable lawyer to the effect that the title to the lands covered by such deeds of trust is well vested in the grantors of such deeds, and if said banks or banking institutions furnish a personal bond equal to at least seventy-five per cent of the amount of the accepted bid or bids, said three state officialsmay so express themselves and thereupon said collateral may be acceptedb by the State Treasurer under the provisions of said Section 11469, regardless of whether said notes are insured by someone, whether the Federal Government or otherwise; that such insurance does not put said notes into a different classification with respect to this statute than they would be in if not insured. The fact

that the notes are so insured does not keep them from being proper security if otherwise they measure up to the statutory requirements, nor does it, of itself, lift them into the classification of proper security as defined by the statute.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting)Attorney General

DW:MM

EMINENT DOMAIN:) Board of Permanent Seat of Government
CAPITOL GROUNDS:) does not have power to condemn under
CONDEMNATION:) Laws of 1935, pages 53-54, nor under general law, without special statutory authority.

10-2

September 25, 1935.

FILED
66

Hon. Richard R. Macy
State Treasurer
Jefferson City, Missouri

Dear Mr. Macy:

This is to acknowledge receipt of your letter of September 16, 1935, in which you request an opinion of this Department on the questions therein submitted. Your letter of request is as follows:

> "In the Session Acts of 1935, pages 53 and 54, will be found an act entitled:
>
> > 'APPROPRIATIONS: Money for the purchase of land for the purpose of enlarging the State Capitol Grounds ...'
>
> "Will you please advise me officially whether the State of Missouri may condemn the land referred to in this act, under this act, in the event the owners of the property, and the State, are unable to agree upon a purchase price."

Your question is, whether or not under the Act of the Legislature at the 1935 Session, found in Laws of Missouri, 1935, at pages 53 and 54, the State has a right

to condemn the property to enlarge the State Capitol Grounds.

We are herewith setting forth, in its entirety, said Act as follows(effective August 27, 1935):

> "AN ACT authorizing the Board of Permanent Seat of Government of the State of Missouri to purchase all or any part of the parcels of ground and improvements thereon, lying between the State Capitol Building and the Governor's Mansion, and between Capitol Avenue and the public alley north thereof, in Jefferson City, Missouri, for the purpose of enlarging the State Capitol Grounds:
>
> "Section 1. For the purpose of enabling the Board of the Permanent Seat of Government of the State of Missouri to enlarge the State Capitol Grounds, the Board of the Permanent Seat of Government is hereby authorized to purchase all or any of the parcels of ground and the improvements thereon, lying between the State Capitol Building and the Governor's Mansion, and between Capitol Avenue and the public alley north thereof, in Jefferson City, Missouri.
>
> "Section 2. The Board of the Permanent Seat of Government shall keep accurate records of all purchases made, which records shall, among other things, contain a correct description of the lands purchased, the date purchased and the amounts paid for each parcel, and the title to all property purchased shall be taken in the name of the State of Missouri.

"Section 3. There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of one hundred twenty-five thousand dollars, ($125,000.00) or so much thereof as may be deemed necessary to purchase and landscape all or any part of the parcels of ground and the improvements thereon, lying between the State Capitol Building and the Governor's Mansion, and between Capitol Avenue and the public alley north thereof, in Jefferson City, Missouri; such purchases to be made for the purpose of enlarging the State Capitol Grounds and to make possible the ultimate ownership of all property by the State of Missouri between the present State Capitol Grounds and the grounds upon which the Governor's Mansion now stands, and such sum to be expended by the Board of Permanent Seat of Government, by and with the written consent of the Governor, when and as opportunity may exist, to purchase such parcel or parcels of ground at prices which may be deemed to be reasonable and fair."

It will be noted that the above Act is divided into three sections: Section 1 provides that the Board of Permanent Seat of Government is authorized to purchase the lands mentioned in said act; Section 2 provides that records must be kept by the Board of all purchases made; and Section 3 appropriates $125,000 for the use of the board in purchasing the lands mentioned.

The question turns on whether the Board of Permanent Seat of Government of the State of Missouri, being unable to negotiate the purchase of the lands, would have a right to proceed to condemn same under the general condemnation statutes of Missouri.

I.

The power of "eminent domain" has been defined to be the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare. This power is inherent in the sovereignty without any specific authority given by the Constitution. The prevailing authority is that the power to exercise the right of eminent domain is legislative.

10 Ruling Case law, Section 11, has this to say:

> "Under the customary division of governmental power into three branches, executive, legislative and judicial, the right to authorize the exercise of the power is wholly legislative, and there can be no taking of private property for public use against the will of the owner without direct authority from the legislature. Riche v. Water Co. 75 Me. 91., Hamor v. Water Co., 78 Me. 127, 3 Atl. 40; Moseley v. Water Co., 94 Me. 83, 46 Atl. 809; Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526; Hayford v. Bangor, 102 Me. 340, 66 Atl. 731, 11 L. R. A. (n. s.) 940; Brown v. Water Dist., 108 Me. 227, 79 Atl. 907; Bowen v. Water Co., 114 Me. 150, 95 Atl. 779. The executive branch of the government could not, without the authority of some statute, proceed to condemn property for its own uses, and no municipal corporation or other sub-division of the state has any prerogative right to exercise the power of eminent domain."

The Supreme Court of Missouri in the case of State ex rel. State Highway Commission v. Gordon, 36 S. W. (2d) 105, l. c. 106, speaking through Ragland, J., had this to say on the subject:

> "The power of eminent domain is inherent in sovereignty and exists in a sovereign state without any recognition of it in the constitution. Constitutional provisions relating to the taking of property are but limitations upon a power which would otherwise be without limit. 10 R. C. L. 11. The right to exercise the power, or to authorize its exercise, is wholly legislative. When an agency of the state asserts that the right to exercise the power has been delegated to it, it must be able to point out a statute which in express terms or by clear implication authorizes such exercise and to the extent claimed.

As is stated in Lewis, Eminent Domain, Vol. 1, (3d ed.) Section 367:

> "The power of eminent domain being an incident of sovereignty is inherent in the state government and in the several states, by virtue of their sovereignty. It does not exist in any subordinate political division or public corporation unless granted by the sovereign power * * * * *. This power, with all its incidents, is vested in the legislatures of the several states by the general grant of legislative powers contained in the Constitution. From this it follows, first, that the power can only be exercised by virtue of a legislative enactment; second, that the time, manner and occasion of its exercise are wholly in the control and discretion of the Legislature, except as restrained by the Constitution. 'It lies in its discretion to determine to what extent, on what occasions, and under what circumstances this power shall be exercised.'"

And found in the same text, Section 369:

> "Whether the power of eminent domain shall be put in motion for any particular purpose, and whether the exigencies of the occasion and the public welfare require or justify its exercise are questions which rest entirely with the legislature."

Section 371:

> "The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out by argument and inference, it does not exist."

Quoting from the notes of 4 A. L. R. 786, the rule is stated as follows:

> "The legislature must determine, in each particular case, the necessity or expediency of exercising the power of eminent domain for making public improvements. Coster v. Tide Water Co., 18 N. J. Eq. 67; Buffalo & N. Y. City R. Co. v. Brainard, 9 N. Y. 109; Valley City Salt Co. v. Brown, 7 W. Va. 195."

The question then resolves itself into whether or not the Legislature under the provisions of the above act has delegated, by the language therein used, to the Board of Permanent Seat of Government the power to condemn the lands in question. We do not find that this agency of the State, either under this statute or generally, has any

right to condemn property to enlarge the State Capitol Grounds. The Legislature has given to this Board, under this act, the power to purchase all or any of the parcels of ground and the improvements thereon, but nowhere does the act state that it has a right to condemn the lands, in event that it is unable to purchase the lands by negotiation with the owners. It might be said that the word "purchase" in its broad sense would include the word "condemn" but we think that the word "purchase" cannot be given any such meaning and it was not the intent of the Legislature to use it in its broad sense, but on the contrary to give to it its popular meaning.

II.

As to the question as to whether the word "condemn" is included in the word "purchase," we cite the following cases and excerpts from same:

In the case of Paris Mountain Water Co. v. City of Greenville, 89 S. E. 669, l. c. 671 (S. C.), the court had this to say:

> "It is said, however, that even if the statute is unconstitutional, the Constitution itself gives the right of condemnation when it gives the right to purchase; that condemnation is purchase.
>
> "In Cummings v. Coleman, 7 Rich. Eq. 518, 62 Am. Dec. 402, it is said:
>
> > 'A general rule in the interpretation of statutes is to define the words employed by the Legislature, in their popular sense.'
>
> "The same rule applies to constitutions (Kents Com. Vol. 4, page 441); 'A purchase in the ordinary and popular acceptation of the term is the transmission of property from one person to

another, by their voluntary act and agreement, founded on a valuable consideration.'

"Condemnation has a valuable consideration, but it is in its nature not voluntary. There may be something in the context or general surroundings to show that the word is not used in the popular sense. There is nothing in the context to show that the word 'purchase' is not used in its popular sense. The surroundings are the other way."

Also, in the case of City of Enterprise v. Smith, 62 Pac. 324, l. c. 326 (Kans.), the court said the following:

"But in general, statutes are presumed to use words in their popular sense. Hence the technical meaning is rejected as soon as the judicial mind is satisfied that another is more agreeable to the object and intention. End. Inter. of Statutes, 74, 76. It is evident, therefore, that the word 'purchase' in the title to the act in question, was not used in the technical legal sense, because such title is not inclusive of, or cognate with the technical subject of titles to real estate by purchase, but is inclusive of and cognate with the general subject of acquisition of the title to real estate for waterworks purposes. The authorities, though few in number upon the particular question, support the ruling we make.

"In Kohl v. United States, 91 U. S. 366, 23 Law. Ed. 449, the meaning of the word 'purchase,' as used in the statute providing for the condemnation of property, was considered. The court said: 'It is true the words "to purchase" might be construed as including the power to acquire

> by condemnation; for, technically, "purchase" includes all methods of acquisition other than that of descent. But generally in statutes, as in common use, the word is employed in a sense not technical, only meaning acquisition by contract between the parties without governmental interference."

In the case of Griffith v. Trenton, 76 N. J. Law.Rep., page 24, it was said:

> "The contention of the prosecutors is that the City of Trenton is not invested with the power to condemn their lands by force of a statute, the title of which is 'An Act to authorize cities of this state to purchase lands and erect suitable buildings for city purposes, and to sell land and buildings now used for such purposes.' * * * * * * The ground of this contention is that the exercise of the right of eminent domain is not expressed in this title as one of the objects employed in the act."

Further quoting,

> "The controverted question is whether the words 'to purchase,' in the title of this act, expressed in a constitutional sense, that it is one of the objects of the act to authorize the taking of private lands for condemnation. On behalf of the state it is argued that 'to purchase' is the equivalent of 'to acquire;' that the term 'purchase' is broad enough to include any method of acquiring real property by the act of the party as

> opposed to the act of law; that in legal terminology 'purchase' means the acquisition of an estate in land otherwise than by inheritance."

In this case the court decided that the words "to purchase" meant "to buy"; and hence did not embrace the right to condemn, though it is broad enough to embrace such right, stating the following:

> "The obvious purpose of this constitutional requirement, Article Iv, Section 7 (P. L. 4) is to give information as to the statute to the legislators and the public, and, consequently, the title should read as it probably would be understood by unprofessional persons of ordinary intelligence."

In Words & Phrases, (2d s.) Vol. 4, page 63, the words "to purchase" are defined as follows:

> "The words 'to purchase' may be construed as including the power to acquire by condemnation, yet generally in statutes, as well as by common use, the word 'purchase' is employed to denote acquisition by contract between the parties without governmental interference. Weeks v. Grace, 80 N. E. 220, 222, 194 Mass. 296, 9 L. R. A. (N. S.) 1092, 10 Ann. Cas. 1077 (citing Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449)."

Historically, we refer to the 1911 Session Acts, page 108, which was the Act creating a State Capitol Commission Board following the destruction of the State Capitol

by fire. This board was given the following power:

> "If said board shall be unable to purchase the premises or any part of said premises so described by it for the additional state capitol premises, for a price or prices deemed by it to be just and reasonable, the Attorney-General shall on behalf of the State, and in its name institute in the Circuit Court of Cole County, Missouri, against the proper property owners and prosecute to a final termination an action or actions for the condemnation of said premises (including intervening streets of the City of Jefferson) to said public use contemplated by this act. Said proceeding or action to conform to the provisions of Article 2, Chapter 22 of the Revised Statutes of 1909 of this State, so far as the same may be applicable thereto."

So it will be seen that the Legislature deemed it necessary to give specific authority to the State Capitol Commission Board to condemn the needed property, in event the board was unable to purchase same.

At the time of the creation of the State Highway Commission, Laws of Missouri, 1921, 1st and 2d Extra Sessions, page 141, Section 21, express power was given to the Commission to condemn land in event of its inability to purchase or lease the necessary land for highway purposes, and was given the specific authority to exercise the right of eminent domain under the general condemnation statutes.

Also, under the law providing for a Commission to supervise the repairing, remodeling and rebuilding of State eleemosynary and penal institutions, found at page 107, Laws of Missouri, 1933-34, in almost the identical language

as used in the authority given the State Capitol Commission Board to condemn lands, the power is given the State Building Commission to condemn lands for the purpose of constructing and remodeling eleemosynary and penal institutions thereon.

It will thus be seen that in each of these cases the respective commissions and boards were given specific authority to condemn the needed properties in event they were unable to purchase same, and the Legislature authorized the respective boards to proceed under the general condemnation statutes, namely: Sections 1340 to 1349, inclusive, R. S., Mo., 1929, and amendments thereto.

In this case, if the Legislature had desired to add the power "to condemn" to the right "to purchase," it could have very easily done so, and it undoubtedly had such power.

Further, the Legislature appropriated $125,000 to purchase the property, and in condemnation proceedings it is possible that more than that amount would be adjudged against the State for the property, and in that case there would not be sufficient sum appropriated to pay for same. We do not think that the Legislature intended to include the power of condemnation to this Board when it gave the authority "to purchase."

Conclusion.

From the above and foregoing, and other reasons, it is our opinion that the Board of Permanent Seat of Government neither under this Act nor under the general statute would have authority to condemn the property in question, in the event the owners of the property, and the State, are unable to agree upon the purchase price.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

INHERITANCE TAX: Exemptions of a widow or widower under the Inheritance Tax Laws of the State of Missouri are $20,000.00 plus the value of a child's share in the entire net estate.

FILED
66

10-24

October 22, 1935

Hon. Richard H. Nacy
State Treasurer
Jefferson City, Missouri

Attention: E. J. Arnett, Supervisor
Inheritance Tax Department

Dear Sir:

This Department is in receipt of your request for an opinion relative to the exemption of a child's share in the net estate of a decedent passing to the widow or widower.

In the case of In re Rogers' Estate 250 S. W. 576, the Court said:

> "In the Sanford Case, 91 Neb. loc. cit. 753, 137 N. W. 865, 45 L. R. A. (N.S.) 236, the court said:
>
> 'The reason for the rule seems to be that the widow takes her dower interest in the estate of her deceased husband by operation of law; that she could not be deprived of it by his will; that it is something which belongs to her absolutely and independent of any right of inheritance or succession, and therefore so much of the estate as belonged to her by right is not chargeable with an inheritance tax.' * * *
>
> "The wife's interest does not pass to her by will nor by the intestate

laws, but it is hers, will or no will. The will has nothing to do with it. * *

"By reason and authority the laws by which the widow elects to take on renunciation of the will are not 'intestate laws,' and the property which she acquires in that manner is not subject to the inheritance tax. The purpose and effect of the law is to tax property which descends. It is taxed once by reason of such descent. The interest which the widow acquires does not descend. Her interest inheres and remains."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the exemptions of a widow or widower, under the Inheritance Tax Laws in the State of Missouri, are twenty thousand dollars ($20,000.00) plus the value of a child's share in the entire net estate.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

OFFICIAL BONDS: No county officer should become a surety on the official bond of another county officer.

June 24, 1935.

FILED
67

Honorable Ralph Nolen,
Representative Monroe County,
Paris, Missouri.

Dear Sir:

This department is in receipt of your recent letter making the following inquiry:

> "In giving official bonds for their term of office, a number of county officers in the various counties have personal sureties thereon who are holding other county offices. I would appreciate an opinion from your department as to who are disqualified from becoming personal sureties on bonds of county officials."

Some statutes relating to the giving of official bonds contain the qualifications of the sureties for the individual offices. Section 2846, R.S. Mo. 1929, however, is a general section, covering all county officers' bonds, and is as follows:

> "The sureties of all clerks, sheriffs, constables, collectors and other county officers shall be residents of the county in which the bonds to which they become parties, by reason of being sureties for any of the said officers, shall be executed."

We assume that any person who possesses the proper qualifications of a surety may become a legal surety on a county official's bond unless he be disqualified by the terms of Section 2847, R.S. Mo. 1929, which provides:

> "No sheriff, collector, constable, county treasurer, attorney at law, clerk of any court of record, judge or justice of any court of record, shall be taken as surety in any official bond that may be given by any officer in this state."

CONCLUSION

In view of Section 2847, supra, it is the opinion of this department that no county officer should become a surety for another county officer on his official bond.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

March 18, 1935.

FILED
68

Mr. R.E. O'Malley,
Sup't. of the Insurance Dep't.,
Jefferson City, Missouri.

Dear Sir:

We are in receipt of papers and documents pertaining to the merger of the Western Funeral Benefit Association and the Crescent Insurance Association, both of St. Louis, Missouri, and both organized under Article IV, Chapter 37, R.S. Mo. 1929, which said papers and documents, in our opinion, comply with Sections 5760 and 5770, R.S. Mo. 1929.

Very truly yours,

JWH:AH

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

INSANE POOR PATIENTS:

SHERIFF'S FEES : For transporting insane poor patients.

March 22, 1935.

3-27

FILED
68

Mr. Archie E. Odell
Sheriff of Ray County
Richmond, Missouri

Dear Mr. Odell:

This is to acknowledge receipt of your letter of March 7th in which you request the opinion of this Department as to fees you are entitled to as Sheriff, for transporting an insane poor patient to the State Hospital, and also as to whether you are allowed assistance in violent cases.

Under the provisions of Section 8636, R. S. Mo. 1929, the county court shall have power to send to the state hospital such of their insane poor as may be entitled to admission thereto.

The county court may, upon a hearing, under Section 8647, R. S. Mo. 1929, cause a suitable order to be entered of record sending said insane poor patient to a designated state hospital. Such order shall further set forth that the person found to be insane is a fit subject to be sent to the state hospital and the clerk of the court forthwith forward a certified copy of said order to the superintendent of the hospital, accompanying the same with the request of admission of the person found to be insane to the hospital.

Under Section 8649, R. S. Mo. 1929, the clerk of the county court shall forthwith transmit to the superintendent of the state hospital a copy of such order and the clerk shall thereupon, in due season, for the conveyance of such person to the hospital by the appointed time, issue his warrant to the sheriff of his county, or any other suitable person, commanding him forthwith to arrest

such insane person and convey him to the state hospital designated in the order. And said section further provides that if the clerk be satisfied of its necessity, he may authorize one or more assistants to be employed to assist in taking the patient to the hospital.

Under Section 8650 R. S. Mo. 1929, the relatives of the insane person shall have the right, if they choose, to convey him to the hospital. In such case, the warrant shall be directed to one of them and the person to whom it is directed and his assistant shall, if demanded, receive the same compensation allowed for the like services to the sheriff. The compensation for transporting an insane person to the hospital, is fixed by Section 8662 R. S. Mo. 1929, as amended by Laws of 1933 at page 408, which amended section is as follows:

> "To the Sheriff or other person, for taking a patient to a state hospital or removing one therefrom, upon the warrant of the Clerk, mileage going and returning, at the rate of ten cents per mile, and $1.00 per day for the support of each patient on his way to or from the hospital shall be allowed: to each assistant allowed by the clerk and accompanying the Sheriff, or other person acting under the warrant of the clerk, $4.00 per day for the time actually consumed in making said trip, said sum to include all expenses of such assistant. The computation of mileage in each case is to be made from the place of arrest to hospital by the nearest route usually traveled. Provided, that the said Sheriff shall furnish all necessary means of transportation without charge other than as above allowed. The cost specified in this Section shall be paid out of the County Treasury of the proper county."

It is, therefore, the opinion of this Department that the sheriff, or other suitable person, for transporting an insane poor patient to the State Hospital, under order of the County Court, is entitled to mileage at the rate of ten cents per mile

each way from the place of arrest to the state hospital by the nearest route usually traveled, and in addition thereto he is entitled to $1.00 per day for the support of each patient on his way to or from the hospital; if the clerk of the court is satisfied of its necessity he may authorize one or more assistants to be employed to assist the sheriff, or other suitable person, in transporting the patient, which assistant, or assistants, shall receive $4.00 per day each for the time actually consumed in accompanying the sheriff, or other suitable person, on said trip, said sum to include all expenses of such assistant. The sheriff shall furnish all necessary means of transportation in transporting a patient to the hospital and said fees and compensation shall be paid out of the County Treasury of the proper county.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CRH:LC

March 29, 1935.

FILED
68

Mr. R.E. O'Malley,
Sup't. of the Insurance Dep't.,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of March 29 with reference to the Reserve Mutual Fire Insurance Company.

We have examined the declaration of intention to form said corporation and find same to be in accordance with the provisions of Art. VI, Chapter 37, R.S. Mo. 1929.

Sincerely yours,

JWH:AH

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

October 2, 1935.

FILED
68

Hon. R.E. O'Malley,
Sup't. of Insurance Department,
State of Missouri,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of October 2, 1935 with reference to the Mutual Mortgage Insurance Company.

We have examined the Declaration of Intention to form said corporation, and find same to be in accordance with the provisions of Article VII, Chapter 37, R.S. Mo. 1929, and not inconsistent with the Constitution and laws of this state and the United States.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH

PENAL BOARD--CONVICTS: Certificate of Penal Board issuable in compliance with Section 8442 R. S. 1929, upon demand of former convict.

10-4

October 3, 1935.

FILED
68

Mr. W. M. Oakerson
Secretary of Penal Board
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated October 1, 1935, which reads as follows:

> "Section 8442 R. S. Mo. 1929 calls for a certificate to be furnished by the Board of Pardons and Paroles.
>
> "Please furnish this office with a facsimile topographical certificate containing the necessary legal form and substance which, in your opinion, should be issued by the Board in compliance with the provisions of this section or other sections particularly relating to the provisions of this section. Also, please advise how the minutes of the Board should record the issuance of said certificate."

Section 8442 R. S. Mo. 1929, provides as follows:

> "Any convict who is now or may hereafter be confined in the penitentiary, and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceably manner, without having any infraction of the rules of the prison or laws of the same recorded against such convict, shall be discharged in the same manner as if said convict had served the full time for which sentenced, and in such case no pardon from the governor shall be

required; and in all cases of first conviction of felony the civil disabilities incurred thereby shall cease at the end of two years from such discharge under the three-fourths rule, and such convict shall thereupon be restored to all the rights of citizenship: Provided, the he or she shall not have been indicted, informed against by the prosecuting or circuit attorney, or convicted of any other crime, during such period, and shall obtain a certificate to that effect from the board, whose duty it shall be, upon proper showing, to issue the same and keep a record thereof; Provided further, that nothing herein shall be construed as repealing section 12971, R. S. 1929."

It is our opinion that the minutes of the Penal Board, upon issuance of the Statutory certificate should read as follows:

Minutes for the _____day of _____1935. A certificate as authorized by Section 8442 R. S. Mo. 1929, was ordered issued by the Board and the Secretary was directed to furnish the former convict_____ prisoner No._____, with the original certificate and a copy of said original certificate was ordered hereto attached to the minutes and made a part of the records of the Board. (Here follows a copy of the original certificate issued and attached pursuant to the above order.)

CERTIFICATE.

State of Missouri)
) ss.
County of Cole)

Before me personally appeared_____, _____and_____, to me known to be the members of the Board of

Pardons and Paroles on the _____day of _____, and on their oath they state that they have investigated the records of the penitentiary, and that they have made additional investigation, and to their best knowledge and belief they swear that _____ _____, former prisoner, No._____ has not been indicted or informed against by any Prosecuting Attorney, nor has he been convicted of any other drime since his discharge from the Penitentiary on the_____ day of_____to the date of this certificate.

_____

_____

_____
Members of the Parole Board.

Subscribed and sworn to before me this_____ _____day of _____19_____.

_____
Notary Public.

My Commission expires_____day of _____19____.

It is our opinion that the form and substance of the certificate above outlined is a facsimile typographical certificate containing the necessary legal form and substance sufficient to comply with the provisions of Section 8442 R. S. Mo. 1929, and all other sections particularly relating to the provisions of this Section.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

_____
JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS.W

CRIMINAL LAW -
HABITUAL CRIMINAL ACT: Death sentence may be imposed on charge under habitual criminal act.

October 24, 1935 10-25

FILED 68

Honorable Michael W. O'Hern,
First Assistant Prosecuting Attorney,
Kansas City, Missouri.

Dear Sir:

We are in receipt of your inquiry, which is as follows:

> "I would like to have your interpretation of a portion of Section 4461 R. S. 1929, known as the Second Offense Act, and also the case of State vs Krebs, 80th S. W. 2nd, 196, if it is your custom to give such an opinion to a prosecuting attorney.
>
> "The point in question can be stated briefly:
>
> "A person is charged with Murder in the first degree. He had previously been convicted of a felony and complied with his sentence as provided in Section 4461.
>
> "Can he be charged and tried under the Second Offense Act and given the death penalty by the jury?"

We construe your inquiry to be based on the following facts:

The defendant has heretofore been convicted of a felony under the laws of Missouri, sentenced to the penitentiary, and has been regularly discharged therefrom. This defendant is now accused of murder in the first degree. May he be properly charged and prosecuted under the habitual criminal act?

Section 4461, R. S. Mo. 1929, reads as follows:

> "If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life; second, if such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

It will be noted that this section says:

> "If any person convicted of any offense punishable by imprisonment in the penitentiary * * * shall be discharged * * * and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the

> penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life."

In the case of State v. Krebs, 80 S. W. (2d) 196, the Supreme Court of this state had this question under consideration, and the defendant there was contending that to hold that the habitual criminal section has any application to capital offenses is to reach an absurdity, and contended that under such a view, a person accused of a capital offense and found to have a criminal record could only be sentenced to life imprisonment; whereas, a person accused of a capital offense, but without any criminal record, could be executed. The court, speaking as to that, said (l. c. 198):

> "We do not agree with appellant. It is not true that a person charged with and convicted of a capital offense under the habitual criminal section can only be sentenced to life imprisonment. When a defendant is charged under that statute and it is found that he has not been convicted before, the punishment prescribed for the crime generally may be assessed. State v. Sumpter, supra, 335 Mo. 620, loc. cit. 627, 73 S. W. (2d) 760, loc. cit. 763. If the punishment for the crime in the first instance includes the death penalty, the court or jury can impose it. Why should they be bound to assess a less punishment (life imprisonment) merely because they find the defendant has previously been convicted of one or more felonies and has served penitentiary sentences, especially when it is remembered that the obvious intent of the habitual criminal statute is to impose <u>heavier</u> penalties on defendants with felony records?
>
> "We understand this point was expressly decided in State v. Taylor, 323 Mo. 15, 23, 18 S. W. (2d) 474, 476. In that case this court was discussing alleged conflicts

> between three statutes: What is now section 4061, fixing the punishment in the first instance for robbery in the first degree with a dangerous and deadly weapon; what is now section 4428 (Mo. St. Ann., sec. 4428, p. 3043), fixing increased punishments to be added by the trial judge for successive convictions of felonies committed while armed with a pistol or deadly weapon; and what is now section 4461 (Mo. St. Ann., sec. 4461, p. 3063). The appellant was contending that section 4428 (Laws Mo. 1927, p. 173 (Mo. St. Ann., sec. 4428, p. 3043) by implication repealed section 4461, the habitual criminal statute. This court said: 'We fail to find any conflict between the two statutes, although it is perfectly apparent that both cannot be effectively applied to the punishment in all cases at the same time. For example, a defendant might be sentenced to death for robbery in the first degree, accomplished by means of a dangerous and deadly weapon, under the provisions of section 3310, p. 174, Laws 1927 (Mo. St. Ann., sec. 4061, p. 2863), so that such defendant could undergo no additional punishment under section 3702 (Mo. St. Ann., sec. 4461, p. 3063), although it was alleged and proved that he had previously been convicted of a felony.'"

In the case of State v. Taylor, 18 S. W. (2d) 474, the court, speaking of the habitual criminal act, says (l. c. 476):

> "In substance, section 3702, R. S. 1919, requires the jury, upon conviction for any offense, to impose as punishment the maximum penalty provided by law for such offense, providing it is alleged and shown that the defendant has previously been sentenced upon a conviction of any offense punishable by imprisonment in the penitentiary or of an attempt to commit such an offense,

> has thereafter served out his sentence, and has been finally discharged. The character of the prior conviction and the nature of the subsequent charge are not controlling, so long as the first offense was punishable by imprisonment in the penitentiary, or was an attempt to commit such an offense."

As stated in the Krebs case, the object of this statute was to impose heavier penalties on the offender who has a previous criminal record.

If the jury, on having the question submitted to them of whether the defendant is guilty of the homicide charge, regardless of his criminal record theretofore, believe the facts justify it, they may assess the punishment at death.

Statutes should be given a reasonable construction, and it would be contrary to reason to contend that a defendant should be punished with a lighter sentence if he had been formerly convicted than if he had not.

CONCLUSION

It is our opinion that the defendant, under the circumstances set forth by your inquiry, is subject to being charged under the habitual criminal act, and if the jury have submitted to them by proper instructions the commission of the former felony, conviction thereof, service of the sentence and discharge, and they find that the same has occurred, and that defendant is guilty of the immediate charge, the jury may legally assess the death penalty and must, at all events, assess the defendant's punishment at as much as life imprisonment.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

November 7, 1935.

FILED
68

Hon. R.E. O'Malley,
Superintendent of Insurance,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of November 7 with reference to the Atlas Mutual Insurance Company.

We have examined the Declaration of Intention to form said corporation and find same to be in accordance with the provisions of Art. VI, Chapter 37, R.S. Mo. 1929 and not inconsistent with the Constitution and laws of this State and of the United States.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

JWH:AH

TAXATION AND REVENUE: Penalties, interest, commissions and attorneys fees as allowable on delinquent taxes against railroad undergoing re-organization under Section 77 of Bankruptcy Act.

January 2, 1935.

FILED 69

Hon. John B. Owen,
Prosecuting Attorney,
Henry County,
Clinton, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of December 7, 1934, such request being in the following terms:

"The Treasurer and Ex-officio Collector has for collection the taxes of the Chicago, Rock Island & Pacific Railway Company state, county, school and other taxes for the year 1933. Said taxes are of course delinquent and would ordinarily carry with it the commission of one percent per month from January 1, 1934, 2% on principal and interest and a ten percent attorney fee on principal and interest. The principal amount of the tax is something in excess of $1600.00.

The Treasurer and Collector received a memorandum entered apparently by Judge Barnes in the District Court of the United States for the Northern District of Illinois Eastern Division in the matter of The Chicago, Rock Island & Pacific Railway Company, bankrupt. Docket 33209. The memorandum recites that this is a hearing on the claim of State of Missouri at the relation and to the use of the Collector of the Revenue within and for Cole County, Missouri, the Collector for Miller County, Missouri, the Collector for Morgan County, Missouri, and the Collector for Benton County, Missouri, for taxes including interest and penalties, commissions and attorney fees. The Court recites, that 'The Court is of the opinion that taxes legally due and owing are 'debts' within the meaning of the Bankruptcy Act; that Section 57 (j) (Section 93 (j) Title 11. U.S.C.A.) forbidding the allowance of claims based on penalties, includes penalties imposed for non-payment of taxes; that all the exactions imposed by the Missouri statute upon a delinquent tax-payer over and above the principal

amount of taxes are penalties; and that the same are imposed upon the delinquent not only for the purpose of general deterence of delinquency but as a punishment (See State vs Koeln, 61 S.W. (2nd) 750.

The court then in the memorandum says there may be an order directing the trustees of the debtor's estate to pay, in the due course of administration, the principal amount of taxes in question and a further order denying the petitions of the State of Missouri for judgment for penalties, commissions and attorney fees.

The Henry County Treasurer and Ex-officio Collector is in receipt of a check for the principal amount of the taxes but said check does not include interest, penalties, commissions or attorney fees. He is willing to accept said check but the County Court is unwilling to advise him so to do unless an opinion is obtained from your office stating that the State of Missouri is not entitled to collect commissions and penalties. In other words, the Treasurer and Collector does not want to be liable to the County in case the State should claim said penalties and commissions should be paid.

The County Court and Treasurer Ex-officio Collector have requested me to furnish an opinion on the subject and requested that I secure an opinion from your office. Would appreciate the opinion from your office as quickly as possible so the County Treasurer and Collector can either cash or return the check."

We have examined certain orders entered by the court in The Chicago, Rock Island & Pacific Railway Company debtor proceeding referred to in your letter, including Order No. 31 entered December 15, 1933, ordering the trustees of the debtor to pay the principal amount of Oklahoma taxes due for the tax year 1932-33, Order No. 31-A entered September 20, 1934, directing such trustees to pay the principal amount of Oklahoma taxes for the tax year 1933-34, Order No. 58 dated July 24, 1934, authorizing the Collector of Benton County, Missouri, to file petition and claim against the debtor for taxes, penalties, commissions and costs, and authorizing said Collector to accept and receive from the debtor the principal of said taxes without prejudice to his claim for penalties, commissions and costs, and reserving said claim for penalties, commissions and costs for further determination by the court, Order No. 59, dated July 24, 1934, with respect to the Collector of Miller County, Missouri, making the same provisions for such Collector

as Order No. 58 made for the Collector of Benton County, Order No. 65, dated December 14, 1934, ordering the trustees of the debtor to pay the principal amount of the taxes for the year 1933 to the Collector of Miller County, Missouri, and denying the motion, petition and claim of said Collector for judgment for tax penalties, commissions, costs and attorneys fees, similar orders being made simultaneously with respect to the several motions, petitions and claims of the Collectors of Morgan, Benton and Cole Counties, Missouri. We have likewise examined the memorandum of the court in the above proceeding, dated November 24, 1934, referred to in your letter, pursuant to which Order No. 65 of the court was entered.

11 U.S.C.A., Section 93 (j) provides as follows:

> "Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." (July 1, 1898, c 541, Sec. 57, 30 Stat. 560, as amended February 5, 1903, c. 487, Sec. 12, 32 Stat. 799).

In the case of New York v. Jersawit, 263 U. S. 493 (1924), the Supreme Court of the United States held that where a State Franchise Tax Law provided for the payment of the tax in advance, and if not paid by January 1st, "in addition to the amount of such tax * * * ten percentum of such amount, plus one per centum for each month the tax * * * remains unpaid", the addition of 10% where the tax was not paid by January 1st was a penalty within the meaning of this statute, and that the further addition of 1% for each month the tax remained unpaid was not statutory interest, but part of the penalty, and that neither could be allowed the State in a bankruptcy proceeding.

The Supreme Court of Missouri sitting in banc in the case of State ex rel Crutcher v. Koeln, 61 S. W. (2nd) 750 (1933) held that "as used in the chapter on taxation in the Revised Statutes the expressions 'commissions', 'interest', 'fees', and 'costs' are included in the generic term 'penalty' ". (61 S.W. (2nd) 753). From this recent construction of the revenue statutes of this State by the Missouri Supreme Court it is apparent that that court regards the principal of a tax as one thing, and all amounts over and above the principal which the statute provides shall be collected in the event the tax is not paid when due as something separate and distinct from such principal, and on the same page the court says that these latter "are imposed upon his property as a punishment to him as well as for the purpose of general deterrence

of delinquency. They are essentially of a penal nature, since they imply punishment." Thus it would seem that commissions, interest fees and costs imposed on delinquent tax payers under our statutes in addition to the principal amount of the taxes, are penalties within the meaning of the act of Congress above quoted, and consequently are not to be allowed against the estate of a debtor in a proceeding under the Bankruptcy Act.

Under Section 77 of the Bankruptcy Act, relating to the reorganization of railroads, to the terms of which the Chicago, Rock Island and Pacific Railway Company proceeding here involved, is subject, the district court in which the proceedings are pending has "exclusive jurisdiction of the debtor and its property wherever located." (Act of July 1, 1898, c.541, Sec. 77 (b), as added March 3, 1933, c.204, Sec. 1, 47 Stat. 1474). To that court any person seeking to establish a claim against the debtor railroad must go, and that court has decided, on the authority of the Koeln case referred to above, that such a debtor can only pay the principal amount of the delinquent taxes due to certain Missouri county collectors. That decision should be adequate protection to any Missouri county collector against personal liability arising out of the failure to collect anything except the principal amount of delinquent taxes due by that railroad to his county, even though an appeal could be taken from the decision which has been made by that court.

In conclusion it is our opinion that the Collector of Henry County would not be personally liable for a failure properly to discharge the duties of his office for accepting from the trustees of the Chicago, Rock Island & Pacific Railway Company a sum of money equal to the principal only of delinquent taxes owed by that company to such collector, and in making no further attempt to collect the penalties, interest of 1% per month, commissions and attorneys fees on such delinquent taxes, authority to pay which has been denied by the United States District Court in which the affairs of the railway company are being administered with respect to substantially identical claims by collectors of other counties of this State.

Very truly yours,

EDWARD H. MILLER
ASSISTANT ATTORNEY GENERAL

APPROVED:

ROY McKITTRICK
ATTORNEY GENERAL

CITY ORDINANCES: Validity of same based on necessary statutory vote on final passage.

March 25, 1935.

3-27 FILED 69

Honorable E. E. Oliver, Mayor
Charleston, Missouri

Dear Sir:

Your request of March 15, 1935, for an opinion is as follows:

> "If consistant, I will appreciate very much your opinion on the following matter.
>
> "At the regular meeting of the City Council on February 4th, an ordinance pretaining to the salaries of Mayor and Councilmen was presented, same was read for first, second and third time and voted on by roll call with four in favor and three against.
>
> "Charleston Mo. is a City of third class and has eight elective Councilmen, due to the death of one councilman in November the board consists now of only seven members all of which were present and voted at the February meeting.
>
> "Opinions wary as to whether or not the ordinance passed, I will appreciate very much any enlightment you may give me on the matter."

Section 6735 R. S. Mo. provides for the number of councilmen to be elected in cities of the third class and reads as follows:

> "The council shall, by ordinance divide the city into not less than four wards, and two councilmen shall be elected from each of such wards by the qualified voters there-

> of at the first election for councilmen in cities hereafter adopting the provisions of this article; the one receiving the highest number of votes in each ward shall hold his office for two years, and the one receiving the next highest number of votes shall hold his office for one year; but thereafter each ward shall elect annually one councilman, who shall hold his office for two years.

You state in your letter that eight were elected but since the election one has died.

Section 6745 R. S. Mo. 1929, specifies who are officers in cities of the third class and provides:

> "The term 'officer,' whenever used in this article, shall include any person holding any situation under the city government or any of its departments, with an annual salary, or for a definite term of office."

Section 6747 R. S. Mo. 1929, gives to the council the right to fix salaries by ordinance in cities of the third class, and reads as follows:

> "The council shall have power to fix the compensation of all the officers and employes of the city; but the salary of an officer shall not be changed during the time for which he was elected or appointed."

There can be no doubt that members of the city council are officers, within the meaning of the above section, when they have otherwise qualified for such office as required by law. The qualifications to hold office are not questioned in your request.

Section 6740 R. S. Mo. 1929, specifies how proceedings of council shall be kept, and provides:

> "The council shall cause to be kept a journal of its proceedings, and the ayes and nays of the members shall be entered on any question at the desire of any two members. The council may prescribe and enforce such rules as may be necessary to secure the attendance of its members and the expeditious tranaaction of its business."

Section 6800 R. S. Mo. 1929, provides the style of ordinance and when an ordinance becomes a law, and reads as follows:

> "The style of the ordinances of the city shall be: 'Be it ordained by the council of the city of_____, as follows.' No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the council shall vote therefor, and the ayes and nays shall be entered on the journal; and all bills shall be read three times before their passage. No ordinance shall be revived or re-enacted by mere reference to the title thereof, but the same shall be set forth at length, as if it were an original ordinance. No bill shall become an ordinance until it shall have been signed by the officer presiding at the meeting of the council at which it shall have been passed. When so signed, it shall be delivered to the mayor for his approval and signature, or his veto."

We take it from the above section that a majority of the members elected to the council constitute a quorum to transact business.

In the case of O'Dwyer v. Monett, 123 Mo. App. 184; 100 S. W. 670, l. c. 671, the Appellate Court said:

> "The journal shows that the latter ordinance was read three times at the meeting of the city council on March 24, 1903, and that there were three votes in favor of its passage and one vote against it. Section 5767, chap. 91, art. 4, concerning cities of the third class, R. S. 1899, provides that cities of the third class must be divided 'into not less than four wards, and two councilmen shall be elected from each of such wards,' etc. Section 5832, same chapter and article, provides: 'No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the council shall vote therefor,' The ordinance, therefore, did not received the votes of a majority of the members elected, and failed to pass. In these circumstances, the learned trial court correctly held that the ordinance fixing the salary of the marshal at forty dollars per month, as printed in the revised ordinances, was in full force and effect, and on this finding properly rendered judgment for defendant, as plaintiff had received his full salary as fixed by the revised ordinances. The contention of the plaintiff is not that there was a valid ordinance fixing his salary at fifty dollars per month, but that the city is estopped by the action of the city council in auditing his salary at fifty dollars per month, and for the reason he claimed and believed he was entitled to it. A city councilman like a city marshal is a public official. His duties are defined by law. He is not the general or pri-

vate agent of the city, and the councilmen could only bind the city by such contracts as they were by law authorized to make, and since the right of any public officer to compensation can only exist by law, the city council was powerless to bind the city in any manner to pay a compensation to the marshal not fixed by a valid ordinance."

CONCLUSION.

It is the opinion of this office that an ordinance, to be valid in your City, must receive the necessary vote on final passage as provided in Section 6800, supra. It must receive a majority of the votes from the eight councilmen who were elected, as provided by law and as admitted in your request. The death of a member does not change the express language of the Statute. It takes five votes to make the statutory majority.

We are of the opinion that the ordinance in question did not pass as required by statute.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

Insurance: Re Approval of decreased value of Trans-Mississippi Life Insurance Company stock.

4-16

April 15, 1935.

FILED 69

Mr. R.E. O'Malley,
Superintendent of Insurance,
Jefferson City, Missouri.

Attention: Mr. J.F. Allebach,
Assistant Counsel

Dear Sir:

We have examined the attached document by which the Trans-Mississippi Life Insurance Company seeks to reduce the par value of its shares of stock from $10.00 to $5.00 per share.

In our opinion these documents are in accordance with the laws of the State of Missouri and of the United States and are not inconsistent with the Constitution and laws of this state and the Constitution and laws of the United States.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH
Encl.

DEAD BODIES: Consent of the Secretary of the State Anatomical Board must first be obtained before an autopsy may be performed on unclaimed dead bodies.

4-26

April 23, 1935.

FILED
69

Hon. M. D. Overholser
Secretary
Missouri State Anatomical Board
Columbia, Missouri

Dear Sir:

This is to acknowledge your letter which reads as follows:

> "I am enclosing a copy of a letter just received from Dr. Schoemaker, President of the Missouri State Anatomical Board.
>
> "The City Hospital of St. Louis is apparently violating our State Anatomical Law by performing autopsies on unclaimed bodies. They justify this procedure by obtaining the consent of the dying patient for the autopsy. The Anatomical Board maintains that this is illegal and asks for a ruling from you in regard to this matter."

The letter of Dr. Schoemaker, appended to your request, reads as follows:

> "Some more grief for us. The City Hospital is securing the consent of a dying patient, having no relatives, for an autopsy. I objected strenuously - They tell me that an opinion from the City Legal Dep't states that they have the right to do so.
>
> "Our Law states that: 'Immediately upon the death of such person they become the property of the Anatomical Board.' I think we should do something about this.

"I have been told many a time that the Supreme Court has ruled that a person loses all equity in his body at time of death.

"In olden times when schools and Dr's 'bought' a persons body, paying in advance, they were not able to collect. My contention is that they have no right to such procedure.

"Just had a talk with Dr. Terry, who joins me in urging that you secure an opinion from the Attorney-General."

Section 9129, R. S. Mo. 1929, provides:

"Superintendents or wardens of penitentiaries, houses of correction and bridewells, of hospitals, insane asylums and poorhouses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers in whose custody the body of any deceased person, required to be buried at public expense, shall be and are hereby required immediately to notify the secretary of the board of distribution, whenever any such body or bodies come to his or their possession, charge or control, and shall thereafter dispose of such body or bodies, as the secretary of the state board may direct: Provided, that at any time before said body or bodies have actually been distributed, as provided in this article, any relative or friend of any such deceased person or persons, shall have the right to take and receive the same from the possession of any person in whose charge or custody it may be found, for the purpose of interment: Provided, that when a claim is made for such body or bodies by any person, not a relative of such deceased person or persons, the expense of the interment shall be borne by the person making such claim. The school or college securing such body shall pay all necessary expense incurred in the delivery thereof, including cost of notice to secretary, which notice shall be by telegraph, when neces-

> sary. A correct record of all such bodies, name and date of death, shall be kept in a book kept for that purpose with the county clerk of the county in which such person died, or the city health commissioner of St. Louis city, and such record must be furnished said county officer by person or persons reporting said bodies to the state anatomical board."

Section 9132, R. S. 1929, provides:

> "It is hereby declared unlawful for any person or persons to hold an autopsy on any dead human body mentioned in this article, without the written, telegraphic or telephonic consent of the secretary of said board first had and obtained."

In view of the provisions of Section 9129, supra, we are of the opinion that it is mandatory upon the superintendent or person having the custody or possession of the body of any deceased person, required to be buried at public expense, to immediately notify the secretary of the state board regarding the disposition of said body.

Section 9132, supra, plainly states that it is unlawful for any person or persons to hold an autopsy on any dead human body without the written, telegraphic or telephonic consent of the secretary of said board first had and obtained.

Your attention is directed to Section 9134, R. S. 1929, which provides as follows:

> "Any person violating the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than fifty dollars nor more than five hundred dollars."

We are of the opinion and therefore conclude in construing the above mentioned statutes that if the consent of a patient, who is about to die, is obtained for the purpose

of performing an autopsy on such patient's dead body, then before an autopsy could be performed on such deceased person's body, the provisions of Section 9129, supra, must be first complied with; in other words, the consent of the patient would not operate to circumvent the application of Section 9132, supra.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

RCS/JET;afj

September 12, 1935.

FILED
69

Hon. R.E. O'Malley,
Sup't. of the Insurance Dep't.,
Jefferson City, Missouri.

Attention: Mr. P.B. McHaney,
Counsel

Dear Sir:

We are in receipt of papers and documents pertaining to the reduction of the capital stock of the National Fidelity Life Insurance Company of Kansas City, Missouri.

In our opinion said papers and documents are not inconsistent with the Constitution and laws of this state and the United States, and the proceedings had by said company were, insofar as it appears from the face of said documents, regular, and according to law as set out in Sec. 5915, R.S. Mo. 1929.

It is impossible, however, for this department to certify with respect to the said reduction of capital stock that same will not be prejudicial to the interest of the policy-holders or that the condition and assets of the company justify said reduction.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

COUNTY COURTS:)
SCHOOL FUNDS:) Expense of managing and maintaining property acquired under a mortgage given to secure a loan of school money should be paid out of the income of said property.

9-17

September 13, 1935.

FILED
69

Mr. J. R. Oliver
County Court Clerk
Dunklin County
Kennett, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office.

You state in your letter that recent rulings from this office seem perfectly clear to you and to other officers that the expense of managing and taking care of property which the county has foreclosed and purchased under a deed of trust or mortgage given to secure payment of a loan of school funds should be paid out of the principal school fund instead of out of the income derived from said fund. You no doubt refer to an opinion rendered by this department to Honorable Elbert L. Ford, Prosecuting Attorney at Kennett, Missouri, under date of May 14, 1935. Since rendering said opinion, we have given the matter further consideration and decided to render this additional opinion which is to be taken as superseding and overruling the opinion above referred to.

Section 9243, R. S. Mo. 1929, provides that it is the duty of the several county courts to diligently collect, preserve and securely invest the moneys belonging to a county school fund; the income of which fund shall be appropriated for establishing and maintaining free public schools. That section reads as follows:

> "It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent. per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

It will be noted that the above section requires that the school fund shall be secured, invested and sacredly preserved and only the income from said fund is to be appropriated for establishing and maintaining free public schools.

Section 9256, R. S. Mo. 1929, provides that the county court, through its agent duly appointed, may purchase property sold under mortgage or deed of trust given to secure the payment of a loan of school funds. Said section provides that the county court may appoint an agent to take charge of, rent or lease or otherwise manage the same under the direction of the court. This section provides further, however, that the property as soon as practicable and when advantageous to the school or schools interested therein shall be resold and the money realized shall become part of the school fund out of which the original loan was made. Said section reads as follows:

> "Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under

> the provisions of this chapter, or by virtue of any power in any such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been out of the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

The above section does not provide how the expenses incidental to the management and the upkeep of such property purchased by the county court shall be paid. Neither does the section specifically provide that the rents or other incomes that are derived from said property shall be appropriated to the various schools. However, we think it plain that such rents or other income is income derived from the investment of school funds and should be so appropriated.

The exact question to be decided, as we understand it, is whether the expenses incidental to the ownership of such property should be paid out of rents and the income derived from the property or whether it should be paid out of school fund principal.

As pointed out above, Section 9243 provides that

the money belonging to the school fund shall be securely invested and sacredly preserved. We think it plain that the Legislature intended that this fund should not be expended or diminished for any purpose. The income from such principal is to be apportioned to the various school districts.

The further question arises as to whether the schools are to receive the gross income or the net income derived from the property. 31 Corpus Juris, Section 8, page 402, defines "income" when used with the word "rent" as follows:

> "While generally the word 'income' has a different signification from 'net income,' the usual and ordinary meaning of the word, when used alone, may be 'net income;' and, in the ordinary commercial sense, the term may, especially when connected with the word 'rent,' mean net or clear income. ****"

Note (b) of said section reads as follows:

> "'There is some apparent confusion in the authorities respecting the meaning of the word "income," but we think that the word as used in the statute under consideration was intended by the legislature to mean net income. True, the word "income" has been construed to mean gross income or revenue derived from specific property, where from the language of the statute or contract, gross income appeared to have been intended. Seligman in his work on Income Tax says that "income" is to be distinguished from mere receipts or gross revenue; that it is more than that which simply comes in from any economic activity. He further says: "By income is always meant net income, as opposed to gross income. In other words, from the receipts in any enterprise we must, in the first place, deduct the expenses of the enterprise -- that is, the outlay incurred in securing the gross product."'" Niland v. Niland, 154 Wis. 514, 517, 143 N.W. 170, Ann. Cas. 1915B 1127."

Bouvier's Law Dictionary, (Rawle's Third Revision), page 1527, gives the following definition of "income":

> "Income. The gain which proceeds from property, labor, or business. It is applied particularly to individuals. The income of the state or government is usually called revenue. The word is sometimes considered synonymous with 'profits,' the gain as between receipts and payments; People v. Board of Supervisors, 4 Hill (N. Y.) 23; 'rent, and profits,' 'income,' and 'net income' of the estate are equivalent expressions; Andrews v. Boyd, 5 Greenl. (Me.) 203; it may mean 'money' or the expectation ofreceiving money; U. S. v. Schillinger, 14 Blatch. 71, Fed. Cas. No. 16,228; Gray v. Darlington, 15 Wall. (U. S.) 63, 21 L. Ed. 45; and a note is ground for expecting income, and in the sense of a statute taxing incomes the amount thereof is to be returned when paid; Portland Co. v. U. S. 15 Wall. (U. S.) 1, 21 L. Ed. 113. See Simpson v. Moore, 30 Barb. (N. Y.) 637. In the ordinary commercial sense 'income' especially when connected with the word 'rent,' may mean clear or net income." *****

CONCLUSION.

In view of the above, it is the opinion of this department that the expenses incidental to a county owning property purchased under a mortgage or deed of trust given to secure a loan of school moneys should be paid out of the income derived from said property. After deducting said expenses, the balance or net income, if any, should be approrpiated by the county court for the purpose of establishing free public schools.

Yours very truly,

APPROVED:

J. E. TAYLOR
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JET/afj

SCHOOLS:)
) Distributable property of railroads and similar utilities is ascertained by the average rate
TAXATION:) levied for taxation.

11-25

November 23, 1935.

FILED
69

Hon. J. R. Oliver
Clerk of the County Court
Dunklin County
Kennett, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"Will you kindly advise me in the following matter?

"The average school tax rates as determined in accordance with Section 10,029-1929 Statutes for This County is $1.15 per $100.00 valuation.

"Two Railroads whose lines extend into this county had representatives examine tax estimates of schools in the County submitted to this office, who reported that the average tax rate necessary to operate the schools is only $ .81 per $100.00 valuation, distributed among the several funds as follows:

"Teacher's and incidentals	$ .51
Building fund	.04
Sinking fund	.15
Interest fund	.11
Total	.81

"The County Court, by its order has fixed the rate for school purposes to be extended against railways, railroads,

> utilities, and telephone and telegraph companies at the rates reported to be the amount needed, as determined by the representatives of the said railroads.
>
> "The discrepancy that will appear between the tax rate charged against real estate and personal property, and the distributable property of railroads, utilities etc. seems to me to be discriminatory and contrary to the act above referred to."

Distributable property of railroads and other similar public utilities is assessed by the Missouri State Tax Commission by virtue of Section 9854, paragraph 6, R. S. Mo. 1929.

Section 10029, R. S. Mo. 1929, provides how taxes for school purposes are levied on distributable property of railroads. It is controlling and specific and must be complied with by the county courts. The distributable property of railroads is assessed by the Tax Commission and certified back to the counties and the amount so certified is prorated to each district regardless of whether the railroads' physical property touches the district.

We quote Section 10029, supra, in part as follows:

> "For the purpose of levying school taxes, and taxes for the erection of public buildings, and for other purposes, in the several counties of this state, on the roadbed, rolling stock and movable property of railroads in this state, the several county courts shall ascertain from the returns in the office of the county clerk the average rate of taxation levied for school purposes, and also the average rate of taxation levied for the erection of public buildings, and for other purposes, each separately, by the several local

school boards or authorities of the several school districts throughout the county. Such average rate for school purposes shall be ascertained by adding together the local rates of the several school districts in the county, and by dividing the sum thus obtained by the whole number of districts levying a tax for school purposes, and shall cause to be charged to said railroad companies taxes for school purposes at said average rate on the proportionate value of said railroad property so certified to the county court by the state auditor, under the provisions of this article, and the said clerk shall apportion the said taxes for school purposes, so levied and collected, among all the school districts in his county, in proportion to the enumeration returns of said districts. Such average rate levied for the erection of public buildings, and for other purposes, shall be ascertained, each separately, by adding together the local rates of the several districts in the county levying a tax for the erection of public buildings, or for other purposes, and by dividing the sum thus obtained in each case by the whole number of districts in such county; and the clerk shall cause to be charged to said railroad companies taxes for the erection of public buildings or for other purposes, at said average rate on the proportionate value of said railroad property so certified to the county court by the state auditor, under the provisions of this article, and the county court shall apportion the said taxes for the erection of public buildings, or for other purposes so levied and collected, among the several

school districts levying such taxes, in proportion to the amount of such taxes so levied in each of said districts: * * * * * * * * * * * *"

Your letter states, "The average school tax rates as determined in accordance with Section 10,029-1929 Statutes for This County is $1.15 per $100.00 valuation." However, the county court took estimates as compiled by representatives of two railroads, showing "that the average tax rate necessary to operate the schools is only $ .81 per $100.00 valuation" and made an order that $ .81 was all that should be extended in each school district for school tax purposes. In other words, if we understand the facts, the average school tax levied is $1.15, while the county court provided in its order that only $ .81 was necessary to operate the schools.

The duty upon the county court is to take the average of the taxes levied in all school districts and not the average of what might be necessary to operate the schools. And if the county court by its order arrived at the figure of $ .81 by a method of calculating what was necessary to operate the schools, said order was without authority of law and contrary to and violative of Section 10029, supra, in our opinion.

The only thing the county court has to do relative to fixing the rate of taxation for school purposes against distributable property of railroads and public utilities is to take the rates levied in each district and add them together and strike an average. There is a vast difference between what rates are levied in each district and what rates may be necessary to operate the school. The statute says "the several county courts shall ascertain from the returns in the office of the county clerk the average rate of taxation levied for school purposes."

In concluding this opinion we do not wish you to be under the impression that we are [redacted] approving the average school tax rate in Dunklin County of $1.15 per $100.00 valuation. We merely take your figure of $1.15 per $100.00 valuation as the average rate and trust that same was arrived at in conformity with the Constitution. We call attention to said fact in view of the case of State ex rel. Kersey, Collector v. Western Union Telegraph Co., 263 S. W. 419, l. c. 420, wherein the court said:

> "The school tax rate was fixed by the county court at 146 cents per $100 of valuation shown on the railroad tax book, in attempted compliance with section 13031, R. S. 1919. Among the 53 school districts which filed certificates with the county clerk, there appear several levies which are indisputably in excess of the largest rates permitted by the Constitution. For instance, in district No. 5 the record shows there had been an attempt to vote a tax of 120 cents per $100 valuation for ordinary school purposes. The board attempted to levy the full amount of this, as well as a much larger rate for building fund, sinking fund, and payment of accrued interest. Counsel contends the rate first mentioned was 20 cents too high, and in this he is correct. Harrington v. Hopkins, 288 Mo. 1, 231 S. W. 263. The record shows like excess levies in several other districts. It is contended there are still other districts in the same condition, but the summaries are not full enough to show the amounts of the excesses in these in such way that the lawful rate can be separated from the unlawful. Even if it be held that the circuit court could reduce the levy so as to exclude parts of rates in excess

> of constitutional limits (State ex rel. v. Railroad, 149 Mo. loc. cit. 644, 645, 51 S. W. 479), yet this court cannot substitute a new average rate because the record does not give all the necessary information. Enough appears to show the average rate used is excessive because levies exceeding constitutional limitations went into it. There is a remedy provided by the statute, but it is not available in this suit to sustain the present levy. The judgment as to school taxes cannot be upheld."

See also: Harrington v. Hopkins et al., 231 S. W. 263.

In State ex rel. School District v. Waddill, 52 S. W. (2d) 476, the Supreme Court of Missouri, page 479, said the following:

> "There is no conflict, however, between the general language and the specific provision. Private property lying in different school districts is rarely taxed for school purposes at the same rate. The property of A situated in school district No. 1 may be taxed at the rate of $1.15 on the $100 valuation; that of B in school district No. 2 at only 40 cents. In order to determine the extent to which the property in all school districts in a county, considered en masse, is taxed for school purposes, the average of the rates which obtain in the several school districts must be accepted as the gauge. And so the aggregate value of the property of a street railroad company, apportioned to a county to be taxed for the benefit of all the school districts in the county, when

taxed for school purposes at the average rate, is subjected to taxation for those purposes to the same extent as the property of private persons."

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attor ey-General.

JLH:EG

ELECTIONS: Death of contestee in election contest abates the action; if vacancy in office exists, the governor must issue writ of election to fill such vacancy.

January 18, 1935.

1/21

FILED 70

Honorable Guy B. Park,
Governor of Missouri,
Jefferson City,
Missouri.

Dear Governor Park:

Honorable Lawrence Pressley, member of the Legislature, informs this department that you desire an opinion based substantially on the following facts:

"At the November election, November 6, 1934, J. J. Easterday was declared elected to the office of Representative from Crawford County, and certificate of election was duly issued to him. His opponent, Dr. John H. Martyn, served notice of a contest; proceedings were regularly instituted and the contest is now pending. On January 7, 1935, Mr. Easterday died. Does the death of Mr. Easterday abate the action? Is it necessary to hold a special election?"

I.

We shall first consider the question of the effect of Mr. Easterday's death in so far as the election contest is concerned.

Statutes relating to contested elections, beginning with Sec. 10339 R. S. Mo. 1929, to Sec. 10382 R. S. Missouri, 1929, inclusive, do not contain any provision for the revival of the contest in the event of the death of the contestor or contestee; nor are we able to find any general section in the statutes relating to abatement and revival which would apply to the death of a contestee in an election contest.

The general sections relating to abatement and revival of actions is Section 891, R. S. Mo. 1929, which is as follows:

> "No action shall abate by the death, marriage or other disability of a party, if the cause of action survive or continue. In case of the death, marriage or other disability of a party, the court, on or before the third term after the suggestion of such death, marriage or disability, may, on motion, order the action to be continued by or against the representative or successor of such party in interest. When

> the cause of action does not survive, the action shall abate only as to the deceased parties, and shall continue as to the survivors, if any, without a revival thereof."

The general principle of law relating to the abatement of actions by death is found in 1 C.J., p. 153:

> "At common law, every real or personal action abated on the death of either the sole plaintiff or the sole defendant before verdict and judgment, and this is still the law except in so far as the common-law rule has been modified by statute. And the death of a party had the same effect, with certain exceptions, where there were several plaintiffs or defendants."

In 20 C.J. Sec. 3244 the following is supported by cases of Gantt vs. Brown, which will be quoted by law, and by the decisions of many other states:

> "Unless otherwise provided by statute, a contested election case abates on the death of the contestee, and in some jurisdictions it abates upon the death of the contestant. But in others it is not abated by the death of the contestant, and where an election for governor and lieutenant governor is contested and the contestant for the office of governor dies pending the contest, the contest for the office of lieutenant governor may continue the governorship contest for his own benefit, as the lieutenant governor, upon the death of the governor, succeeds to that office."

A leading decision, and very much in point, is the case of Gantt v. Brown, 244 Mo., 271, l.c. 301, wherein the court said:

> "Does the admitted death of Judge Gantt abate this action? We think so. We have no statute in Missouri providing for the survival of such an action. The very nature of the office contested makes the action purely personal. The duties of such an office are such that they must be performed by the holder thereof and can not be delegated to another. In other words, the duties must be personally performed and are nondelegable. These things impress the suit as being one purely personal in character. No one has any interest in the office except the contending parties. Salary is a mere incident to the office. (State ex rel. Evans v. Gordon, 245 Mo. 12) And salary is not in a legal sense involved in this case. Salary might follow as a result of the

case, and purely as an incident to the office, but not by force of the judgment itself to be rendered in this case. That judgment is fully bounded by the terms of our statute. (Sec. 5925, R. S. 1909.) And it should also be remembered that in the United States the right to hold office is not a property right in the same sense as personal or real property. It is in no sense an incorporeal hereditament, as in some English offices. (Throop on Public Officers, chap. 2, sec. 16 et seq.)

"In this country the right to hold office is purely statutory, and unless forbidden by constitutional edict, can be given and taken by the legislative will. Being purely statutory the modes and manner of acquiring it are likewise purely statutory, and it is to the statutes that we must go to determine a case of this character. However, the common law as to abatement may shed light. The common law rule is thus tersely stated in 1 Cyc., p. 47: 'At common law a suit abated by the death of a party before trial or verdict. If the cause of action was one that did not survive, death put a final end to the suit. If the cause was one that survived or could survive, plaintiff or his personal representative was obliged to bring a new action against defendant or his personal representative.'

"This strict common law rule has been modified by statutes in the States generally, and provisions have been made for the revival of the pending action in the name of the parties having the right, by survivor, to further prosecute the case. These statutes obviate the necessity of bringing a new suit by those to whom the action survived. Then we have statutes which make certain actions survive, which at the common law did not survive the death of the party. But as stated we have no statute in this State providing for the survival of an action like the one at bar. Nor is it an action which at common law survived.

"Let us test this case by the general rule. In 1 Cyc, p., 49, it is said: 'As a general test an executor or administrator cannot come in and prosecute a suit unless he was in a condition to commence a like suit if it had not been begun by his testator or intestate. At common law, as a general rule, the qualities of assignability and survival are tests each of the other and are convertible terms.' Applying these tests to the

case at bar it is clear that it must abate. Had Judge Gantt died ten days after the election in 1910 and without bringing this action, was there any one who could have brought it for him? The answer must be in the negative. If not there is no one who can be substituted for him how for the further prosecution of the case. And if we apply the common law test of assignability we come out at the same point. There are some cases that the very nature of the case makes death the end of the case and this is one of them. For instance in a divorce proceeding death of necessity determines the case. In such case as to the marital relation death accomplishes just what the party sought, i.e. a dissolution of the marriage relation. So in the case at bar. Here the contestant sought the right to exercise the rights and privileges of a judge of this court. Such could not be exercised for him by another, so that death of necessity put an end to his ambitions in this direction. The case might be likened to a dowress, who in life sues for the admeasurement of her estate. If such dowress die, the further prosecution of such suit would be useless, because with her death was the death or falling in of her estate. So here the grim reaper has destroyed the power of contestant to occupy the office, and to enjoy the privileges, powers, duties and emoluments thereof. This to my mind is the reason of the situation. But going to our statutes we have a further and conclusive reason. As above indicated we have a statute which prescribes the judgment to be rendered in such a case. Section 5925, Revised Statutes 1909, reads:

'In every case of a pending contested election, the person holding the certificate of election may give bond, qualify and take the office at the time specified by law, and exercise the duties thereof until the contest shall be decided; and if the contest is decided against him, the court or other tribunal deciding the same shall make an order for him to give up the office to the successful party in the contest, and deliver to him all books, records, papers, property and effects pertaining to the office, and may enforce such order by attachment or other proper legal process.'

"Such is the only judgment provided for by the law in cases of contest. It is not like a judgment in a quo warranto proceeding. It is a judgment peculiar to contests cases, and for the very good reason that such cases are in an independent class unto themselves.

Death as fully precludes the entering of the judgment provided for in this statute as it precludes the ade measurement of the widow's dower estate after her death. The statutory order we make, is that contestee surrender the office to contestant, and deliver to contestant all the paraphernalia of the office. Death of the contestant forbids such an order or judgment, and as the action is one purely statutory and as there is no statutory provision for a different judgment, the case ex necessitate abates.

"The views we have expressed find full support in the case of Hargett v. Parrish, 114 Ala. 515. In that case Hargett contested the election of Parrish and was unsuccessful below. He appealed and pending the appeal Parrish died and the Governor appointed one Hall to succeed Parrish as sheriff. Motion was made to revive the case as against Hall, the successor of Parrish. In that State there was a statute providing that the death of contestant should not abate the suit, but the statute was silent as to the death of the contestee. Discussing the case, McCLELLAN, J., said:

" 'The proceeding being purely statutory, no pretense that there could be such revivor or substitution at common law being made, the order sought must find statutory authorization, or it cannot be granted. The statute providing for the contest itself provides that a contest does not abate by the death of the contestant, but contains no provision in respect of the death of the contestee.' "

In view of the above decisions, that the proceedings of contested elections are purely statutory and that the statutes in no wise provide that the contest does not abate by the death of either of the parties, nor for a revival, we are of the opinion that the contest now is abated due to the death of Mr. Easterday.

II.

We shall consider the effect of the abatement of the action in the death of Mr. Easterday from the standpoint of whether or not it creates a vacancy in the office of Representative of Crawford County.

Section 11233 R. S. Mo. 1929, relating to vacancies in the General Assembly, reads as follows:

"If any member elected to either house of the general assembly shall resign in the recess thereof, he shall address and transmit his resignation, in writing, to the governor; and when any such member shall resign during

> any session, he shall address his resignation, in writing, to the presiding officer of the house of which he is a member, which shall be entered on the hournal, in which case, and in all cases of vacancies happening, or being declared, during any session of the general assembly, by death, expulsion or otherwise, the presiding officer of the house in which such vacancy shall happen shall immediately notify the governor thereof."

We assume that Mr. Easterday received his ceritificate of election, but never qualitied or took his seat in the present session of the Legislature. We believe the phrases "and in all cases of vacancies happening" or "being declared, during any session of the general assembly, by death, expulsion or otherwise" are of sufficient scope to bring the condition in the instant case within the purview of the statute.

Article 4, Section 14, is as follows:

> "Writ of election to fill such vacancies as may occur in either house of the general assembly shall be issued by the governor."

Section 11234 R. S. Mo. 1929, is as follows:

> "Whenever the governor shall receive any resignation or notice of vacancy, or when he shall be satisfied of the death of any member of either house, during the recess, he shall, without dealy, issue a writ of election to supply such vacancy."

CONCLUSION.

From the foregoing sections we are of the opinion that a vacancy exists in the office of Representative of Crawford County, and that the vacancy can be filled in accordance with the terms of Section 11234, supra.

Respectfully submitted,

OWH/LD

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

Attorney-General

Are Police Officers entitled to reward for the capture of criminals.

4-25

April 25, 1935

FILED
70

Honorable Guy B. Park
Governor
Jefferson City, Mo.

Dear Sir:

This department is in receipt of your request for an opinion relative to the application of certain police officers of the city of St. Louis for the reward of $200 for the arrest and conviction of the person or persons guilty of murdering John W. Whitted and Edwin C. Shane.

It appears from the papers attached to your request that Lieutenant Ira L. Cooper and detectives Charles E. Johnson, Frank Crook and Arlanda Ryan of the Department of Police of the city of St. Louis, apprehended one William Roland for the murder of John W. Whitted and Edwin C. Shane, and that Roland was subsequently tried and convicted of this crime and was later hanged on April 12, 1935 in conformity with the sentence of the court.

The precise question involved is whether these police officers are entitled to the reward of $200 offered by you as Governor of the State of Missouri.

In the early case of Kick v. Merry, 23 Mo. 72, Judge Scott in holding that an agreement to reward a public officer, a policeman, for doing that which is his duty by law to do, is void against public policy, said:

> "Under the circumstances, the officer has no right to insist that he acted as an individual in his private capacity. The case falls within the mischief of the rule of the common law which prohibits an officer from taking a reward as an inducement to do

> his duty. He received a stated salary for his services. The services rendered were within the duties of his office. All his energies had been devoted to the service of the city. Under such circumstances, to permit an officer to stipulate for extra compensation for services to which the public was entitled, would lead to great corruption and oppression in office. It would follow that whenever a crime was committed, instead of speedy efforts for the arrest of the offender, there would be a holding back, in the hope that there would be a reward given for his apprehension. If once a habit of taking a reward is introduced, nothing will be done unless the service is previously purchased by extra pay. The other judges concurring, the judgment will be reversed."

A recent case on this subject has been decided by the St. Louis Court of Appeals in the case of Bennett v. Gerk, 61 S. W. 2d 241, decided June 20, 1933. In that case the sheriff of Lincoln County and two deputy sheriffs sought to collect a reward in the sum of Two Thousand Dollars for the arrest and delivery of two men wanted for kidnapping. Judge Kane in holding that officers may not receive a reward for services required of them as a part of their official duties, said:

> "However, these claimants (Groshong, sheriff, Bennett and McGregor, deputy sheriffs), being public officials, it is against public policy to allow them to receive a reward for the performance of their sworn official duty and for which they received fixed fees and salaries, and we must rule that the delivery to the police officers of the city of St. Louis was not such an act or extraordinary service alike

beyond and outside the limits of their official duty which would entitle them to claim the reward. * * * * * * * * *

The principle that at common law it was against public policy for a public officer to take any additional sum in the way of a reward for extra services has been dealt with in strong language by our courts. Hatch v. Mann, 15 Wend. (N.Y.) 49-50: 'That a public officer, whose fees are prescribed by law, may maintain an action to recover an additional sum promised him by a party for doing his official duty, is a monstrous proposition, fraught with every kind of mischief.' "

CONCLUSION

In view of the foregoing it is the opinion of this department that it is against the public policy of the State of Missouri for public officials to receive a reward for the performance of their official duties and for which they receive fixed fees and salaries. For this reason it is our further opinion that the applicants herein seeking the reward, being police officers of the City of St. Louis, Missouri, are not entitled to receive said reward.



Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:SW

NOTARIES PUBLIC: (1) One may hold the office of Notary Public and County Superintendent of Schools. (2) Notary Public is entitled to charge statutory fees for services rendered.

8-13

August 6, 1935.

FILED 70

Mr. Raymond H. Patterson
Superintendent of Schools
Stone County
Galena, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

> "I would like an opinion from your department on the following question: May a county superintendent hold a commission as a Notary Public and charge a reasonable fee for the services?"

I.

MAY A COUNTY SUPERINTENDENT OF SCHOOLS BE COMMISSIONED AS A NOTARY PUBLIC?

Notaries Public are officers of the state and commissioned by the Governor for a term of four years. See Chapter 80, R. S. Mo. 1929. Section 11738 of said chapter provides in part as follows:

> "The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. * * * "

A notary public holds an office of profit. In our opinion dated March 1, 1935, to Mr. Woodson Cockrill, Jefferson City, Missouri, we held, "In view of the above, we are of the opinion that a notary public holds an office of profit under this state."

Article 12, Chapter 57, R. S. Mo. 1929, and amendments, pertain to county superintendents of schools, and Section 9454 of said article and chapter provides in part as follows:

> "There is hereby created the office of county superintendent of public schools in each and every county in the state; * * *"

It is thus seen that the county superintendent of schools likewise holds an office of profit. The question arises as to whether or not a person holding an office of profit, such as county superintendent of schools, may also hold an office of profit, that of notary public.

Nowhere in the statutes do we find that a county superintendent of schools may not also be commissioned as a notary public and hold both offices. Absent constitutional or statutory provision as to determining the question as to the holding of two offices, recourse must be had to the functions and duties of said offices to ascertain if such be inconsistent, incompatible or in conflict with each other. As to the inconsistency, incompatibility, or conflict, see our opinion to Honorable John B. Owen, Prosecuting Attorney of Henry County. We are of the opinion that the offices of county superintendent of schools and notary public are not inconsistent, incompatible or in conflict with each other, and as authority for said conclusion rely upon our opinion of November 3, 1933, to Honorable John B. Owen, supra.

The Constitution of Missouri contains several provisions as to one holding two offices and while such are not decisive of the question involved, yet show the intent of the framers of our Constitution on the proposition of one holding an office and also being appointed notary public. We invite your attention to Article IX, Section 18, of the

Constitution of Missouri, which provides as follows:

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

Article IV, Section 12, of the Constitution of Missouri, also provides as follows:

> "No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

It is thus seen that the framers of the Constitution excepted notaries public as an office when it placed a bar against certain persons from holding two offices.

Conclusion.

From the foregoing it is our opinion that the fact that one holds the office of county superintendent of schools does not disqualify or bar said person from being commissioned notary public.

II.

COMPENSATION OF NOTARY PUBLIC.

In answer to your question as to whether or not a notary public can charge a fee for services rendered, we invite your attention to the fact that the office of notary public is a statutory one and for performing certain duties entitled to compensation therefor. Section 11801, R. S. Mo. 1929, enumerates the fees that notaries may charge.

Conclusion.

It is our opinion that a commissioned notary public may charge the fees allowed by Section 11801, supra, for services rendered as notary public.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

SALES TAX: Sales of milk and farm products subject to tax.

10-3

September 30, 1935.

FILED 70

Honorable W. W. Parker, President,
Southeast Missouri State Teachers College,
Cape Girardeau, Missouri.

Dear Mr. Parker:

We wish to acknowledge your letter of September 11 wherein you state as follows:

> "I shall very greatly appreciate it if you will give me an opinion as to whether or not the farm which the Southeast Missouri State Teachers College owns and operates is expected to collect the sales tax on the sale of milk and other products of the farm.
>
> "I shall appreciate it further, if you will inform me as to whether or not we are expected to collect the sales tax on admissions to athletic contests."

We are enclosing herein copy of an opinion rendered by this department to Honorable J. R. Davis, Business Manager of William Jewell College, under date of July 25, wherein we ruled upon the applicability of the sales tax as it relates to the activities of William Jewell College.

By the terms of the new act, Section 1, subsection (b), the term "sale" or "sales" is defined as follows:

> "The term 'sale' or 'sales' includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale, and means any transfer, exchange or barter,

> conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration and the rendering, furnishing or selling for a valuable consideration any of the substances, things and services hereinafter designated and defined as taxable under the terms of this Act."

Under subsection (c) "business" is defined as follows:

> "'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect and the classification of which business is of such character as to be subject to the terms of this Act. The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business, within the meaning of this act."

Assuming that the sale of milk and other farm products by the Southeast Missouri State Teachers College are not occasional sales so as to bring them within the exemption, we are of the opinion that same constitutes the doing of "business" and the "sale" of "tangible personal property" within the meaning of subsections (b) and (c) of Section 1, supra, and that the gross receipts from such sales are subject to the tax.

Your second question is answered by Question IV of the enclosed opinion, which holds that the gross receipts from athletic events are subject to the sales tax.

Yours very truly,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

WW:HR

TOWNSHIP ELECTIONS - Names of candidates may be printed on ballot or ballot left blank and same written in, but voters cannot write candidates name on blank ticket, separate from regular ticket.

April 2, 1935.

FILED
71

Hon. W.S. Pelts,
Prosecuting Attorney,
Greenfield, Missouri.

Dear Sir:

This department is in receipt of your letter of March 18 wherein you request an opinion on the following question:

> "Will you please inform me whether or not a person can be elected to a township office in a township where the county is under township organization by writing his name on a blank ticket when there is a regular nominated ticket being voted on at such election?"

The statutes governing township elections are Sec. 12267, R.S. Mo. 1929, which provides:

> "The citizens of the several townships in all counties having adopted the township organization law of this state, who are qualified by the Constitution and laws of this state to vote at general elections, shall assemble biennially on the last Tuesday in March at their usual place of voting, or at such place in their respective townships as they may have previously agreed upon, for the purpose of electing township officers and such other officers and transacting such other business as may be necessary."

and Section 12270, R.S. Mo. 1929, which provides:

> "On the day of the township election the polls shall be opened between seven and eight o'clock A.M. and be kept open until six o'clock p.m. by the judges of the election, and when so opened the electors of the township shall have to elect all officers to be chosen at said election. Said officers shall be chosen by ballot. Each ballot shall contain the name of every officer or measure voted for, written or printed on the face of such ballot, with the name of the office for which the persons voted for are intended to be chosen, which ballot shall be folded so as to conceal the names of the persons voted for; where the names of two or more persons appear on any ballot for the same office, such ballot shall be rejected by the judges in canvassing the votes, only as to the persons erroneously voted for. Said township election shall in all things conform to the general law concerning elections for state and county officers, so far as the same is consistent with the provisions of this chapter."

We call your attention to the sentence in Section 12270, supra, which says, "Each ballot shall contain the name of every officer or measure voted for, written or printed on the face of such ballot, with the name of the office for which the persons voted for are intended to be chosen, which ballot shall be folded so as to conceal the names of the persons voted for;" We construe this sentence to mean that the offices enumerated in Section 12268, supra, the same being one trustee, who shall be ex-officio treasurer of the township, one township collector and one township clerk, who shall be ex-officio township assessor, one constable, two members of the board and two justices of the peace, shall be printed or written on one ballot and same shall contain the name of every officer or measure voted for. The last sentence of Section 12270 contains the provision that the election shall "conform to the general law concerning elections for state and county officers, so far as the same is consistent with the provisions of this chapter."

We shall attempt to apply the general election laws to the question at hand. Section 10310, Laws of Mo. 1933, page 228 sets forth the manner in which a ballot shall be voted, and contains, among others, the following sentence:

> "If the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such cancelled name the name of person for whom he desires to vote, and placing a cross mark in the square at the left of such name."

The election of township officers appears to be a general election, as there is no provision made for a primary.

CONCLUSION

In view of the fact that Sec. 12270, supra, makes provision for only one ballot, we are of the opinion that the names of the candidates may be printed on the ballot for the various offices, or the ballot may be left blank and the name of the candidate desired to be voted for written in by the voter.

It is further the opinion of this department that the candidate you mention in your letter could not present his candidacy by having the voter write in his name on a blank ticket separate and distinct from the main ticket, but the voter could draw lines through the names of the legal nominees and write in the name of the person desired to be voted for in lieu thereof, as provided in Sec. 10310, a portion of which is quoted supra.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

TAXATION: Tender of tax, and no interest or penalty, etc., is all that is required if before June 30, 1933.

June 24, 1933

FILED
71

Mr. M. S. Pelts,
Prosecuting Attorney,
Dade County,
Greenfield, Missouri.

Dear Sir:

This office acknowledges receipt of your inquiry which we construe to be as follows:

If the record owner who in fact also owns real estate in Missouri is delinquent in the payment of his taxes thereon, and it so appears on the collector's books upon the list of delinquent and back taxes of any year or years prior to January 1, 1933, including delinquent taxes for 1932, and suit has been filed and is pending on same on June 30, 1933, at which latter date the owner tenders to the collector a valid tender of the amount of the actual back taxes, but does not tender any greater amount than that, is that a sufficient tender within the meaning of the act below set out in order to pay the said taxes? Stated in another way, is the actual amount of the taxes all that is required in order to pay said delinquent taxes if the tender is made on June 30, 1933, or is the collector entitled to require that the owner, in addition to the back taxes, shall also pay certain interest or penalties or attorney fees or court costs?

In 1933 the Legislature enacted a law with reference to the collection of taxes which became effective on April 15, 1933. See Laws of Missouri 1933, page 423, the first section of which is as follows:

> "In payment of the taxes assessed against any person whose name appears upon the personal delinquent lists of any year or years prior to January 1, 1933, and in payment of the taxes assessed against any real estate which appears upon the lists of delinquent and back taxes of any year or years prior to January 1, 1933, including delinquent taxes

> for the year 1932, the collectors of revenue of the counties and cities of this state are hereby empowered and directed to accept the original amount of said taxes as charged against any such person or real estate relieved of the penalties, interest and costs accrued upon the same; Provided, however, that such remission of penalties, interest and costs shall be in full if said taxes are paid not later than June 30, 1933; if paid after June 30, 1933, and not later than August 31st, 1933, then such remission shall be 75 per cent of such penalties, interest and costs; if paid after August 31st, 1933, and not later than October 31, 1933, such remission shall be 50 per cent of such penalties, interest and cost; if paid after Oct. 31, 1933, and not later than Dec. 31, 1933, then such remission shall be 25 per cent of such penalties, interest and costs: Provided, further, that after Dec. 31, 1933, all penalties, interest and costs as aforesaid shall be restored and be in full force and effect for the full period of time since their accrual and as if this act had not been passed."

This statute and the interpretation of it has caused some confusion over the state and one of the controversies arising over it has reached the Supreme Court and been decided by that court and is reported in 63 S. W. (2d) 64, being the case of State ex rel. McKittrick, Attorney General v. Bair, Collector of Revenue. We think the construction there placed on this law with reference to the matters you inquire about answers your question. At page 67, Judge Hays, writing the opinion of the court en banc, says:

> "It seems advisable, before closing this opinion, to observe briefly the effect of the change in the law upon the back tax suits that have been filed, or may be filed, subsequently to the date, April 13 of the current year, when this new law became effective. Owing to the alternative options granted the taxpayer, with periodically and increasingly reduced advantage to him in the avoidance of penalties, a question of

> some difficulty is presented pertinent to the effect upon suits pending during any part or all of the entire period covered by the act. Concerning this matter, it is our view (1) that none can proceed to final judgment before the expiration of the act on January 1 next; (2) a taxpayer exercising the first option may pay the original tax without more, and all penalties are thereby discharged, and his pending tax suit, if any, will be abated; (3) exercising the second option the taxpayer, if suit be pending against him, must, in addition to the original tax, pay one-fourth of all penalties formerly chargeable, in full discharge of the whole, and the suit will likewise abate, and (4) the same process and result will apply in a general way to the remaining options. We think this mode of procedure seems practical and just, and accomplishes the legislative purpose, as we have determined it."

This case was decided on June 23, 1933.

CONCLUSION

We are of the opinion that the tender to the collector on June 30, 1933, of the amount of the actual back taxes was all that the law required in satisfaction of said back taxes, and that on the payment of the said sum to the collector the suit theretofore brought on the same abated and all penalties thereon were thereby discharged.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HB

COUNTY TREASURER'S BOND: County Court may not "reduce" bond by court order.

June 25, 1935.

FILED
71

Hon. James H. Pettijohn
Prosecuting Attorney
Holt County
Oregon, Missouri

Dear Sir:

We are in receipt of your request for an opinion of this office on the following matter:

> "County Court of Holt County desires to reduce the County Treasurer's Bond from a Hundred Thousand Dollars ($100,000) to Eighty-Thousand Dollars ($80,000). They feel that they are warranted in making this reduction. In fact, I understand that the court has already made an order reducing the Bond, but the Insurance Company in which the Treasurer has her bond, says that they have taken this matter up with the Attorney and that they are of the opinion that a County Court has no authority to reduce the Treasurer's Bond during her term."

I.

COUNTY COURT MAY NOT "REDUCE" BOND OF COUNTY TREASURER.

We presume that the bond you have reference to is that which is required of the County Collector to protect the general revenue fund of the county while in his hands. This bond is required by the provisions of Section 12133 R. S. Missouri

1929. The 57th General Assembly repealed and reenacted this Section, Laws of Missouri 1933, page 338, but this office has heretofore held in an opinion to Elvin S. Douglas, dated May 17, 1935, that the reenacted Sections 12133 and 12134 are not effective until January 1, 1937, and that Section 12133 R. S. Missouri 1929, is presently effective. This section reads as follows:

> "The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

The bond supplied by virtue of the foregoing may not be less than Twenty Thousand Dollars, but may be any sum in excess thereof which is in good faith fixed by the County Court as being the sum sufficient to protect the County from loss because of the failure of the Treasurer to properly perform his duty. The statute places a wide discretion in the County Court in the fixing of this bond. However, once the amount is fixed and the bond entered into by the principal and sureties and filed and approved by the County Court, it fixes the liabilities of the parties thereto. A bond is nothing more than a special contract, 9 C. J. 7:

> "In a technical sense a bond is an obligation in writing and under seal binding the obligor to pay a sum of money to the obligee, usually with a clause to the effect that on the performance of a certain condition the obligation shall be void."

and is to be construed as other contracts, 9 C. J. 31, Sec. 49:

> "A bond or obligation is a deed at common law and is also regarded as a contract, and is to be construed like other contracts according to the fair import of the language used."

It is recognized that contracts may only be modified or changed by the mutual consent of the parties. 13 Corpus Juris 589:

> "Parties to an unperformed contract may, by mutual consent, modify it by altering, exercising or adding provisions" * * **

When the surety company executed the bond as surety for your county collector and the bond was delivered to the county court, a contract was entered into which could only be modified and changed with the consent of the surety. From your request it is apparent that the surety has refused to consent to the modification of the contract.

CONCLUSION.

It is therefore the opinion of this office that the County Court may not, merely by its order of record, reduce the amount of the County Collector's bond.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
Acting Attorney General.

HGW:MM

COUNTY SURVEYOR: County Surveyor when ex-officio county highway engineer has only the powers that the county court confers upon him by direction.

8-27

July 30, 1935.

FILED 11

Hon. James H. Pettijohn,
Prosecuting Attorney,
Oregon, Missouri.

Dear Sir:

This department is in receipt of your letter of July 2 wherein you make the following request:

> "There is some question in our county concerning the power and duties of the Ex-officio Highway Engineer. The County Engineer Law was rejected by the vote of the people in 1912. The question on which we desire opinion is whether, under the present status, the Ex-officio Engineer has control of all county roads and maintenance equipment or is he merely working for the county court and performing such duties as he is called upon to perform by the court?"

It is noted that Holt County rejected what is termed under Section 8019 as the County Highway Engineer Law.

Under Section 8013, R.S. Mo. 1929 the duties of the county highway engineer are set forth and are as follows:

> "The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county. He shall also have the supervision over the construction and maintenance of all roads, culverts and bridges. No county court shall order a road established or changed until

> said proposed road or proposed change has been examined and approved by the county highway engineer. No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

Section 8020, R.S. Mo. 1929 sets forth the manner in which the county highway engineer's duties are to be performed in the event the county dispenses with the county highway engineer law, and provides as follows:

> "In all counties in this state that may vote against the county highway engineer law in the manner prescribed in section 8019 of this article, all matters relating to roads and highways and the expenditures of the public funds thereon shall be governed by the laws then in force in such counties, except that part of the law pertaining to the appointment of the county highway engineer. In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor shall be ex officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways, and the building of bridges and culverts as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court; and for his services as ex officio county highway engineer he shall receive such compensation as may be allowed by the county court, of not less than three dollars nor more than five dollars for each day he may be actually employed or engaged as such county highway engineer. The county court may empower the county

> highway engineer, or the county surveyor when acting as county highway engineer, to employ such assistants as may be deemed necessary to carry out the court's orders and at such compensation as may be fixed by the court, not to exceed the sum of four dollars per day for deputy county highway engineer nor more than three dollars per day for each other assistant for each day they may be actually employed."

You will note in the above quoted section the following sentence: " In all counties wherein the services of a county highway engineer are dispensed with, as provided by section 8019 of this article, the county surveyor shall be ex-officio county highway engineer, and, as such, shall perform such services pertaining to the working, improvement, repairing and maintenance of the roads and highways * * * as provided by this article to be done and performed by the county highway engineer, or as may be ordered by the county court; " From the above section it would appear that when the county dispenses with the county highway engineer the county surveyor would automatically assume his duties and have identical powers but for an interpretation of the various statutes governing the same; as to the exact status of the county surveyor, ex-officio county highway engineer, you are referred to the case of Spurlock v. Wallace, et al, 204 Mo. App. l.c. 676, wherein the Court said:

> "To get appellant's issue more narrowly stated, he claims that by virtue of his office as ex-officio engineer, the county court shall not draw warrants to road-overseers until the claims therefor shall have been examined and approved by him, as provided under section 10558, Revised Statutes 1909.
>
> "The real issue in the case comes up on the question of the employment of the appellant and the right he has to draw the emoluments of the office; the county court contending that he has no duty to perform until they

order him to perform it; and that he shall then receive the amount which has been provided by them in the order made; the appellant contending that he has certain duties to perform for which he would be entitled to compensation regardless of an order or request of the county court for him to act.

"Section 10572, Revised Statutes 1909, is somewhat ambiguous, as it provides for an ex-officio county highway engineer and defines certain duties as therein specifically set out 'or as may be ordered by the appellate court. Reading this section by itself, it would appear that there is some reason for appellant's contention, but when the whole section is read in connection with other sections relating to roads, and highways, we are inclined to the construction placed upon the law by the trial judge. It appears that the road, highway and bridge laws were amended in 1909, practically setting up a new system, running through which were certain duties provided for a county highway engineer. It was provided, however, in section 10571 that if a majority of those voting on the proposition at such election voted against the county highway act, then this article and the provision of the law relating to the appointment and duties of a county highway engineer shall not be enforced in such county. Douglas County had voted against the highway engineer act, therefore any duties of a county highway engineer were dispensed with. In Section 10572, Revised Statutes 1909, it is provided that all matters relating to roads and highways, and the expenditure of public funds thereon shall be governed by the laws then in force in such counties except that part of the law pertaining to the appointment of the county highway engineer. The latter part of this section also throws light, as it provides that the county court may empower the county highway engineer or county surveyor to employ

such assistance as may be deemed necessary 'to carry out the court's orders'.

"The first road and highway law of Missouri that we find, governing such counties as Douglas, for a county highway engineer, appears in Session Acts of 1907, page 401. Under this act there was no election given to the people to determine for themselves whether there would be a county highway engineer. This law was amended in the 1909 act, which did give the people of the county the right to determine for themselves whether such an officer was desired. The law of 1907 provided that the compensation for a highway engineer would be not less than $300, nor more than $2,000, per year, while the Amendment of 1909, under section 10572, permits the county court to make a per diem charge.

"If the contention made by appellant should be upheld, then we must necessarily hold that to vote under section 10571, and to thereunder abolish the highway engineer act, meant simply a change of the manner and amount of compensation to be paid to the party acting as highway engineer, as the appellant is contending that he is duty bound to perform exactly the same service that the highway engineer would have performed even though the people have voted out this law. We cannot lend sanction to this narrow construction, as it would appear that the purpose of sections 10571 and 10572, Revised Statutes 1909, was to permit the people of a county to abolish the office of highway engineer yet to leave it possible for the surveyor to perform the duties that the highway engineer would have performed had the law not been voted out, provided he acted under the orders and direction of the county court. The general intent of section 10571 was to permit the people of a county to vote out a highway engineer and to abolish the duties of such engineer, and that more was intended by said section than to merely give them the right to change the form and amount of compensation."

CONCLUSION

In view of the above decision, we are of the opinion that the county surveyor ex-officio highway engineer has control of all county roads and maintenance equipment and performs his duties under the orders and direction of the county court, and does not have the power that is conferred upon the county highway engineer if the County Highway Engineer Law is not effective in a county.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

OWN:AH

TAXES - Payment of taxes on part of one tract of land.

September 26, 1935

FILED
71

Honorable J. T. Pinnell
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

We have your request of September 4, 1935 for an opinion, which request is as follows:

> "A farm of 193 acres was owned by A, on which taxes are delinquent for five years; B. foreclosed a mortgage on 119 acres of said farm and became the purchaser at the foreclosure sale; B. wants to pay the taxes on the 119 acres he owns.
>
> Is there any way that B. can pay the taxes on his 119 acres without also paying the taxes on the balance of the 193 acres?"

The answer to the above query appears to be fully set out in Section 9913, R. S. Mo. 1929, which in part provides as follows:

> " * The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes: Provided, the persons

> paying such tax shall furnish a particular specification of the part, and if the tax on the remainder of such lot and parcel of land shall remain unpaid, the collector shall enter into such specification in his return, to the end that the part on which the tax remains unpaid may be clearly known."

It is, therefore, the opinion of this office that under the above stated facts, B., the new owner of the 119 acres of land, may pay the back taxes on only that portion of land which he now owns.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

APPROPRIATIONS: Money cannot lawfully be transferred from a general fund to a specific fund unless authorized by statute.

November 26, 1935.

11-26

FILED
71

Mr. David Perry,
Linneus, Missouri.

Dear Sir:

This department is in receipt of your recent request for an opinion on the following question:

> "Can the John J. Pershing Appropriation made by the Legislature be paid out of the General Revenue Fund?"

Laws of Missouri, 1935, Section 2, page 83, of an Act creating Pershing Memorial Park and authorizing the transfer thereof to the United States Government for a National Park, provides as follows:

> "The State Park Commission, consisting of the Governor, Attorney-General and the Commissioner of Game and Fish (or the latter by such title as he shall hereafter be known), is hereby authorized and empowered to purchase, in the name of the State of Missouri, a desirable tract of land in the immediate vicinity of the Town of Laclede, Linn County, Missouri, as a site of a park to be known as the Pershing Memorial State Park. The said Park Commission shall spend such moneys as may hereafter become available in putting the land authorized to be purchased hereby in such condition as to render it desirable and usable as a state park, and is further authorized to receive contributions, appropriations or awards from individuals, societies, or the United

> States Government for such purpose. The land herein authorized to be purchased, however, to be in one tract or body."

Section 4 of the above Act authorizes an appropriation for the creation of the park thus:

> "There is hereby appropriated out of the State Treasury, chargeable to the State Park Fund, or any other fund that may hereafter be made available, the sum of forty thousand dollars ($40,000.00) for the purchase of said tract of land and for expense that may be incurred in rendering said tract usable as a state park."

We are asked to determine whether the authorization appropriated out of the State Treasury, "chargeable to the State Park Fund, or any other fund that may hereafter be made available", can be so construed as to authorize an appropriation out of the "General Revenue Fund".

The case of Whitehead v. Farmers' Fire & Lightning Mut. Ins. Co., 60 S. W. (2d) 65, 69, 227 Mo. App. 891, the court in holding that the whole statute must be looked to in the construction of any part of it, said:

> "The cardinal rule of statutory construction is that the intention of the Legislature in enacting it must be ascertained (59 C. J. p. 948), and the statute, as a whole, should be looked to in construing any part of it (59 C. J. pp. 993, 994, 995)."

The statute expressly states that the appropriation is chargeable to the "State Park Fund" and adds, "or any other fund that may hereafter be made available". It is upon the latter clause that our decision must turn. In other words, we must determine what "other fund" the Legislature had in mind. In ascertaining such intention we are directed to look to the statute as a whole, and an examination of Section 2, supra, discloses that by "other fund" is meant "contributions, appropriations or awards from individuals, societies, or the United States Government for such purpose".

Section 43, Article 4, and Section 19, Article 10, of the Missouri Constitution pertain and are applicable to the subject of appropriations and are respectively as follows:

Section 43, Article 4:

> "All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. * * *"

Section 19, Article 10:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law * * *."

59 C. J., page 232, makes the following statement with reference to appropriation of funds by the Legislature:

> "Money cannot lawfully be transferred from the general fund to a separate or specific fund except as may be authorized by statute."

CONCLUSION

Finding no statute authorizing the transfer of money from the "General Revenue Fund" to the "State Park Fund", we are of the opinion that the General Pershing Appropriation as set out in Section 4, supra, cannot be paid out of the "General Revenue Fund".

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

MW:HR

TOWNSHIP CLERK'S FEES: Township clerk under Section 12310 R. S. Mo. 1929, as amended Laws of 1931, page 377, is not entitled to any fee for issuing warrants.

FILED 72

January 2, 1935

Mr. H. T. Phelps
Township Clerk
Salisbury, Missouri

Dear Sir:

This is to acknowledge receipt of your request for an opinion, dated December 17, 1934, which reads as follows:

> "I am writing you in regards to the pay of the Township Clerk. I understand that the members of Board and Clerk each receive $2.50 per meeting now. They use to get only $1.50 per meeting.
>
> Now what I want to know is does the clerk get 10cts for each warrant he writes. I know how the law reads but just how do you understand that. I want what is coming to me and no more.
>
> If I am entitled to 10 cts. per warrant I want to know it. That is what you told me when you was prosecuting atty. years ago at Heber Hayes trial. Now the Board understands it that way but I want your opinion so we will all know. Do I collect 10 cts. for each warrant written or not? If not what am I to get?
>
> Thanking you for an early reply and wishing yourself and family a Merry Xmas and very Happy & Prosperous New Year."

Section 12310 R. S. Mo. 1929, as amended by Laws of 1931, page 377, provides as follows:

> "The township clerk, as clerk, the township trustee, as trustee, members of the township board, and judges and clerks of election, shall each receive for their services two dollars and fifty cents per day: Provided, that the township clerk shall receive fees for the following,and not per diem, for serving notices of election, or each: for filing any instrument of writing, ten cents; for recording any order or instrument of writing, authorized by law, ten cents for every hundred words and figures; for copying and certifying any record in his office, ten cents for every hundred words and figures, to be paid by the person applying for the same. And provided further, that the township trustees ex officio treasurer shall receive a compensation of two per cent.for receiving and disbursing all moneys coming into his hands as such treasurer when the same shall not exceed the sum of one thousand dollars and one per cent. of all sums over said amount."

This section provides that a township clerk is entitled to a per diem of $2.50 and to certain stipulated fees in addition to the per diem. A township clerk, under the law, is entitled to only such fees as the statute authorizes. In the case of State ex rel. v. Brown 146 Mo. l. c. 406, the Court said:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute,and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: ' The right of a public officer to fees is

> derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

The above statement of law has been followed and approved by the Supreme Court in numerous decisions.

State v. Wofford 116 Mo. 220;
State ex rel. Linn County v. Adams 172 Mo. 1.

CONCLUSION.

It is the opinion of this office that the above section does not provide that the township clerk can charge a ten cent fee for each warrant issued by the board, and that the charge for this service is illegal.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.

HEALTH COMMISSIONER--COUNTY COURT: County Court can require duties of County Health Commissioner not inconsistent with rules of Board of Health.

5-18

May 13, 1935.

FILED
72

Honorable Tom Phelps
Presiding Judge
County Court of Jasper
Carthage, Missouri

Dear Sir:

We acknowledge your request for an opinion dated April 23, 1935, which reads as follows:

> "I would like very much to have you set out in detail the duties of the County Physician, particularly whether or not he has jurisdiction over or is required to attend cases originating within the limits of any city having a City Physician.
>
> "A short time ago our County Court visited the County Court of Greene County and while there we were told that Court had an opinion fromyour office stating that their county physician was required to attend cases originating outside the city."

We find no public officer known as a County Physician, but we believe you are inquiring about the Deputy State Commission of Health which a County Court may appoint by virtue of Section 9025, Laws of 1933, page 271. Said Section reads as follows:

> "At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said county court every year thereafter, said court may appoint a reputable physician, as a Deputy State Commissioner of health for a term of one year. In case of a vacancy in the

> office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

The duties of the Deputy State Commissioner of Health are provided for in Section 9027 R. S. Mo. 1929. Said Section reads as follows:

> "It shall be the duty of the deputy state commissioners of health for the counties to enforce the rules and regulations of the state board of health throughout their respective counties outside of incorporated cities which maintain a health officer who has been appointed a deputy state commissioner of health as provided for in section 9025. The deputy state commissioners of health for incorporated cities of less than 75,000 population shall enforce the rules and regulations of the state board of health within their respective cities. Any deputy state commissioner of health who neglects or refuses to perform his duties as required by this article shall be deemed guilty of a misdemeanor. In case of dereliction of duty or refusal to act on the part of the deputy state commissioner of health of any county, the state board of health may at their discretion declare the office of deputy state commissioner of health for that county vacant."

The County Court of Jasper County, in appointing a Deputy State Health Commissioner, had it within their power to contract the Commissioner to perform services for the County not inconsistent with the rules and regulations of the State Board of Health. The County Court's contract may legally contain duties which they deem necessary to be performed within the territorial limits of the County.

Where he holds his office and is not working for the County under a contract, then the County Court can by orders or record make rules and regulations prescribing duties which they deem necessary to be performed within the territorial limits of the County. Section 9028 R. S. Mo. 1929, reads as follows:

> "All rules and regulations authorized and made by the state board of health in accordance with this chapter shall supersede as to those matters to which this article relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities. Nothing herein shall limit the right of local authorities to make such further ordinances, rules and regulations not inconsistent with the rules and regulations prescribed by the state board of health which may be necessary for the particular locality under the jurisdiction of such local authorities."

CONCLUSION.

We are assuming that when you speak of "County Physician" in your letter you mean to inquire about the office of "Deputy State Commissioner of Health" provided for in Laws of 1933, supra.

We are of the opinion that the Deputy State Commissioner of Health in Jasper County is duty bound to enforce all legal rules and regulations of the State Board of Health, and it is also his additional official duty to respect all health ordinances of cities located in the County, and in addition, to perform all duties prescribed by the County Court in his contract or by Court order.

It is not possible for us to comply exactly with your request and set out in detail the duties of the Deputy State Commissioner of Health in Jasper County. We do not have a copy of the rules of the State Board of Health, nor do we have a copy of your County's contract with the Deputy State Commissioner of Health.

It is our further opinion that the Deputy State Commissioner of Health in your County, appointed by virtue of the power in the County Court given by the 1933 Legislature has power to perform his official duties within the territorial limits of Jasper County. The provisions of Section 9027, supra, do not exclude the Deputy State Commissioner of Health from performing duties within the corporate limits of any city in Jasper County. That is to say, he is to enforce the rules of the Board of Health and is to give respect to health ordinances of all cities in the County where his duties take him.

However, the County Court, in exercising the statutory power to create this office in your County, have it within their power to require this officer to "attend cases" as specified in his contract of employment or as they may direct and it is within the power of the Court to contract or to direct the Health Officer to "attend cases" in the territorial limits of the County excluding cases arising in corporation limits, in which case the Deputy State Health Officer should refuse to "attend cases" in excluded corporate limits.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

COLLECTION OF TAXES: 1927 warrants cannot be used by taxpayer in payment of 1932 taxes.

12-21

December 19, 1935.

FILED
72

Honorable Henry M. Phillips,
Prosecuting Attorney,
Stoddard County,
Bloomfield, Missouri.

Dear Sir:

This department is in receipt of your letter of December 12 wherein you make the following inquiry:

> "I am writing you requesting an opinion on the following state of facts as governed by Section 9911, R.S. 1929.
>
> "It appears that at some time in the future all the 1932 general revenue warrants of Stoddard County, Missouri, will be paid, and that there will be a surplus of 1932 revenue to be applied on the oldest outstanding general revenue warrants issued by Stoddard County, which happen to be 1927. It appears that as a result of this situation the 1932 revenue will be applied on 1927 warrants. The question I desire to have answered is whether or not as a result of the above situation 1927 warrants--that is, the oldest outstanding county revenue warrants--can be used by the taxpayer in the payment of 1932 taxes. It appears that there are many of these old warrants outstanding and the benefits accruing to the taxpayer will in many instances be considerable, and I desire your opinion as to advising the county collector whether or not he should accept warrants of the oldest outstanding year in payment of taxes for the year in which there are no outstanding warrants. It is, of course, assumed that no warrants could be applied on the 1932 taxes as long as there were

any 1932 warrants outstanding."

The statute relating to the payment of taxes by the taxpayer is Section 9911, R.S. Mo. 1929, which is as follows:

> "Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year."

In the case of Kercheval v. Ross, 7 F. Supp. 355, a suit was decided in the Federal District Court to the effect that a portion of Section 9911, supra, was violative of the Constitution as it relates to drainage district bonds - it tended to impair a contract which was in force before the amendment made in Section 9911, Laws of Missouri, 1929, page 432.

In regard to county warrants being acceptable for taxes, the courts of this state have construed the same in the case of K.C., Ft. S. & M. R'y. Co. v. Thornton, 152 Mo. 570. In that case it was held that warrants are not receivable in payment of taxes for any year other than that for which the same are issued. The Court said (l.c. 573-576):

> "It is not denied that the decision in State ex rel. Egger v. Payne, 151 Mo. 663, decided by this court, in Banc, in July of this year, applies to and is decisive of this case, nor is it seriously denied that the decision in that case follows the principles announced in Andrew County ex rel. Kirtley v. Schell, 135 Mo. 31, nor yet that it conflicts in any way with what was said in Book v. Earl, 87 Mo. 246, was the purpose of the framers of the Constitution of 1875 in adopting section 12 of Article X of the Constitution. It is contended, however, that the decision in State ex rel. Egger v. Payne, supra, is not in harmony with the decisions of this court in Logan v. County Court of Barton County, 63 Mo. 336; Reynolds v. Norman, 114 Mo. 509, and Wilson v. Knox County, 132 Mo. 387, and that those cases announce the correct rule, and hence it is asked in this case that the decision in Payne's case be reviewed and overruled.
>
> "It is true as contended by appellant, that in the cases cited by it, this court, construing section 3205, R.S. 1889, held that collectors of the revenue were bound to receive county and city warrants in payment of any county or city revenue accruing to any county or city issuing such warrants without regard to when such warrants were issued and without regard to the revenue of the year for which the warrants were offered in payment. But in State ex rel. Egger v. Payne, supra, those cases, and that section (3205), as well as sections 3168, 7604 and 8163, R.S. 1889, were expressly considered, and it was held that those cases must be overruled,

and that those sections of the statutes must yield, because the cases and the provisions of the statutes were in conflict with the 'evident purpose and intent of the lawmaking power', that is, with section 12 of Article X of the Constitution. It was plainly pointed out that the purpose of the constitutional provision quoted was to put counties and cities upon a cash basis, and to abolish the credit system upon which they had proceeded before the adoption of the Constitution of 1875, by prohibiting a county or city from becoming 'indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose', etc. It was also expressly held in Payne's case that this was declared to be the purpose of section 12, Article X of the Constitution, in Book v. Earl, and that it was held in that case, that: 'Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.' It was also pointed out in Payne's case that it was decided in Schell's case, that: 'County warrants for past indebtedness, though valid, can not be paid from the revenue provided for current expenses, until all warrants, drawn for expenses of the year for which the taxes were levied, have been paid.' It is also a fact that the prior cases and the statutory provisions relied on by the plaintiff, were fully considered in Schell's case. The result reached in the Payne case was not hastily or ill advisedly arrived at, but was the logical effect of a gradually developed understanding and appreciation of the true meaning

of the provision of the Constitution quoted. As claimed by counsel, section 3205 has been on our statute books since 1835, but prior to the adoption of the Constitution of 1875 there was no organic law which stood in the way of its enforcement. The result was, overwhelming debts were contracted, which necessarily went unpaid or excessive taxation had to be levied to pay them; the effect of which impaired the credit of the counties and cities, engendered recklessness and extravagance in the management of the public business and constantly oppressed the taxpayers. These were the evils that sections 11 and 12 of Article X of the Constitution were intended to remedy, first, by limiting the rate of taxation and, second, by limiting the yearly expenses to the revenue provided for each year. The wisdom of these safeguards has been fully demonstrated by the experience and improved financial status of the counties and cities since those provisions were adopted. It is the duty of the courts to enforce the organic law and to brush aside any statute which conflicts with it, whether it was passed before or after the Constitution was adopted. Under these provisions of the Constitution warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued, and the warrants so issued each year must be paid out of the revenue provided and collected for that year. If the revenue collected for any year for any reason does not equal the revenue provided for that year and hence is not sufficient to meet the warrants issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the

> warrants drawn and debts contracted for such other year have been paid, or in other words, only the <u>surplus</u> of revenue collected for any one year can be applied to the deficit of any other year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year. The intended effect of all which is to abolish the credit system and to establish a cash system in public business. If this rule results in any county not having money enough to pay as it goes or to run its governmental affairs, the remedy is not with the courts. Having reached this understanding of the meaning of the Constitution, it follows, without the necessity of any analytical examination or comparison of statutes or prior decisions, that all statutes or decisions providing or holding a contrary rule must give way."

CONCLUSION

Repeating your question, to-wit, "The question I desire to have answered is whether or not as a result of the above situation, 1927 warrants, that is, the oldest outstanding county revenue warrants, can be used by the taxpayer in the payment of 1932 taxes" - we are of the opinion that the warrants of 1927 cannot be used by the taxpayer in payment of 1932 taxes for the reasons:

(1) That Section 9911, supra, contains the provision "but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, and there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year";

(2) That the decision hereinabove quoted - K. C., Ft. S. & M. R'y. Co. v. Thornton, expressly holds that county

warrants are not receivable in payment of taxes for any other year than that for which the same were issued.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

SPECIAL ROAD DISTRICTS: Road Districts composed in part of two special road districts would not be liable for the bonded indebtedness of said road districts.

February 6, 1935. 2-16

FILED 73

Hon. J. T. Pinnell
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

This is to acknowledge receipt of your letter, requesting an opinion, which reads as follows:

> "A proposed special road district made up of territories partially within two different special road districts and partially of territory not within a special road district, desires to form a special road district. The two special road districts have voted bonds which are yet outstanding; the question is, in the event should this new district be formed would it be liable for its part of the bonded indebtedness of the two special road districts partially within its bonds?"

Section 8068, R. S. Mo. 1929, provides in part as follows:

> "The commissioners of such districts so incorporated shall have power to issue road and bridge bonds for and on behalf of their respective districts, payable out of funds derived from taxation of all property taxable therein to an amount including existing indebtedness payable out of funds so derived not exceeding five per centum of the

assessed valuation of such property to be ascertained by the assessment next before the last assessment for state and county purposes. ***** If it shall appear that two-thirds of the voters voting at said election on said question shall have voted in favor of the issue of said bonds, the commissioners shall order and direct the execution of the bonds for and on behalf of such district and provide for the levy and collection of a direct annual tax upon all the taxable property in the district sufficient to provide for the payment of the principal and interest of the bonds so authorized as they respectively become due. *****"

Section 8067, R. S. Mo., 1929, reads:

"The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, general taxes on property taxable in the district, and shall also have power and authority and be its duty to levy special taxes for the purpose of paying the interest on bonds when it falls due and to create a sinking fund sufficient to pay the principal of such bonds at maturity; and, whenever such commissioners shall, at any time between the first day of January and the first day of March of any year, file with the clerk of the county court a written statement that they have levied such tax, and stating the amount of the levy for each hundred dollars assessed valuation, the county clerk, in making out the tax books for such year shall charge all property taxable in such district with such tax, and such tax shall be collected as county taxes are collected. Whenever it shall be made to appear to

> the state auditor that the board of commissioners has failed or neglected to comply with this section in making provision for the payment of interest on and the principal of bonds issued it shall be the duty of the state auditor, on or before the first day of May to perform and discharge the duties of the board of commissioners in so far as it is its duty to levy special taxes for the purpose of paying the interest on and the principal of bonds issued. *****

Section 8081, R. S. Mo. 1929, reads in part:

> "Whenever any owner of land within any road district organized under the provisions of this article shall file with the county court of the county in which such district may be located a petition verified by an affidavit stating that such road district has no commissioners and has failed to elect commissioners at any regular election of the district, or has failed to hold a special election to fill any vacancy in the office of commissioner, or that such road district has ceased to perform the functions for which it was created, the county court shall cause five notices to be posted in conspicuous places in said district, giving notice of the filing of such petition, and that unless cause be shown to the said court on a day to be named in said notices, not less than thirty nor more than sixty days from the time of posting such notices, why the said road district should not be dissolved, that the same will be dissolved; ***** Provided further, that nothing in this article shall affect the validity of any bonds that may have been issued by such road district or affect the levy or collection of any special taxes that may have levied

> or assessed against any lands within such district: Provided further, after the dissolution of any such special road district the land therein shall be divided into road districts under the provisions of article 3, chapter 42, and any money that may be on hand to the credit of such special road district, that shall not be needed to satisfy any liabilities of such special road district, shall by order of the county court, be turned over to such new road districts in proportion to the number of acres allotted to each such new district. **"

A reading of the above sections shows that the commissioners of the road district have power to issue road and bridge bonds payable out of funds derived from taxation on all property taxable within the district, when two-thirds of the voters voting at an election vote in favor of the issue of said bonds; and it is their duty to levy special taxes for the purpose of paying interest on the bonds and to create a sinking fund sufficient to pay the principal of such bonds at maturity. If the board of commissioners fail to make provisions for the payment of interest on and principal of bonds issued, the state auditor shall levy special taxes for paying interest on and principal of the bonds issued. Section 8081, supra, provides that the dissolution of a road district shall not affect the validity of bonds that may have been issued, or affect the levy or collection of any special taxes that may have been levied or assessed against any lands within such district.

In the case of Embree v. Road District, 257 Mo. 593, l. c. 620 and 621, also 622, the Court, in passing upon the question as to whether the bonds issued by a road district were the obligation of the road district or simply evidences of an indebtedness payable out of the proceeds of the special tax bills issued against the lands embraced in the district, said:

> "The indebtedness voted by the landowners, whether payable by a single assessment or several constitutes liens upon the respective tracts of land in the district, in proportion to their respective values, and must be paid severally by each landowner, whether paid in bulk or in annual installments. If in bulk, the pay-

ments would have been made payable to the contractor, because in such case the tax bill would have been made payable to and delivered to him, but if in installments, then they would have been payable to the county collector, and by him turned over to the county treasurer, and by him paid to the bond-holders, whoever they might be.

"This is not controverted by counsel for appellants, but they insist that there is no provision contained in said article 7 of the statutes which authorizes the issuance of such bonds, containing a clause showing that they are only payable out of the special benefits collected, and, therefore, they must be considered and treated as the bonds of the district and not simply evidences of an indebtedness, only payable, as previously stated, out of the proceeds of special tax bills issued for benefits imposed against the several tracts of land in the district, and collected in the manner therein provided for.

"This contention is unsound for two reasons: first, because the statute does not undertake to prescribe the form of the bonds to be issued, and the presumption is that the officers charged with their execution, will issue bonds in harmony with the provisions of the statutes authorizing their issuance and the purpose for which they are executed and the means of their payment.

"If those mandates of the statutes are complied with, the bonds upon their face, as well as the statutes authorizing their execution, which must be read into the face of the bonds, will conclusively show that

> they are not the bonds of the road district, but simply evidences of an indebtedness payable out of the proceeds of the special tax bills issued against the lands embraced in the district, for the benefits mentioned.
>
> "And the second reason mentioned for saying that said bonds are not obligations of the road district is this: That in considering the nature and character of the bonds in question it is the duty of the court and all parties dealing with them, to read and consider in connection therewith the entire article of the statute bearing thereon and authorizing their execution; and by so doing it will clearly appear that no authority is given to any officer of the county or road district to levy or collect any tax with which to pay said bonds, except the special assessments authorized for the improvements mentioned, which are for the benefit of the respective landowners, and not for the benefit of the district itself. Moreover, the district as such, has no means out of which it could pay said bonds, nor any authority to make assessments therefor, except in the manner previously stated, which conclusively shows that the indebtedness is against the lands and not against the road district."

In view of the foregoing statutes and the construction placed upon them by the Supreme Court, we are of the opinion that a new special road district composed of two former special road districts would not be liable for any part of the bonded indebtedness of the two special road districts. However, the

bonded indebtedness of the two special road districts would be a lien upon the respective tracts of land located in the districts in proportion to their respective values and must be paid severally by each land owner.

Very truly yours,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

JET/JLH:afj

COUNTY BUDGET ACT: Claims against the county not included in the estimate made at the February 1935 term may be paid out of (1) Classes 5 or 6; (2) out of an ascertainable surplus in any of the other classes; (3) out of delinquent taxes.

3-22

March 21, 1935.

FILED
73

Hon. J.T. Pinnell,
Prosecuting Attorney,
Pineville, Missouri.

Dear Sir:

This department is in receipt of your letter of March 7 wherein you enclose a copy of the court's order in the mandamus suit of Herbert Perkins v. Charles Burks, et al; also, a history of the case, and request our opinion on same.

The facts appear to be that Herbert Perkins brought a mandamus suit against the County Court of McDonald County for back salary in the amount of $437.43 for the year 1931 and there is now due the sum of $1,137.59 for back salary during the year 1932. We assume that Mr. Perkins has not brought suit for the latter amount for the reason that the former case will decide the latter claim. The Supreme Court has recently passed on the original case and affirmed the judgment of the trial court.

In 1934 the County Budget Act of the State of Missouri became effective and evidently the county court ignored this pending suit. The County Budget Act compels the county court to pass on the estimates for the various classes at the February Term 1934. It is now too late to revise and amend so that the claim can be paid.

The fact that the contempt proceedings are now imminent against members of the county court places the county court in the situation of being fined or punished for contempt, and at the same time, if the mandate of the Supreme Court is carried out, they will be violating Section 8, Laws of Missouri, 1933, page 346, which is as follows:

> "Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any

county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

In our opinion it was the duty of the County Court to take into consideration the pendency of this suit and anticipate that the court might eventually be compelled to pay the same. The suit has been pending since 1932 and they at least had constructive notice of the same. Had the court not been negligent or careless in its duty in that respect, the members might have pleaded as an answer to any probable contempt proceedings that the issuance of the warrant and the auditing of the claim of Mr. Perkins would compel them to violate the law as members of the County Court.

Section 2 of the County Budget Act, Laws of Mo. 1933, page 341, provides that the funds of a county such as McDonald County shall be expended from six different classes, each having a priority over the following classes. Section 4 of said Act makes it the duty of the County Clerk to compile, along with other information, the following: "Total unpaid obligations of the county on January 1st of current year".

Your letter contains two questions, i.e., "Please give your opinion as to what the present county court can do about it" and "Can the present county court, under present statutes pay that, and if so, how?" These two questions may be consolidated into one, i.e., Can the present county court under present statutes pay the claim?

As stated above, the estimates of the final budget of the county may be revised and amended at the February Term, but since that term has evidently expired, we know of no way by which the claim might be included in the estimates.

The County Budget Act was passed by the Legislature for the purpose of promoting efficiency and economy in county government. The first four classes are rather rigid in that they include certain specific things and exclude others. We call your attention to Class 5, which provides for contingent and emergency expenses. It is more than possible that the claim of Mr. Perkins could be paid from this class, and of course, if there are any funds in Class 6, the same may be used.

Another method by which the same might be paid is by a surplus in any one of the four other classes. If it could be determined at this time that there will in all probability be a surplus in any one class and no shortage of funds in the class

prior to it, it is possible that such a surplus could be used for paying the claim.

This has long been recognized as the law prior to the enactment of the Budget Act, as has been said in the case of State ex rel. v. Johnson, 162 Mo. 621: (l.c. 630)

> "****a warrant valid when issued is not rendered invalid because the revenue provided to pay it is not collected during the year for which it was issued, or is misappropriated by the officers of the county for whose act the holder of the warrant is not responsible.
>
> *****
>
> (l.c. 621)
>
> "On the contrary, the surplus county revenue remaining after the payment of all current expenses of every kind for the year for which such revenue was levied and collected, may be used in the payment of outstanding valid unpaid county warrants for previous years."

We do not deem the above decision to be relegated or of no force due to the passage of the County Budget Act. We believe that many sections of the County Budget Act are directory and not mandatory--that the spirit and plan of the Act should be carried out conscientiously and to the best judgment of the county court, and if the financial structure of your county is such that the county court can carry out any of the suggestions made above for the payment of the claim, after the same is done the State Auditor should be notified of the change in the financial set-up of your county.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

INSANE PAUPERS:)
)
SHERIFF:)

Not mandatory upon County Court to designate Sheriff to transport patient to State Hospital.

5-3

April 15, 1935.

FILED
73

Hon. Walker Pierce
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Mr. Pierce:

This is to acknowledge receipt of your letter of March 27, 1935, in which you request the opinion of this Department. Your letter of request is as follows:

> "Will you please give me your opinion as to whether or not it is mandatory upon the County Court to designate the Sheriff to keep and transport insane patients to the State Hospital. The practice in this County has been for the County Court, themselves, to deliver the patients and it is my opinion that they may do so if they like, but considerable friction has arisen between the Court and the Sheriff and as a result I am referring the matter to you for your opinion."

Your question is whether or not it is mandatory upon the county court to designate the sheriff to keep and transport insane patients to the State Hospitals? We, of course, assume that your question pertains to insane poor patients sent to the State Hospitals at the expense of the county.

We shall briefly review the statutes which pertain to the sending of insane poor patients to the State Hospitals by the county court.

Under Section 8636, R. S. Mo. 1929, which provides in part as follows:

> "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. * * *"

The county court may upon a hearing, under Section 8647, R. S. Mo. 1929, cause a suitable order to be entered of record sending such insane poor patient to certain designated State Hospital and such order shall set forth that the person found to be insane is a fit subject to be sent to the State Hospital, and the clerk of the court shall forthwith forward a certified copy of said order to the Superintendent of the hospital accompanying same with the request of admission of the person found to be insane to the hospital.

Under Section 8649, R. S. Mo. 1929, upon receiving the application and the official copy of the order of the court, the Superintendent shall immediately advise the clerk whether the patient can be received and, if so, at what time. The clerk shall thereupon in due season, for the conveyance of such patient to the hospital by the appointed time, issue his warrant to the sheriff of his county or any other suitable person commanding him to forthwith arrest such insane person and convey him to said State Hospital.

Section 8650, R. S. Mo. 1929, provides as follows:

> "The relatives of insane person shall have the right, if they choose, to convey him to the hospital. In such case, the warrant shall be directed to one of them; and the person to whom it is directed and his assistant shall, if demanded, receive the same compensation allowed for the like services to the sheriff."

So, under the foregoing statutes, the relatives of this insane person have the right, if they choose, to convey him to the hospital and a warrant shall be directed to one of them. If that right is not exercised by the relatives, the warrant shall be directed to the sheriff of the county or any other suitable person.

It is a matter left to the discretion and judgment of the county court as to who shall execute the warrant and convey the patient to the hospital, the sheriff or any other suitable person. However, we are of the opinion that it is against public policy for the warrant issued under the provisions of Section 8649, supra, to be directed to one of the members of the county court "commanding him forthwith to arrest such insane person and convey him to the state hospital designated in the order." In other words, the county court should not execute its own warrant by an individual member of the court.

The county court, under the provisions of Section 8647, R. S. Mo. 1929, conducts a hearing and either on its own finding or on the verdict of the jury, if one shall have been employed, finds that the person is insane and a fit subject to be sent to the state hospital; the county court in this instance is acting judicially and when the court has made such a finding, for one or more of the members of the court to execute the warrant issued and convey the patient to the state hospital, would, in our opinion, be against public policy. And further, it must be remembered that the county court would pass on, determine and allow the fees and mileage to be paid for rendering this service for the reason that the fees and mileage are paid by the county under Section 8662 as amended by Laws of 1933, at page 408.

As was said by the Kentucky court in the case of Meglemery v. Weissinger et al., 131 S. W. 41:

> "It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to

> which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford to place the other members under obligations that they may feel obliged to repay. Few persons are altogether exempt from the influence that intimate business relations enable associates to obtain, and few strong enough to put aside personal considerations in dispensing public favors. And it is out of regard for this human sentiment and weakness, and the fear that the public interest will not be so well protected if appointing bodies are not required to go outside their membership in the selection of public servants, that the rule announced has been adopted, and ought to be strictly applied."

The above case was cited approvingly and quoted from in the case of State ex rel. Smith v. Bowman, 184 Mo. App. 549, l. c. 559.

It is true that the county court is not appointing one of its members to an office, yet the court in the present case is directing the warrant to one of its members and performing the service and collecting the fees therefor, and we think that it is objectionable and would fall in line with the reasoning adopted in the Kentucky case.

It is, therefore, our opinion that it is not mandatory upon the county court to designate the sheriff to keep and transfer insane persons to the state hospitals, but any person who answers the description of "any other suitable person"

in the discretion of the county court may be designated to transfer the patient to the hospital, but in our opinion one of the members of the county court cannot be selected and designated to execute the warrant, convey the patient to the hospital and collect the fees therefor.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

LICENSE--COUNTY COURTS: Pool tables operated in a County may be licensed when?

5-18

May 13, 1935.

FILED
73

Hon. J. T. Pinnell
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

Your request for an opinion, dated May 4, 1935, is as follows:

> "Battery E., 203rd Artillery, Anderson, Missouri, operates a pool room, having several tables, on a sort of 'club plan.' Charges are made for playing on the tables.
>
> "Please give me an opinion as to whether the Battery may so operate a pool room with several tables without paying state and county licenses.
>
> "The Manager of the pool room tells me that the net profits are turned into the 'Mess' fund.
>
> "I find no exceptions in the statutes other than of a table privately owned and played on without charge."

Article X, Section 1, Missouri Constitution provides:

> "The taxing power may be exercised ty the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes."

Article X, Section 10, Missouri Constitutinn provides:

> "The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon

> the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Pursuant to these constitutional provisions, the Legislature in Chapter 131 R. S. Mo. 1929, has delegated to the County Court the power to assess and levy a tax on pool and billiard tables and has provided a plan and general scheme of putting the licensing into effect. The tax is subject to such limitations as the Legislature has provided..

Section 14272 R. S. Mo. 1929, provides:

> "The county court shall have power to license the keepers of billiard tables, pigeonhole tables, jenny lind tables, and all other tables kept and used for gaming, upon which ball and cues are used. At each term, the clerk of said court shall prepare and deliver to the collector of their counties as many blank licenses for the keepers of such tables, hereinbefore mentioned, as the respective courts shall direct, which shall be signed by the clerk and attested by the seal of the court."

Section 14280 R. S. Mo. 1929, provides:

> "This chapter shall not apply to any person having set up in his own private residence any one of such tables mentioned in section 14272, when used for his own private use, and for the use of his family, and upon which no charge is made for playing."

The legislative acts above quoted have been in the Statutes for over one hundred years (R. S. Mo. 1835, p. 96) and are substantially the same law that was on the books in the territorial days of Missouri. (1. Missouri Territorial Laws, 1804-1824, p. 699.)

In the case of Hawkins v. Harris, 263 S.W. 807; 304 Mo. 309, l. c. 318, the plaintiff by mandamus was asking our Supreme Court to compel the County Court to issue a pool table license. The relief was denied and our Supreme Court said:

> "As the instant case stands, under the legislative policy of the State, the occupation in which relator sought to engage was not one he could exercise except by grant of a privilege or license from the State. Under the holding of this and some other appellate courts of the State it is not recognized as a useful occupation. It is not an occupation which public welfare demands that he shall be permitted to exercise. His private interest or right in exercising it is not such as 'exists independent of the grant of the power,' to issue him a license, or, independent of the right conferred by the license itself, but is to be created thereby."

CONCLUSION.

We are of the opinion that the manager of the pool room described in your request should obtain a license to operate where the County Court has so ordered.

The Statutes provide for the privilege of operating pool tables within county territorial limits, and the privilege can be granted at the discretion of the County Court in all cases whose facts do now fall within the exceptions of Section 14280, supra. In such exceptional cases the privilege license is not necessary.

We find nothing in the Constitution or Statutes of Missouri which exempts Battery E., 203rd Artillery from paying a license tax for the privilege of operating pool tables. The fact that said pool tables are operated by a military unit does not exempt them. The

fact that the tables are operated on a club plan or that the net profits from the tables are turned into a mess fund does not exempt them. If the operator of these tables establishes an exemption from this privilege tax he must show the Court that the tables are set up in a private residence for the private use of the owner or his family, and that no charge is made for playing upon the tables.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

INTOXICATING LIQUORS: Wholesale Liquor Dealers subject to assessment and payment of an ad valorem tax.

6-26

June 26, 1935.

FILED 73

Hon. J. T. Pinnell
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

This will acknowledge your request for an opinion which reads as follows:

> "Is a wholesale liquor dealer in this state subject to assessment and collection of an ad valorem tax?"

We direct your attention to the general law respecting the taxation of merchants which is found, in part, in Section 10075 of the Revised Statutes of Missouri, 1929. This section reads in part as follows:

> "Every person, corporation or co-partnership of persons, who shall deal in the selling of goods, wares, and merchandise, ****, is declared to be a merchant. ****"

In the case of the Great Atlantic & Pacific Tea Company, v. Cream of Wheat Company, 227 Fed. loc. cit. pages 46 and 47, the Court, in defining a "wholesaler" said:

> "A 'wholesaler' is one who buys in comparatively large quantities and who sells, usually in smaller quantities, but never to the ultimate consumer of an individual unit. He sells either to a 'jobber', a sort

> of middleman, or to a 'retailer', who sells to the consumer. The quantities bought by the wholesaler may vary from a fraction of a car load to many car loads; it being the character, not of his buying, but of his selling, that marks him as a wholesaler. *****".

In construing Section 10075, supra, with what the Court said in the above mentioned case in defining a "wholesaler", it is the opinion of this department that a wholesale liquor dealer would come within the meaning of said section for the purpose of taxation.

Section 10077, R. S. Mo. 1929, provides in part that merchants shall pay an ad valorem tax equal to that which is levied on real estate, and reads in part as follows:

> "Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in March and the first Monday in June in each year. *****".

It is provided under the provisions of the Liquor Control Act that certain fees be paid for licenses issued to manufacturers, wholesalers and retailers. Also, in addition thereto there shall be paid for the privilege of selling certain alcoholic liquors various amounts of inspection fees.

It is the opinion of this department that the aforementioned fees would not abridge the right to levy an ad valorem tax. In the case of Monett v. Hall, 128 Mo. App. loc. cit. page 94, the Court said:

> "***** It has been frequently adjudged to be perfectly competent for the State to collect an ad valorem tax on property used in a calling and at the same time to impose a license tax on the pursuit as a condition to the right to carry it on, and this power may be

delegated to municipal corporations, ****".

In light of the foregoing statutes and authorities, it is evident that a wholesale liquor dealer would be subject to the payment of an ad valorem tax.

CONCLUSION.

We conclude that a wholesale liquor dealer is a merchant within the meaning of Section 10075, supra, that such wholesale liquor dealer is subject to assessment and collection of an ad valorem tax in addition to the license and gallonage fees required to be paid under the Liquor Control Act.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

CITY MANAGER GOVERNMENT: Ordinance permitting marble and slot machines to operate and pay occupation tax illegal.

8-28

FILED
73

August 21, 1935.

Dr. H.D. Poe, Captain,
In Charge of Reserve Police Corps,
Excelsior Springs, Missouri.

Dear Sir:

This department is in receipt of your letter of some time ago wherein you request an opinion regarding certain questions therein contained as they relate to the City of Excelsior Springs, which has changed from the aldermanic to the city manager form of government in 1923. Your first question is as follows:

> "To be perfectly legal, according to law in this state, should not the City Council have enacted certain ordinances complying with the Missouri statutes relating to the appointment of such police officers as were desired or necessary for the good government of our city, establishing and defining their duties, etc?"

Section 6937, R.S. Mo. 1929, relating to the powers of the Council under city manager form of government is as follows:

> "Except as herein otherwise provided the council of any city organizing under this article shall have all the powers now or hereafter given to the council or to the mayor and council jointly, under the law by which such city adopting this article was governed under its former organization; and shall have such power over and control of the administration of the city government as is provided in this article.
>
> "It shall be the duty of the council to pass all ordinances and other

> measures conducive to the welfare of the city and to the proper carrying out of the provisions of this article. It shall appoint a suitable person not a member of the council to be the administrative head of the city government whose official title shall be 'city manager'. The council shall also provide for all offices and positions in addition to those herein specified, which may become necessary for the proper carrying on of the work of the city, and shall fix the salary and compensation of all officers and employes of the city not herein provided for. All officers of the city shall be paid in equal monthly installments for their services and all employes of the city shall be paid monthly or at such shorter periods as the council shall determine. The creation of all offices and salaries attached thereto, which may be provided for by the council under this article shall be by ordinance, and they shall all be for an indefinite term. The council shall also provide office rooms at the city hall or at some other convenient and suitable place in the city for the transaction of the business of the city and for the convenience of its officers."

In view of the terms of Section 6937, supra, we are of the opinion that it is the duty of the City Council, when the city manager form of government is adopted, to enact all ordinances in conformity with the statutes in order to make effective the terms of Sections 6930 to 6945, R.S. Mo. 1929, inclusive.

Your second and third questions are:

> "Are the police who have been appointed without the enactment of such proper ordinances, legally and duly appointed officers in every sense of the word?"

> " * * * In the month of May this year our City Manager came to my office complaining that the town was full of marble machines and asked that I * * * make a survey of the city and get a list of the number of machines, find out who the agents were who were planing them around throughout the city, etc.
>
> "I complied with his request, * * * * Upon submitting my report I asked this question: 'Are you going to run these machines out of town?' Answer: 'No, we are going to create an ordinance wherein the agents placing such machines will pay an occupation tax so much per machine per year.' * * * *
>
> "Is not such an ordinance illegal, in as much as it makes the city an abettor to the act of having possession or in aiding the placing of such machines?"

Referring again to Section 6937, supra, in order for the appointment of various police officers to have been legal in every sense of the word, it is our opinion that the City Council should have passed appropriate ordinances in compliance with the statutes; however, bearing in mind that there are two classes of officers, i.e., de jure and de facto officers, we are of the opinion that regardless of the fact that the Council failed to pass appropriate ordinances, the officers acted and carried out the duties of police officers and are at least De facto officers; therefore, as such defacto officers, their acts may be considered legal.

A decision bearing on this question is the case of State ex rel. v. Cartwright, 122 Mo. App. l.c. 204-205, wherein the Court said:

> "We readily concede that the appointment of the district clerk should have been made by the board at a regular or special meeting thereof. (Pugh v. School District No. 5, 114 Mo. App. 688) And as this was not done, that Mr. Cartwright was not the district clerk de jure. But it does not follow that he must be regarded as a mere interloper and his acts in the discharge of the

duties of the office held to be void because of the absence of his formal appointment. In a recent case, this court, speaking through Ellison, J., quoted with approval the doctrine in State v. Carroll, 38 Conn. 449, that, 'An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be, etc.' (Usher v. Telegraph Co., (not yet reported)). The school board by a course of conduct extending over a period of years recognized Mr. Cartwright as district clerk, adopted and profited by his official acts and knowingly permitted the county officers and the general public to deal with him as a legal officer. These facts constituted him such officer de facto and the enumeration taken and filed by him in 1905 in the usual way and in compliance with the requirements of the statute must be deemed to have been authorized by the school board. That body 'caused it to be taken and forwarded to the county clerk' within the meaning of the statute."

The police officers in question have been acting and carrying out their duties as such officers--are recognized by the general public as the officers of the city--therefore, we are of the opinion that their acts in carrying out their official duties would be legal, and the same would not constitute a defense by lawyers in criminal cases.

Your next question, relating to marble and slot machines which have by ordinance been permitted to be operated by payment of an occupation tax, is as follows:

> "If the prosecutor of this county should order a raid on places having such machines in their place of business and order the destruction of same, would not the city be in rather a precarious position, both from a legal standpoint and from a standpoint of civil suit for damages by the agents and syndicates putting out such machines?"

The question arises as to whether or not such machines are gambling devices within the meaning of Section 4287, R.S. Mo. 1929, which is as follows:

> "Every person who shall set up or keep any table or gaming device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years, or by imprisonment in the county jail for a term not less than six nor more than twelve months."

Assuming, as you state in your letter, that such machines are gambling devices, has the city the authority to pass ordinances licensing them to operate? Section 7289, R.S. Mo. 1929 states that all ordinances must conform to the state laws, providing as follows:

> "Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

In the case of State ex rel. Nigro v. Kansas City, 325 Mo., l.c. 101, the Court said:

> "But the Board can in no case relieve from a substantial compliance with the ordinance; their administrative discretion is limited to the narrow compass of the statute; they can not merely pick and choose as to the individuals of whom they will or will not require a strict compliance with the ordinance. (State v. Christopher, 317 Mo. 1179, 1196, 298 S.W. 720)."

Likewise, in the case of St. Louis v. Bernard, 249 Mo. l.c. 56:

> "The design of said last named provisions of our Constitution, statutes and the Scheme and Charter of St. Louis is to prevent the enactment of city ordinances which are not in conformity with the general laws of the State.
>
> "The defendant's motion to quash designates several alleged reasons why the information is defective, but the trial court made no finding

of facts and gave no declarations of law. Therefore, we are not fully informed on what ground the information of the city attorney was quashed, However, the attorneys for both plaintiff and defendant have, in their briefs, assumed that the information was quashed on account of the alleged conflict between the ordinance and said sections 4804 and 4805, Revised Statutes 1909; and we will treat that alleged conflict as the issue upon which the judgment of the court of criminal correction must be affirmed or reversed.

"We think it is perfectly clear that the plaintiff city cannot by ordinance authorize the doing of any act which the general laws of the State have prohibited; and where the statutes of the State expressly restrict or limit the power of a city to legislate upon a given subject, such city cannot legally overstep the boundaries marked out for it by the General Assembly. Agreeable to these views it was held in the case of City of St. Louis v. Meyer, 185 Mo. 583, that St. Louis could not levy a peddler's license tax upon a farmer who sold products of his farm in said city, for the reason that section 9516, Revised Statutes 1909, prohibits all incorporated cities in the State from levying any such tax."

CONCLUSION

It is the opinion of this department that an ordinance permitting marble and slot machines to be operated by paying an occupation tax is illegal because same sanctions that which the State statutes prohibit. The Prosecuting Attorney or Sheriff would have power to raid places wherein such devices were operated and prosecute the operators on the grounds that such machines are gambling devices, irrespective

of a city ordinance permitting the operation of same.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

TAXES - Payment of taxes on part of one tract of land.

September 26, 1935 10-1

FILED 73

Honorable J. T. Pinnell
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

We have your request of September 4, 1935 for an opinion, which request is as follows:

> "A farm of 193 acres was owned by A, on which taxes are delinquent for five years; B. foreclosed a mortgage on 119 acres of said farm and became the purchaser at the foreclosure sale; B. wants to pay the taxes on the 119 acres he owns.
>
> Is there any way that B. can pay the taxes on his 119 acres without also paying the taxes on the balance of the 193 acres? "

The answer to the above query appears to be fully set out in Section 9913, R. S. Mo. 1929, which in part provides as follows:

> " * The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes: Provided, the persons paying such tax shall furnish a

particular specification of the part, and if the tax on the remainder of such lot and parcel of land shall remain unpaid, the collector shall enter into such specification in his return, to the end that the part on which the tax remains unpaid may be clearly known."

It is, therefore, the opinion of this office that under the above stated facts, B., the new owner of the 119 acres of land, may pay the back taxes on only that portion of land which he now owns.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

COUNTY COURT--SHERIFFS: In Counties of less than 75,000 inhabitants, County Judges are entitled to $5.00 per day when necessarily engaged in holding Court. There is no statutory or common law duty in Missouri for a sheriff to open Court, but his duty is to attend Court.

October 16, 1935.

10-17

FILED
73

Honorable C. W. Piper
Clerk of the County Court
Saline County
Marshall, Missouri

Dear Sir:

We acknowledge your request for an opinion dated September 21, 1935, which reads as follows:

> "We are wishing to have your opinion in regard to duties of the Sheriff of the several Counties of Missouri.
>
> "1. Is it compulsory for the Sheriff to open the County Court each day that the County Court meets for that body to be in an official session, or is it only necessary for the Sheriff to open the County Court four (4) times a year, the beginning of each term of Court?
>
> "2. If the County Court goes as a body into the Country to view roads and bridges, is it necessary for the Sheriff to open the County Court in order for the County Court to receive their pay for that day when no work of record has been transacted, or is it only necessary for the Clerk to make an entry on the County Court record to that effect?
>
> "We are very anxious for your opinion on this matter, and would be very grateful for an early reply."

It is the mandatory statutory duty of the sheriff to act in attendance upon the County Court at every term. Section 11518 R. S. Mo. 1929, provides in part:

> "* * * *he shall attend upon all courts of record at every term,* * * *."

Again in Section 1870 R. S. Mo. 1929, the Legislature provided:

> "The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

County Judges are constitution officers with constitutional duties to perform, and Article VI, Section 36, Missouri Constitution provides:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Section 2077 R. S. Mo. 1929 provides:

> "The said court shall, when not otherwise provided by law, have power to award process and to cause to come before them all and every person whom they may deem it necessary to examine, whether parties or witnesses, and may examine every person on oath or affirmation, touching any matter in controversy before them."

The Legislature has provided for the terms of the County in Section 2083 R. S. Mo. 1929, which reads:

> "Four terms of the county court shall be held in each county an-

> nually, at the place of holding courts therein, commencing on the first Mondays in February, May, August and November. The county courts may alter the times for holding their stated terms, giving notice thereof in such a manner as to them shall seem expedient: Provided, that in counties now containing or that may hereafter contain seventy-five thousand or more inhabitants, and where county courts are now or may hereafter be held at more places than one and at other places than the county seat, the terms of said court shall be held monthly and alternately at the county seat and such other places as may be provided for the holding of such court, and each monthly term shall commence on the first Monday of each month."

Section 2691 R. S. Mo. 1929 provides the statutory method whereby a County Court can do County business and reads:

> "A majority of the judges of the county court shall constitute a quorum to do business; a single member may adjourn from day to day, and require the attendance of those absent, and when but two judges are sitting and they shall disagree in any matter submitted to them, the decision of the presiding judge at the time being, to be designated by the clerk of such court, shall stand as the judgment of the court."

In the case of Gammon v. Lafayette County, 76 Mo. 675, l. c. 676, the Supreme Court said:

> "The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it.

> When the statute fails to provide a fee for service he is required to perform as a public officer, he has no claim upon the State for compensation for such service."

County Judges in Saline County receive their compensation as provided for Counties under 75,000 population, and Section 2092 R. S. Mo. 1929, as amended in the Laws of 1931, page 191, read in part:

> "* * * * In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having seventy-five thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, provided that such mileage shall be charged only once for each regular term."

15 Corpus Juris, page 881, Section 231, paragraph 2, provides:

> "Where the time of beginning but not of ending a term is fixed, the term, when it has been duly begun, will continue, and may for all general purposes be considered as in session, until it has been determined by some affirmative judicial act, such as an adjournment sine die, or

> until the next term; and after the term of a court has been opened, the questions how long it shall remain open, to what day it shall be adjourned, and whether and how often it shall remain open for incidental business after the regular business of the term has been concluded are matters which rest in the discretion of the judge, the general rule being that the term should or may be continued until all the business before the court is disposed of."

In the case of Lewis v. Hoboken 42 N. J. L. 377, that Court said at l. c. 379:

> "The relator's theory is that the court is always open, and that there is each day a constructive sitting of the court, at its usual meeting place, where he may attend, and for each day of such attendance, claim pay.
>
> "The defendant thought that he should be paid only when he was serving the court at an actual session.
>
> "This latter view seems to me to be the correct one, and to be rested upon the only interpretation which the words used in the act will admit of. 'Attendance upon the sittings of the court,' is the condition of payment.
>
> "A court is defined by Bacon (Bac. Abr., tit. 'Court,' A,) to be 'an incorporeal political being, which requires for its existence the presence of its judges, or a competent number of them, and a clerk or prothonotary, at or during which, and at a place where it is, by law,

authorized to be held, and the performance of some public act indicative of the design to perform the functions of a court.' "

CONCLUSION.

As per the Missouri Constitution, the County Courts of the several Counties in Missouri are Courts of Record "with jurisdiction to transact all County business as may be prescribed by law." According to Section 2077, supra, they have power to award process touching any matter in controversy before them. According to Sections 11518 and 1870, supra, it is the sheriff's duty to attend the County Court at every term, and to attend all process issued out of the County Court, except where the attention of process is directed otherwise by the Legislature. The Legislature has provided fees incidental to the performance of certain duties in the office of sheriff, including fees for attending the County Court and fees for the attention of process issued out of the County Court, but in our search we find no Statute specifically directing the sheriff at any time to "open Court", nor is there a statutory fee allowed for "opening Court." Is it to be said that because the Legislature said that he must attend each term of the County Court, and that he must attend all process issued out of the County Court, it is necessarily implied from this statutory duty that he has the implied duty to "open Court?" We think not. Where the sheriff opens the County Court, as is practiced in many courts in Missouri, he does so either under the rule of the Court or by sufferance of the Court. The common law and Statutes of Missouri are silent on the matter of a sheriff opening the County Court.

Once the statutory term is in session it continues in session at the discretion of the Court until all business before the Court is disposed of. It is common knowledge that a term of Court may in fact consist of many days, but by legal fiction it is deemed to consist of but one day, the day upon which it is first held, with the sheriff in formal attendance. Once Court is in session, at no place in the law is a sheriff empowered

to assume that the County Court closes from day to day with a new opening on each succeeding day. All succeeding days of Court are in contemplation of the law only a part and continuance of the first day.

The County Judges are constitutional officers charged with administering the affairs of the County, and many of their functions are other than judicial, and do not necessitate the presence of a sheriff. It becomes their duty to view roads and bridges when occasion demands. It is their duty to see and know where County money is being spent, or expected to be spent. Nothing in the Statutes compel them to hold Court in the Court House. The Statutes say that once the term of Court is legally in session the majority of the judges shall constitute a quorum to do County business, as long as the term is not determined by some affirmative judicial act or by operation of the law.

We are of the opinion that during statutory term time, but not during judicial adjournment, they can meet at any public place within the County where the occasion, in their discretion, demands their presence, and a quorum of said Court can then and there necessarily hold court and do business for the County, for which service they are entitled to per diem compensation. The Sheriff need not be physically present after his attendance on the first day of the term. During term time, if the Court needs him for any official service, it is within their power to send for him.

The Legislature has said that the County Court of Saline County shall receive "$5.00 for each day necessarily engaged in holding Court", and it further says that each term they "shall receive five cents per mile for each mile necessarily traveled in going and returning from the place of holding Court."

Respectfully submitted

APPROVED: WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

SCHOOLS: Money found in the teachers' fund may not be transferred to either incidental fund or building fund, directly or by subterfuge.

11-27

November 27, 1935

FILED
73

Hon. J. T. Pinnell
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

This is to acknowledge your letter dated November 19, 1935, as follows:

> "During the year 1934 and prior years, some of the rural school districts in this, McDonald County, accumulated surpluses of approximately $300.00 in the teachers' funds which up to this time are intact.
>
> Because of better conditions, more state help etc., those funds are not and will not be needed for payment of teachers' salaries.
>
> These same schools are greatly in need of repairs to their buildings, additional equipment, books etc., and could use such surpluses to great advantage if there is any legal way to transfer them to the incidental funds of the districts.
>
> Can such transfer be legally made?
>
> The County Superintendent, who requests this opinion, suggested that the districts might legally draw warrants to the teachers, on such funds, present the warrants to the

> County Treasurer for payment and have the amounts credited to the incidental fund of each district.
>
> Because of these surpluses in this county, the corporations refuse, of course, to pay a **quota** of school taxes equal to that paid by persons.
>
> In the future, we will arrange, of course, so that we shall not be embarrassed (?) with such surpluses."

Section 9311 R. S. Missouri 1929 provides for the payment of district indebtedness, and said section, in part, provides as follows:

> "Upon the order of the board of directors, it shall be the duty of the district clerk to draw warrants on the county treasurer in favor of any party to whom the district has become legally indebted,
>
> * * * * * * * * * * * * * * * * * *.
>
> The species of indebtedness must be clearly stated and should be drawn on its appropriate fund; all moneys for teachers' wages on the teachers' fund; all moneys used in the purchase of a site, erection of building thereon, and furnishing the same, on building fund; and all other expenses to be paid out of the incidental fund."

Section 9312 R. S. 1929 provides for the form of warrant and makes provision for transfer of funds from building fund to incidental fund, under certain conditions. Said section, in part, provides as follows:

> The treasurer shall open an account for each fund specified in this section, * * * * * * * * * * * * * *.
>
> No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; * * * * *:
>
> Provided, that the board of directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property: Provided further, that in the event of a balance remaining in the Building fund after the purpose for which said fund was levied is accomplished, the said board shall have the power to transfer such unexpended balance to the incidental fund."

It is thus seen that the above two sections define the three funds and provide the source from which each is derived. Provision is also made for transferring of funds from the incidental fund to the building fund, and vice versa, under certain conditions. However, nothing is found therein that permits the transfer of money from the teachers' fund to any of the other two funds, or vice versa.

In Consolidated School District v. Shawhan 273 S. W. 182, the Kansas City Court of Appeals had before it the question of liability of the board of directors when said directors commingled the three funds in one bank deposit and drew warrants from the one fund. The Court, at page 184, said the following:

> "Under our state law the government of a school district, as well as the handling of the finances thereof, is vested in a board of directors duly elected by vote. Their powers and duties are prescribed by statute. A trust is reposed in them, the

execution of which is frequently attended with difficulty and embarrassment. By accepting such trust each director obligates himself to perform the duties as the law directs, and if there is a misapplication of the funds, or any part thereof, the question for determination is as to whether or not the directors are personally liable and may legally be required to respond in damages therefor."

* * * * * * * * * * * * * * * * * * * *

"Section 11223 (9312 R.S.1929) sets forth the form of warrant to be issued by school boards, a separate form for teachers' fund, for incidental fund, and for building fund, and provides that all money derived from the state, county, and township funds, and all money derived from taxation for teachers' salaries, and all tuition fees, shall be placed to the credit of the teachers' fund; that money for incidental purposes shall be kept in the incidental fund and all money for building purposes in the building fund. Further, this section prohibits the honoring of any warrant by any county treasurer unless such warrant be in proper form and drawn upon the proper fund; and provision is made that, in case of emergency, transfers back and forth of the incidental and building fund may be made by the board.

The law as stated in the section last mentioned is reflected in the opinion of this court in Cleveland Village School District v. Zion,

195 Mo. App. 299, 304, 190 S. W. 955, 957, where it is held that:

'* * * Money collected by taxation for school purposes cannot be diverted from one fund to another. Certainly money in the teacher's fund cannot be transferred to and used in the incidental fund.'

It is likewise true, and for the same reason, that money in the teachers' fund may not be used in the building fund. That this was done in the case at bar stands admitted. Defendants contend they are not liable therefor. We think the Supreme Court settled this point against defendants' contention in Knox County v. Humolt et al,110 Mo. 67, 19 S. W. 628."

In view of the foregoing, it is our opinion that moneys in the teachers' fund may not be legally transferred to either the incidental or building fund. It is our further opinion that said transfer may not be made by subterfuge, that is, by drawing warrants to the teachers and have the teachers present the warrant for payment and deposit the money in some other fund.

We cannot understand why corporations should refuse to pay taxes levied against other persons merely because there is a surplus in one fund, namely, the teachers' fund. We are cognizant of the fact that corporations, especially public utilities, adhere to the construction that assessments on their distributable property for school purposes, should be on the basis of the amount of money <u>necessary</u> for school purposes, but see our opinion inclosed herewith dated November 23, 1935, to Hon. J. R. Oliver, Clerk of the County Court of Dunklin County, wherein we specifically held

that the levy is on the average school tax rate and not on the amount necessary to operate the school.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JLH:LC

Inclosure

COUNTY CLERKS - Construction of Section 12183, R. S. Mo. 1929.

November 29, 1935

11-30

FILED
73

Honorable C. W. Piper
Clerk of the County Court
Saline County
Marshall, Missouri

Dear Sir:

We have your request of November 25, 1935 for an opinion, which request is as follows:

"Recently we find that we have been for many years collecting fees to run the Clerk's office, that are not legal.

"Our court has allowed 50¢ each for writing warrants, 50¢ each for opening and closing court and $200.00 per year for keeping a record of Court proceedings. This loss is about $1,800.00 per year. We have been allowed only $860.00 per year for keeping the Treasurer's and other books. Now it will be necessary to get a Court order allowing about $2,600.00 per year for these books to get the necessary fees to run our office.

"Can you approve of our Court making an order allowing the clerk $2,600.00 per year for keeping these books, payable monthly, under Section 12183?

"We only ask for enough to pay the salary of $2,500.00 and clerk hire of $2,400.00 amounting to $4,900.00, which is less than this office has been paying for a number of years."

Your opinion only calls for a construction of Section 12183, R. S. Mo. 1929. That section is as follows:

> "The court shall allow to the clerk of the county court, for his services under this article (except sections 12145, 12146 and 12147,) such compensation as may be deemed just and reasonable."

This section is a part of Article 8, Chapter 85, R. S. Mo. 1929.

Under the above statute (Sec. 12183), the county court is vested with a limited power, and the statute must be given a reasonable, as distinguished from an arbitrary, construction by the county court. It is necessary to ascertain what the Legislature meant by the term "compensation as may be deemed <u>just and reasonable</u>".

Webster's dictionary defines "just" as:

> "Violating no right or obligation; giving to every man his due,"

and the same author defines "reasonable" as:

> "Governed by reason; agreeable to reason; just."

In fixing such compensation as may be allowed the county clerk under this section, the county court should keep in mind the two parties to the contract; the taxpayers on the one hand, and the county clerk on the other. The amount of compensation is to be fixed by the county court, and is to be based upon the amount of services rendered, and the value of those services to the public.

Under the statute authorizing this office to give opinions, Sec. 11274, R. S. Mo. 1929, such opinions must necessarily be limited to "questions of law". This

general rule is also set out in 6 C. J., p. 811, Section 16. The amount of compensation to be allowed under the above statute is a matter that rests exclusively with the county court; the amount of pay should be a reasonable compensation for the services rendered; no more, no less.

It is, therefore, the opinion of this office that the term "just and reasonable", as contained in Section 12183, R. S. Mo. 1929, calls for the payment of a reasonable compensation for the services rendered, and the county court should neither pay less than the value of the services, nor more than the value of the services rendered.

Yours very truly,

FRANKLIN L. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FLR:FE

NEPOTISM: It is not a violation of the nepotism section of the Constitution for a county court to appoint as janitor a first cousin of one of the judges' deceased wife, providing there are no living children of the marriage aforesaid.

1. 7

February 11, 1935. 2-16

FILED 74

Hon. Thomas V. Proctor,
Prosecuting Attorney,
Monroe County, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of February 8 wherein you make the following inquiry:

> "Would it be in violation of the nepotism section if a janitor is hired by the county court who is a first cousin of the wife of one of the county judges, the wife of said judge being now deceased, and all of the judges concurring and voting for the appointment of the janitor?"

Your inquiry has reference to Sec. 13 of Article XIV of the Constitution of Missouri, which is as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

This is usually referred to as the nepotism section and its terms have been strictly construed by the courts. In the case of State v. Whittle, 63 S.W. (2d) 100, the court had before it the question of a school teacher being employed by a school district

in which a member of the school board was related to the teacher within the prohibited degree of affinity or consanguinity. In discussing this matter the Court said:

> "Of course, there must be a substantial compliance with the statute. Otherwise the teacher is not employed. It follows that, as between the district and the teacher, the power to employ is lodged with the board. However, as between the public and a director, 'the right to name or appoint' a teacher is not determined by reference to the statute. To hold that said 'right' is so determined would convict the people of intending to eradicate only a small part of the evil. Furthermore, to so hold would be absurd. Respondent also argues that the amendment is only directed against officials having all the right (power) to appoint. We do not think so. The question must be determined upon a construction of the amendment. It is not so written therein. The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course,a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

It was held that the respondent Whittle had forfeited his office of school director of the district and an ouster was ordered against him.

A more recent case bearing on the constitutional section is that of State v. Ferguson, 65 S.W. (2d), l.c. 99. In that case the Mayor of Monett, Mo. was ousted by quo warranto proceedings under the nepotism section because he had appointed his

first cousin to the position of pumper for the city water system. Judge Hays, in discussing the case said:

> "Obviously, said appointee Cox, the first cousin, was within the express prohibition of the nepotism section of the Constitution quoted supra. Respondent, by making said appointment, was thereby guilty of abuse of his power and authority in the premises whereby he has forfeited his right and title to said office and its franchises, and is unlawfully usurping the powers and prerogatives thereof. Therefore judgment of ouster from said office should be entered against him and our final writ of ouster should issue. It is so ordered."

Under the above decisions and in view of the section of the Constitution itself, we would have no hesitancy in holding that the county judge, in appointing his wife's first cousin, would forfeit his office; however, the question must be considered as to the effect, if any, the death of said judge's wife prior to the appointment would have. It is a well recognized principle of law that relationship by consanguinity is in its very nature incapable of dissolution. Affinity is the relationship existing in consequence of marriage between each of the married persons and the blood relatives of the other and the degrees of affinity are computed in the same way as those of consanquinity. The husband is related by affinity to all the blood relatives of his wife and the wife is related by affinity to all the blood relatives of her husband.

There is no decision directly in point in Missouri on the question of what effect the death of the wife of the county judge would have on the appointment of her cousin. In 2 Corpus Juris, we find this terse statement:

> "Death of the spouse terminates the relationship by affinity. If, however, the marriage has resulted in issue who are still living, the relationship by affinity continues."

The effect of the death of a spouse is discussed in the case of Blodget v. Brinsmaid, 9 Vt. 30, wherein the Court said:

> "There the objection taken was founded upon an affinity arising out of a marriage between the party who was alleged to have performed a judicial function, and the sister of the real

> defendant in the execution, whose property he had appraised. The appraiser having intermarried with the sister of the party, there could be no doubt of the existence of an affinity so long as the marriage continued, and consequently the only question for the court to determine in that case was whether such marriage was undissolved at the time of the performance of the judicial act. The rule as applicable to the facts of that case, was there correctly laid down, and under it there could be no doubt of the affinity, in case the marriage still subsisted. It is there said that 'consanguinity is the having the blood of some common ancestor. Affinity arises from marriage only, by which each party becomes related to all the consanguinei of the other party to the marriage; but in such case these respective consanuiniei do not become related by affinity to each other. In this respect these modes of relationship are dissimilar: 1 Bla. Com., c. 15, p. 434, Christian's notes to same; 15 Vin. Abr. 246. The relationship by consanquinity is in its nature incapable of dissolution, but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is by affinity brother to his wife's sister, yet upon the death of his wife he may lawfully marry her sister.

The following cases appear to hold that the death of a spouse does not sever the relationship of affinity:

> "The relation by affinity is not lost on the absolution of the marriage any more than a blood relation is lost by the death of those from whom it is derived. The dissolution of the marriage, once lawful, by death or divorce has no effect on the issue, and can have no greater effect to annul the relation by affinity." Spear v. Robinson, 29 Me. (16 Shep.) 531, 545.

> "Where a defendant during the life of her husband stood in the fourth degree of affinity to the chancellor, as her husband was related to him in the fourth degree of consanguinity, the death of the husband did not sever the tie of affinity where there was living issue of the marriage in whose veins the blood of both parties was commingled, since the relationship of affinity was continued through the medium of the issue of the marriage." Paddock v. Wells, 2 Barb. Ch. 331, 333.

The following cases appear to hold unequivocably that the relationship by affinity ceases with the dissolution of the marriage:

> "Relationship by consanguinity is in its nature incapable of dissolution, but relationship by affinity ceases with the dissolution of the marriage which produced it." Blodget v. Brinsmaid, 9 Vt. 27, 30; Kelly v. Neely, 12 Ark. (7 Eng.) 657, 659, 56 Am. Dec. 288. Hence though a man is by affinity brother to his wife's sister, on the death of the wife he may lawfully marry the sister. Kelly v. Neely, 12 Ark. (7 Eng.) 657, 659.

> "A justice whose brother's widow became the wife of plaintiff's brother, of which marriage there was no issue, the wife being dead at the time of trial, is not related by affinity to plaintiff." Carman v. Newell (N.Y.) 1 Denio, 25, 26.

Likewise, in the case of Bigelow v. Sprague, 140 Mass., l.c. 428-429, the Court said:

> "During the trial Bigelow moved that a juror should be withdrawn from the panel on account of his relationship to Sprague. It appeared that an uncle of Sprague married an aunt of the juror, and that two uncles of the juror married aunts of Sprague, but that each of these marriages had been dissolved by the death of one of the parties, and it did not appear that there was issue of any of them living. The court rightly ruled that the juror was not related to Sprague."

CONCLUSION

In view of the foregoing, it is the opinion of this department that if the county judge in question has no children born of the marriage aforesaid, and his wife passed away prior to the appointment, the relationship by affinity as contemplated by the constitutional section is dissolved and said county judge could not be ousted by quo warranto proceedings for a violation of Section 13 of Article XIV of the Constitution of the State of Missouri.

There are three ways in which a marriage may be dissolved, viz.: by death, by divorce or annulment, and we think they are on a parity. We are not unmindful of the fact that quite often the ties of affection for the husband's relatives or the wife's relatives remain intact after the dissolution of the marriage, and to all intents and purposes the status does not change.

Upon the death of either spouse, the living spouse may remarry and thereby contract new relatives by affinity. There are no limits to the number of marriages or dissolutions; hence, it might be said that during the course of years, by marriage and dissolution, a person could become related by affinity to half the population of his county, and he would thereby be precluded from making any appointments of any relatives by affinity for fear of forfeiting his office.

We therefore adopt the above conclusion, i.e., that the county judge in question will not forfeit his office by appointing his deceased wife's first cousin as janitor, providing there are no living children born of the marriage aforesaid.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

SCHOOLS: School district organized as a town district under the provisions of Section 9325, prior to the enactment of Section 9194, may levy a maximum tax of $1.00 on the $100.00 valuation.

School district classified as a town district, under Section 9194 may levy a tax of $1.00 on the $100.00 valuation.

District not so organized or classified is limited to a levy of 65 cents on the $100.00 valuation.

L-12

May 15, 1935

FILED 74

Mr. J. E. Pummill
Superintendent Eureka Public Schools
Eureka, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this department, which reads as follows:

"Would it be possible for your office to render us an opinion as to the following:

This is a Consolidated School District, duly organized as such, with six directors, secretary, treasurer, etc., but we have been voting a levy of only 65¢ for school purposes (teacher salaries and incidentals). In reading carefully the sections of the 1933 School Laws which apply to classification of school districts, and Article IV which has to do with town, city, and consolidated districts, it would seem that the clear intention of the Legislators in framing the consolidation laws was that consolidated districts could vote the limit of $1.00 for school purposes, just as town and city districts may do.

Could you render an opinion as to whether we may do this?"

You informed us by supplemental letter that there are no incorporated towns in your district but that there are three unincorporated towns, the plats of which have been filed with the recorder of deeds and that your district was organized prior to 1909.

Section 11 of Article X of the Constitution of Missouri, provides, in part, as follows:

> "For school purposes in districts composed of cities which have one hundred thousand inhabitants or more, the annual rate on property shall not exceed sixty cents on the hundred dollars valuation and in other districts forty cents on the hundred dollars valuation: Provided, The aforesaid annual rates of school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are tax-payers, voting at an election held to decide the question, vote for said increase. * * * **"

Section 9194 Revised Statutes Missouri 1929, which was enacted in 1909, reads as follows:

> "The public schools of the state are hereby classified as follows: First, all districts having only three directors, shall be known as common school districts; second, all districts outside of incorporated cities, towns and villages, which are governed by six directors, shall be known as consolidated school districts; third, all districts governed by six directors and in which is located any city of the fourth class, or any incorporated town or village, shall be known as town school districts, and fourth, all districts in which is located any city of the first,

second or third class shall be known as city school districts."

Section 9325, Revised Statutes Missouri 1929, was first enacted in 1895 and reads, in part,

"Any common school district containing within its boundaries a city, town or village, the plat of which has been filed in the recorder's office of the county in which the same is situated, or any district having two hundred or more children of school age by the last enumeration, may be organized into a town or city school district, and, when so organized, shall be a body corporate, and known as the school district of _____, and in that name may sue and be sued and possess the same corporate powers and be governed the same as other school districts except as herein provided; * * * * * * *."

In State v. St. Louis and S. and F. R. Co. 174 S.W. page 64, it was held that a school district governed by six directors and in which was located any city of the fourth class or any incorporated town or village, is a town school district. And said town district, although having contiguous territory outside of said city, town or village, could levy taxes not exceeding $1.00 on the one hundred dollars valuation. At l. c. page 65 the court said:

"Reducing, for the purposes of this discussion, the contention of appellant to its last analysis, does section 11 of article 10 of our Constitution, which fixes the maximum amount of taxes which may be levied upon each $100 valuation at 65 cents, except 'in districts formed of cities and towns,' require that the limits of such city or town school district be precisely coterminous with the limits of the incorporated town or city, and unless school district limits are exactly coterminous with the town limits and no

> outside contiguous territory is attached, can the district legally levy more than 65 cents taxes on the $100 valuation for school purposes?"

In conclusion, the court, at l. c. pages 66 and 67, stated:

> "Therefore, being mindful of the rule which forbids us to declare a statute unconstitutional unless it so appears to be beyond a reasonable doubt (State v. Baskowitz, 250 Mo. 82, 156 S.W.945), wwe are constrained to hold that so much of the section of the statute which allows a town school district to attach or have attached to it outlying country territory for school purposes, pursuant to the provisions of said section, is not unconstitutional. It follows, we think, and we so hold, that a town school district as classified by the third subdivision of section 10775, and as such district is defined by section 10864, may lawfully levy as much as 100 cents on the $100 valuation as taxes for school purposes. This view we reach without the necessity of falling back upon the argumentum ab inconvenienti; for the contrary view, applied to the conditions as we know them now to exist, would be utterly destructive, because of the fact that there is scareely a town school district in the state outside of cities of 100,000 inhabitants or more, but which has some outlying contiguous territory attached to it, to the great mutual profit and convenience of both city and country."

In the case of State ex rel. Reynolds, v. Rickenbrode 4 S. W. (2d) page 436, it was held that a school district organized under the provisions of what is now Sections 9325 and 9326 as a town district, that is a district which includes an unincorporated town, the plat of which has been filed with the recorder of deeds, was not annulled by the enactment of Section 9194, supra, which defines a town school district as one in which a city of the fourth class or an incorporated

town or village is located, and could therefore, by a vote of the people, levy a tax of one hundred cents on the $100.00 assessed valuation. The court, at l. c. 437, stated:

> "We have here the Avalon district organized as a town district, and the only requirements regarding the town was that the plat of the town should be filed with the recorder of deeds. It was not necessary that the town should be incorporated. The subsequent statute (section 11123) could not annul an organization which had already been made, even if it applied to such a case. The Avalon district, as a town district, was therefore properly incorporated under the Constitution and under the statute then in force. It provided for six directors, and it was brought within the proviso of section 11, art. 10, of the Constitution, which authorized the school tax to be increased by vote of the people to 100 cents on the $100 assessed valuation."

The court further held at l. c. 438, that the fact that the Avalon School District was later organized into a consolidated district would not cause said district to lose its charter as a town district or prevent it as such from voting a tax of $1.00 on the $100. valuation.

CONCLUSION.

In view of the above, it is the opinion of this department that a school district organized prior to 1909, which includes an unincorporated town, the plat of which has been filed with the recorder of deeds of the county in which the district is situated, may, by a vote of the people, levy a maximum tax of $1.00 on the $100 assessed valuation, notwithstanding the fact that said school district was later organized into a consolidated district.

Very truly yours,

APPROVED:

J. E. TAYLOR
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JET/afj

SCHOOLS: Supplement to opinion No. 74, May 15, 1935, to J. E. Pummill.

July 15, 1935 7-16

FILED 74

Mr. J. E. Pummill, Superintendent
Eureka Public Schools
Eureka, Missouri

Dear Sir:

This Department, under date of May 15, 1935, rendered you an opinion in regard to a school district's right to levy a maximum tax of $1.00 on the $100.00 valuation. From the correspondence and the telephone conversation we had with you we assumed, for the purpose of said opinion, that the school district in question had been organized as a town district under the provisions of Sections 9325 and 9326, R. S. Mo. 1929.

Since writing said opinion we have had a communication from Mr. William J. Becker, Attorney at Law, Clayton, Missouri, questioning our opinion, apparently for the reason that said district was never organized as a town district. We are still unable to determine definitely, from your letters or from Mr. Becker's letter, whether or not your school district was ever so organized. In order, therefore, that the opinion of this Department may not be misinterpreted, we desire to supplement same. We call your attention to the case of State ex rel. Brown v. Woods, 61 S. W. (2d) 732, not cited in our original opinion. At l. c. 733 the Court said:

> "On May 24, 1923, the Patterson consolidated school district was organized under sections 11257, 11258, 11259, R. S. 1919 (sections 9351, 9352, 9353, R.S. 1929 (Mo. St. Ann. Secs. 9351, 9352, 9353)). It is governed by six directors. The organization was made by consolidating Patterson, Woods, Camp Creek, Damen, Ring Creek, and Cherry Grove common-school districts, none of which at the time of the consolidation, nor prior thereto, has an enum-

eration of two hundred children of school age. At that time and at all times prior thereto the village of Patterson, with a population of seventy-five, was the only village, town, or city within the limits of the territory comprising the consolidated district. It was never incorporated, but a plat of the village was made on May 25, 1861, and filed in the office of the circuit clerk and ex officio recorder of deeds of said county on May 27, 1861.

"The filing of the plat on the recorder's office of the county authorized the Patterson common school district to organize as a town or city school district under the provisions of sections 11236, 11237, R. S. 1919 (sections 9325, 9326, R. S. 1929 (Mo. St. Ann. Secs. 9325, 9326)). However, it was never so organized. It is clear from the facts above stated that the Patterson consolidated school district falls under class 2 of the classification statute. After its organization, and with the village of Patterson within the consolidated district, it could have organized as a town or city district under section 11257, R. S. 1919 (Section 9351, R.S. 1929,) and sections 11236, 11237, R. S. 1919 (sections 9325, 9326, R. S. 1929.) However, it was never so organized.

"(2) Thus it appears that by organization under sections 11257, 11258, 11259, R. S. 1919, and by classification under section 11123, R. S. 1919, which was in force at the time of the consolidation, the Patterson consolidated district is not a city or town district. It is one of the 'other districts' as that term is used in section 11, article 10, of the Constitution. It follows that

the rate of taxation for school purposes in said districts cannot exceed 65 cents on the $100 valuation of the property in the district."

Bearing the above and all that was said in the original opinion in mind, we supplement the conclusion of the original opinion so it will read as follows:

CONCLUSION.

A school district which contains within its boundaries a city, town or village, whether incorporated or not, the plat of which has been filed in the Recorder's office of the County in which the same is situated, and which has been organized as a town or city school district, under the provisions of sections 9325 and 9326, R. S. Mo. 1929, may by a mote of the people levy a maximum tax of $1.00 on the $100.00 valuation, notwithstanding the fact that said school district was later organized into a consolidated district.

It is our further opinion that a school district not classified as a city or town district, under the provisions of section 9194 R. S. Mo. 1929, and not organized as a town district under the provisions of sections 9225 and 9326, or under the provisions of section 9351, R. S. Mo. 1929, cannot levy a tax in excess of 65 cents on the $100.00 valuation.

Respectfully submitted

J. E. TAYLOR
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

JET:H

INTOXICATING LIQUOR: A city ordinance requiring a person to take out a license for operating each bar in the same place of business is in conflict with Section 20 of the Liquor Control Act, and therefore void.

February 6, 1935. 2-6

FILED 13

Honorable Means Ray
Mayor
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter dated February 5, 1935, which reads as follows:

> "At a meeting of the City Council of Jefferson City last night, an ordinance was passed that requires persons operating more than one bar in the same building to take out two liquor licenses.
>
> "It has been brought to my attention that this is in conflict with the state law, which requires only one state license on the premises.
>
> "I fully realize that the City can not pass an ordinance in conflict with the state law and I respectfully ask you to advise me as soon as possible if the state law permits two service bars on the same premises, with but one license."

Section 20, Laws of Missouri (Extra Session) 1933-1934, page 83 and 84, provides as follows:

> "On approval of the application and payment of the license tax herein provided, the Supervisor of Liquor Control shall grant applicant a license to conduct business in the state for one year from date of the license. A separate license shall be required

> for each place of business. Every license issued under the provisions of this act shall particularly describe the premises at which intoxicating liquor may be sold thereunder, and such license shall not be deemed to authorize or permit the sale of intoxicating liquor at any place other than that described therein."

Section 25, (Liquor Control Act), Laws of Missouri, (Extra Session) 1933-34, page 88, reads:

> "The Board of Aldermen, City Council or other proper authorities of incorporated cities may charge for licenses issued to manufacturers, distillers, brewers, wholesalers, and retailers of all intoxicating liquor, within their limits, fix the amount to be charged for such license, and provide for the collection thereof, make and enforce ordinances for the regulation and coltrol of the sale of all intoxicating liquor within their limits, not inconsistent with the provisions of this act, and provide for penalties for the violation thereof."

Section 7289, R. S. Mo., 1929, reads as follows:

> "Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

Under the provisions of Section 20, supra, only one license is required for each place of business. From your

letter, I understand that the City Ordinance requires a person to take out a license for each bar operated by him even though they be operated in the same place of business.

In the case of St. Louis v. Tielkemeyer, 226 Mo. l.c. 140, the Court said:

> "It is insisted by appellant that the city ordinance in question is void because inconsistent with the State statute on the same subject.
>
> "The city of St. Louis has express authority under its charter 'to license, tax and regulate . . . . saloons, beer houses, tippling houses, dramshops and gift enterprises.' (Art. 3, sec. 26, clause 5.)
>
> "The State, however, has the sovereign power to regulate those matters and its authority being paramount, it follows that a city ordinance is not valid if it is in conflict with the law of the State on the same subject. *****"

In view of the statutes and the construction placed on them by the courts, we are of the opinion that a city ordinance requiring a person to take out more than one license for operating more than one bar in the same place of business would be in conflict with Section 20 of the Liquor Control Act, which only requires one license for each place of business. We are therefore of the opinion that a city ordinance requiring two licenses for the same place of business is void because inconsistent with the State's statute on the same subject.

Very truly yours,

APPROVED:

JOHN W. HOFFMAN, Jr.
Assistant Attorney-General.

ROY McKITTRICK
Attorney-General.

JET/JWH/afj

TAXATION AND REVENUE: Manner of redeeming sold property.

April 4, 1935.

FILED
75

Honorable C. W. Rash
Collector of Revenue
Shelby County
Shelbyville, Missouri

Dear Sir:

This department wishes to acknowledge your letter of March 25, wherein you state as follows:

> "Have two problems which I would like to have your opinions on, namely: There has been a piece of property here which was put up and sold in November 1934 for taxes yrs. past due. The property brought a few hundred dollars more than taxes and costs, the party as former owner comes to redeem. Does he have to pay interest on whole sum paid by purchaser, and if so what else if anything?
>
> "Another party had property advertised for sale and there was no bid made, he wants to pay and settle all back taxes. What expense is he to pay besides all taxes and penalties. Does he pay advertising costs & Clerk or anything of that."

I.

Laws of Missouri, 1933, Section 9956a, page 437, sets out the manner of redeeming property sold for taxes and provides in part as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same * * * * * * * * in the following manner:
>
> By paying to the county collector for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per-centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption."

Section 9969, Laws of Missouri, 1933, page 429, sets out the fees of collectors and provides that:

> "Fees shall be allowed for services rendered under the provisions of this article, as follows: To the collector, except in such cities, two per cent on all sums collected; in such cities, two per cent on all sums collected -- such per cent to be taxed as cost and collected from the party redeeming. To the county collector, for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

The cities referred to in this section are described in Section 9970, Laws of Missouri, 1933, page 451, providing that:

> "The collectors of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state shall, on or before the first Monday in March, annually, return to the county collector a list of lands and lots on which the taxes or special assessments levied by such city or incorporated town remain due and unpaid. The county collector shall receipt for the aggregate amount of such delinquent taxes, which receipt shall be held by the treasurer of the city or town, and shall stand as evidence of indebtedness upon the part of the county collector and his bondsmen to such city or town, until settlement in full has been made by payment to said treasurer or his successor of all taxes thus receipted for, or by a return of such part as is uncollectible."

Laws of Missouri, 1933, Section 9952b, page 431, provides that the county collector publish a list of delinquent lands, and reads in part, that:

> "The expense of such printing shall be paid by the purchaser or purchasers of the lands and/or lots sold and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed the legal rate for the entire notice, as such legal rate is fixed by Sec. 13773, which cost of printing at the rate specified shall be taxed as part of the costs of the sale of any land or lot contained in such list and disposed of at such sale, and the total cost of printing such notice shall be prorated against all such lands or lots so sold or redeemed prior to any such sale."

Laws of Missouri, 1933, Section 9953d, page 434, provides in part that:

> "**** for each certificate of purchase

> issued, including the recording of the same, the county collector shall be entitled to receive and retain a fee of fifty cents, to be paid by the purchaser and treated as a part of the cost of the sale, and so noted on the certificate. *****

Laws of Missouri, 1933, Section 9955, page 436, provides as follows:

> "The clerk of the county court shall attend, either in person or by deputy, as the clerk of the sale of such delinquent land, and shall enter the same on a sufficient record book giving a description of the proper tract or lot, showing how much of each was sold, to whom, and the price, or whether the same remains unsold. For his services as in this section provided, he shall receive the sum of twenty-five cents on each tract of land or lot sold, to become part of the costs of sale and paid by the purchaser, which fee shall include entry of recital of redemption on such record."

From the foregoing sections we are of the opinion that the party redeeming property sold for taxes must pay the full amount of the certificate of purchase with interest on that amount at the rate named in the certificate, together with all subsequent taxes which have been paid thereon by the purchaser at the rate of eight per centum per annum, and in addition thereto the redeemer must pay the collector's fees, advertising costs, and clerk's fees.

II.

In answer to your second question, we set out Laws of Missouri, 1933, Section 9952a, page 430, which states in part as follows:

> "***** Provided, however, delinquent taxes, with penalty, interest and

costs, may be paid to the county collector at any time before the property is sold therefor."

We are of the opinion that where property has been advertised for sale, the party may redeem his property at any time before the property is sold by paying to the County Collector the delinquent taxes, with penalty, interest and costs. The latter includes collector's fees, clerk's fees and expenses for advertising the land for sale.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

MW/WOS;Afj

CONVICTS--PARDON: Where one previously convicted of a crime is not suffering from civil disability, a pardon to remove civil disability is not necessary.

5-15

May 10, 1935.

FILED 75

Honorable Owen C. Rawlings
Prosecuting Attorney
Marshall, Missouri

Dear Sir:

Your request for an opinion dated April 20, 1935, is as follows:

> "Please advise my office as to whether at the expiration of a two year sentence for burglary, a defendant, who was at the date of conviction between the age of eighteen and nineteen years, and who has not been pardoned by the Governor of the State of Missouri, is possessed with all his civil rights; or is a pardon necessary for such restoration? The following section of the Revised Statutes of Missouri, 1929, might be applicable: Section 4172; Section 12968 and Section 12971.

Burglary in all of its degrees is a crime punishable under the provisions of Chapter 30, Article V, R. S. Mo. 1929. Of this same Chapter and Article, Section 4172 R. S. Mo. 1929, provides:

> "Any person who shall be convicted of arson, burglary, robbery or larceny, in any degree, in this article specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this article, shall be incompetent to serve as a juror in any cause, and shall be forever disqualified from voting at any election or holding any office of honor, trust or profit, within this state: Provided, that the provisions of this

> section shall not apply to any person who at the time of his conviction shall be under the age of twenty years; Provided further, that in all cases where persons have been convicted under this article the disqualifications provided may be removed by the pardon of the governor any time after one year from the date of conviction."

Under the facts of your letter the convicted person had already celebrated his eighteenth birthday at the time of his conviction and was going on nineteen years of age. He was within the nineteenth year of his life. At that state of one's life he is yet under the age of twenty years and the above Statute provides: "that the provisions of this section shall not apply to any person who at the time of his conviction shall be under the age of twenty years." Under the facts of your letter there is no provision of punishment in the above Chapter, Article or Section which can be applied to the convict described in your letter in determining the necessity of a pardon of his right to one. Since the Section does not apply, its provisions as to loss of citizenship do not apply for purposes of this opinion.

If the convict be punishable for a burglary under the Statutes by imposition of cdvil disabilities in addition to imprisonment to which he was sentenced, we must find where the Legislature so provided.

Article I, Chapter 91, R. S. Mo. 1929, deals with civil rights of convicts. Section 12968 of said article provides when any convict be civilly dead or when his civil rights be suspended when punished for any crime. Said Sections reads:

> "A sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the persons so sentenced during the term thereof, and forfeits all public offices and trust, authority and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead."

Section 12970 of said Article provides:

> "When any person shall be sentenced upon a conviction for any offense, and is thereby, according to the provisions of this article, disqualified to be sworn as a witness or juror in any cause, or to vote at any election, or to hold any office of honor, profit or trust within this state, such disabilities may be removed by a pardon by the governor, and not otherwise, except in the case in the next section mentioned."

Section 12971 of said Articles provides:

> "If such convict shall have committed the offense while within the age of eighteen years, and such conviction shall be for a first offense, all civil disabilities incurred shall be removed and his competency restored at the expiration of the term of imprisonment to which he shall have been sentenced."

The Legislature has it within its power to provide punishment effecting the civil rights of those convicted of a crime but under the facts of your letter we have been unable to find any Statute relative to your inquiry than those above set out.

It is true that one convicted of a felony at common law suffered a loss of civil rights, in addition to punishment passed in the court's sentence. It is true that the common law is in force in Missouri except where it be repugnant to existing laws. Section 645 R. S. Mo. 1929, provides:

> "The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes

> are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision of this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that the same may be in derogation of, or in conflict with, such common law, or with such statutes or acts of parliament; but all such acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof."

The common law as it affected a criminal's loss of civil rights is repugnant to existing law because our Legislature has provided the extent to which punishment at common law can be applied in Missouri. Section 646 R. S. Mo. 1929, provides:

> "Punishment by virtue of the common law shall in nowise be other than by fine or imprisonment, or both, and such fine shall not exceed one hundred dollars, and the term of such imprisonment shall not exceed two months; nor shall any of the British statutes for the punishment of crimes and misdemeanors be in force in this state."

CONCLUSION.

Loss of civil rights as punishment for a crime must be found in the Statutes and the common law disability as to loss of civil rights has no place in Missouri, except as adopted by Section 646, supra.

We are of the opinin that, under the Statutes, the exconvict in the instant case suffered a suspension of his civil rights when he was sentenced to imprisonment in the penitentiary for a term of two years, and the

suspension of civil rights continued during the period and term of the sentence unless pardoned during the interim of sentence. By the facts of your letter the exconvict cannot claim the benefits of Section 12971, supra, because none of the facts in your letter show that the conviction was for an offense committed while within the age of eighteen years and that such conviction was for a first offense.

However, since the facts do not show him to be a public officer or to come within other statutory provisions of law where civil disability attaches as punishment for crime, and since under the facts of your letter his whole punishment by way of disability in the exercise of civil rights is by virtue of Section 12968, supra, We are of the opinion that at the end of the term of sentence his suspension of civil rights, like any other convict who suffers suspension of civil rights by reason of no other section of law, ceased to exist.

Section 12970, supra, provides for a Governor's pardon where a person is sentenced and is suffering civil disability by virtue of Section 12968, supra. The Legislature intended that no pardon would be necessary where no civil disability is being suffered.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

SCHOOLS: Sending school must pay entire tuition of pupil, receiving credit up to $50.00 if the State has the money.

S-28

May 24, 1935.

FILED
75

Hon. William M. Quinn
Senator 12th District
Missouri Senate
Jefferson City, Missouri

Dear Senator Quinn:

This is to acknowledge your letter as follows:

"I am enclosing herewith statement of account rendered by the La Grange School District for High School pupils from Maywood Public School.

Maywood Public School maintains and operates a common school district, teaching up to and including the eighth grade. Part of the pupils who want a high school education go to the Durham Consolidated District, which does not charge any additional tuition, other than that which they receive from the state. The La Grange School District has, in the past, charged different sums more than the $50.00 allowed by the state under the 1931 School Law, and for this year have attempted to charge the Maywood District $15.00 per pupil in addition to the amount they receive from the state.

It is my understanding that if a school district accepts the $50.00 for the tuition of a non-resident pupil, who is in attendance in the High School, that they cannot make an additional charge for tuition and receive the State Funds.

"I will appreciate having your opinion stating whether or not, under the 1931 School Law, if the La Grange School District accepts funds for High School tuition for non-resident pupils from the State, if the Maywood District should be compelled to pay $15.00 per pupil, tuition, as per the enclosed statement."

The letter enclosed and referred to by you reads as follows:

"Your district is indebted to LaGrange School District for tuition for high school pupils who attended our school for the term ending May 10, 1935 as follows:

Wilma Huebotter -------	$15.00
Junior Beilstine ------	$15.00
Marion Beilstine ------	$15.00
Dorothy Quinn ---------	$15.00
Hobart Lillard --------	$15.00
Harvey Waterman -------	$15.00
Total due ----	$90.00

"You will please remit promptly making warrant payable to J. V. Klusmeier, Treasurer. Mail draft to me."

On August 28, 1934 and May 17, 1935 this Department rendered opinions concerning the subject you inquire, and we enclose herewith copies of same.

The obligation to pay the tuition of pupils resident within the district and attending school in another district rests upon the district wherein the pupils reside. The tuition that the receiving high school may charge to the sending district is determined by the per-pupil cost (teachers' wages and incidental expenses). Thus, the only charge that a receiving

district can place against the sending district for tuition of a pupil would be the per-pupil cost, and whatever the per-pupil cost would be, the sending district would have to pay the full amount. However, the State has stated that it would pay up to $50.00 of this per-pupil cost, to the receiving district, if the money were available. And if the full amount of the $50.00 is not available, then the amount that is available is applied pro rata.

Assume that the per-pupil cost of the receiving high school amounted to $50.00 and the State did not have enough funds to pay said $50.00 as provided in the statute, but the amount of money available would have to be pro rated so that the receiving high school would only receive state aid in the amount of $25.00, and such amount applied on the per-pupil cost of $50.00, would leave a balance of $25.00 that the sending district would have to pay to the receiving high school. In other words, as stated in the enclosed opinion, the sending district is liable for the full amount of the per-pupil cost and whatever the State pays is applied as a credit on said amount. The limitation as to what the State pays is fixed at $50.00 and if there is not enough money to pay the $50.00 the State pays whatever the pro rata part amounts to.

From the above we conclude that the obligation of the Maywood District consists of the payment of tuition of the per-pupil cost of pupils attending the LaGrange School District, and whatever amount the LaGrange School District receives from the State, as state aid to the payment of this tuition, would be applied as a credit to the amount of the per-pupil cost of the pupils from the Maywood District. The fact that the LaGrange District receives state aid does not bar them from making additional charge, if such aid does not pay the entire per-pupil cost of the pupils attending its school.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG
Encs.

SALES TAX: Farmer must be engaged in the "business" of selling apples to be subject to tax.

10-21

October 3, 1935.

FILED
75

Honorable Owen C. Rawlings,
Prosecuting Attorney,
Marshall, Missouri.

Dear Sir:

We wish to acknowledge your letter of September 27, wherein you state as follows:

> "Please advise as to whether sales tax should be imposed on a sale of apples by a farmer who produces them, and who does not buy and sell."

The word "person" is defined in Section 1, sub-section (a), Laws of Missouri, 1935, at page 413, as follows:

> "'Person' includes any individual, firm, copartnership, joint adventure, association, corporations, municipal or private, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

In the case of Worthington v. Robbins and Cadigan, 56 Ont. Law Rep., 1. c. 288, the court, in determining whether the word "farmer" comes within the meaning of the word "person", said:

> "I cannot think that the word 'person' can be interpreted to exclude 'farmer.'"

We are of the opinion that the word "person" as defined in Section 1, sub-section (a), supra, includes the word "farmer."

Laws of Missouri, 1935, page 411, provides in part as follows:

> "An Act to provide for the raising of additional revenue for emergency purposes, by imposing a tax upon the privilege of engaging in the business of selling tangible personal property at retail, and by imposing a tax upon the privilege of engaging in the business of selling services, substances and things," etc.

The word "sale" or "sales" is defined in Section 1, sub-section (b), and the word "business" in Section 1, sub-section (c), Laws of Missouri, 1935, page 413, as follows:

> "(b) The term 'Sale' or 'sales' includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale, and means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration and the rendering, furnishing or selling for a valuable consideration any of the substances, things and services hereinafter designated and defined as taxable under the terms of this Act.
>
> "(c) 'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect and the classification of which business is of such character as to be subject to the terms of this Act. The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business, within the meaning of this act."

Section 1, sub-section (c), supra, exempts casual or isolated sales from the tax.

Section 1, sub-section (e), of the Laws of Missouri, 1935, page 414, defines the words "sale at retail" in part as follows:

> "'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration."

In order to determine whether a farmer producing apples and selling them is subject to the payment of the one per cent sales tax as imposed by the Act of the 58th General Assembly, supra, we must inquire into the question of whether or not he is engaged in the business of selling apples at retail.

We are of the opinion that a farmer to be engaged in the business of selling apples, must make the raising and sale of apples his chief livelihood and gain, and if such be the case and the sale be at retail, we are of the opinion that he is subject to the one per cent tax. However, if he merely produces apples in connection with the operation of his farm and makes only an occasional or isolated sale, we are of the opinion that he is not subject to the tax.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:

MW:HR

LICENSE FEES-- Bond and stock brokers required to pay license fee under Section 14044, R. S. Mo. 1929.

5-7

May 3, 1935

FILED
76

Honorable Fred A. Renick
License Collector
St. Louis, Missouri

Dear Sir:

We have your request of April 22, 1935 for an opinion as follows:

> "For years this office has collected a semi-annual State License Fee of $50.00 from stock and bond brokers in the City of St. Louis. At the present time there is a stock and bond broker here who refuses to pay this fee and I am addressing you to request that you cite the authority under which this office can require the payment of this fee."

The law relating to licenses of brokers is found in Chapter 123, R. S. Mo. 1929, Sections 14044 to 14051, inclusive.

Under Section 14044, no persons shall carry on the business of,

(1) dealing in;
(2) buying;
(3) selling;
(4) shaving

any kind of bills of exchange, checks, drafts, bank notes, promissory notes, bonds or other kind of writing obligatory, or in procuring the gold and silver of the country to dis-

pose of the same for a premium, without a license.

The question raised by your letter is whether a "stock and bond broker" is subject to this license fee. The statute itself uses the term bonds, which in itself makes all brokers who deal in the business of buying or selling bonds liable for the license fee. It will be noted that the statute does not specifically enumerate stocks. The question then arises as to whether or not the term "writing obligatory" includes stocks.

The words "writing obligatory" are technical and imply a written instrument under seal. Clark v. Phillip, 5 Fed. Cas. 908; Stull v. Wilcox, 2 Ohio State, 569, 573; Luna v. Mohr, 1 Pac. 860, 864; Egan v. Horrigan, 51 Atl. 246, 248; Denton v. Adams, 6 Vt. 40; Ide v. Passumpsic and C. RR. Co. 32 Vt. 297, 298; Smith v. Womans' Medical College of Baltimore City, 72 Atl. 1107; Kidd v. Beckley, 60 S. E. 1089, 1090.

The term "writing obligatory" has not from common usage acquired a broader meaning than its technical one. The expression is rarely used. Watson v. Hoge, 15 Tenn. (7 Yerg.) 344, 351.

The term has been applied to a written promise to do something , such as to take a subscription to a paper. State v. Hazzard, 80 N. E. 149.

One of the powers bestowed upon domestic corporations in this state by Section 4555, R. S. Mo. 1929 is as follows:

> "Third. To make and use a common seal and alter the same at pleasure."

It is a matter of common knowledge that all corporations issue written papers under the seal of the corporation. A share of stock in a corporation is an instrument in writing under seal; it is the legal conveyance of that particular interest in the corporation to the holder thereof. It may or may not carry the authority to vote at any elections for the election of its directors. It may carry a contingent

interest in the profits of the company or a fixed annual preferred income. In substance, it is the equivalent of a deed in writing to that particular interest which the holder thereof owns in the corporation, and a deed in writing is a "writing obligatory". Ide v. Passumpsic and C. R.R. Co., 32 Vt. 297, 298.

It may be said in passing that those who engage in the issuing of drafts or checks, for a consideration, such as certain express companies, come within the words of this statute (Section 14044); that those who engage in the business of purchasing promissory notes also come within the license feature of the act.

It is, therefore, the opinion of this office that those persons who carry on the business of dealing in, buying or selling, etc. stocks and bonds, must procure a license and pay the tax fixed in Section 14046, R. S. Mo. 1929.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

BROKERS: Persons who do not deal as money brokers or exchange dealers are not subject to the provisions of Section 14044 R. S. Missouri 1929.

July 20, 1935

FILED
76

Mr. Fred A. Renick
License Collector
City of St.Louis
St.Louis,Missouri

Dear Mr. Renick:

We are in receipt of your letter of some time ago requesting further interpretation of Sections 14046 and 14048, R. S. Missouri 1929. Your letter is as follows:

> "Thank you for your opinion of May 3 received yesterday relating to stock and bond brokers.
>
> I note that in your opinion persons engaged in the above names business must procure a license and pay the tax fixed in Section 14046, R. S. Mo. 1929. I am surprised, however, that you did not cover Section 14048 in your opinion as it seems to exempt from the provisions of this Act all persons engaged in the stock and bond business except those who actually deal as money brokers or exchange dealers. Although Section 14044 states that no person shall carry on the business of dealing in, or buying or selling bonds, etc. without a license, Section 14048 nullifies it as far as it applies to the regular stock and bond broker by stating that persons who do not deal as money brokers or exchange dealers are not amenable to its provisions. Will you therefore please be good enough to construe Section 14048 for me.

> In view of the fact that none of the established stock and bond firms in this City deal as money brokers or exchange dealers it would seem that they are not liable to the provisions of Section 14046, although all are doing what is commonly called a brokerage business - that is, dealing in, or buying or selling, stocks and bonds.
>
> I fear that I shall encounter considerable difficulty in collecting the graduated scale of taxes specified in Section 14046 from brokers who deal only in stocks and bonds unless I can cite legal authority for so doing - especially since they have only been paying semi-annual State License fee of $50.00.
>
> Your earliest convenient reply will be very much appreciated."

An opinion rendered by Assistant Attorney General Reagan, on May 3, appears to have answered your precise question as contained in your original request. Section 14048, R. S. Missouri 1929, referred to in your letter, reads as follows:

> "Persons who do not deal as money brokers or exchange dealers, except as incidental to their other business and as the exigency and convenience thereof may require, are not amenable to the provisions of this chapter."

Section 14044, quoted by Mr. Reagan in the original opinion, is a general section which is very comprehensive in its terms, while Section 14048, quoted supra, appears to exempt or take out of the general

class those "who do not deal as money brokers or exchange dealers." There has been no decision of our Supreme Court interpreting the two sections in question. In the case of State v. Field 49 Mo. l. c. 272, the court, in discussing the question as to whether or not Savings Banks were required to take out license, said:

> "The main question in this case is whether this corporation was required to take out license under the act concerning 'money brokers, exchange dealers, and their licenses.' (See Wagn. Stat.247). The first section of this act provides that 'no person or association of persons, or company of persons, shall carry on the business of dealing in, or buying or selling, or shaving of any kind of bills of exchange, checks, drafts,' etc., 'without a license for that purpose continuing in force.' Section 2 provides that 'before any person or association, or company of persons, shall receive a license to deal as a money broker or exchange dealer, he or they shall deliver to the collector of the proper county a statement in writing, verified by oath or affirmation, showing the amount of business expected to be done and the capital to be employed in his or their business for the six months next ensuing the delivery of such statement.' Section 8 provides that 'persons violating any of the provisions of this chapter shall be fined not less than $1,000,' etc.
>
> It is evident to my mind that it was not contemplated by the Legislature that these savings banks should take out licenses as brokers, in addition to the charter under which they are empowered to act. It seems to me that the provisions of the statute concerning money

brokers and exchange dealers apply only to moral agents who are capable of taking oaths and suffering the penalties inflicted for perjury."

CONCLUSION

It is plain and evident, by Section 14048, that persons who do not deal as money brokers or exchange dealers are not subject to the terms of Section 14044. Therefore, you have no legal authority to exact a license under Section 14044 of such dealers. The question of whether or not an applicant does not deal as a money broker or exchange dealer is a question of fact when applying for a license, or when you attempt to exact a license. We think the burden is on the person asserting that he is not a money broker or exchange dealer to prove that he is not such a dealer.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

OWN:LC

of Class 1

COUNTY BUDGET LAW: expenses/incurred by county court in excess of fund set aside may be paid out of Class 1 regardless of fact that they are in excess of estimate as contemplated by the Budget Act.

January 24, 1935.

FILED 77

Hon. Homer Rinehart,
Prosecuting Attorney,
Howell County,
West Plains, Missouri.

Dear Sir;

On December 18 you made a request for an opinion from this department, as follows:

> "Under the budget law passed by the General Assembly in the State of Missouri, 1933 as appears on page 340 of the laws of the Session Acts of the Laws of Missouri, 1933, the county court is required to classify proposed expenditures in six (6) classes.
>
> Under Section 2 of said act the County court is required to set aside and apportion a sufficient sum to care for insane people in State Hospitals, this expenditure being designated as Class 1; and said act provides that Class 1 shall be the first obligation against the county and shall have priority of payment of all of the other classes. In said act the other expenses of the county are divided into the other classes and it provides that the court shall set aside a sufficient sum to pay the expenditure coming within said classes.
>
> In Howell County, Missouri the warrants have already been heretofore issued by the county court to the amount to cover, excepting a few dollars, all of the estimated revenue that would be collected to pay accounts set aside by said court in Class 1; however, some bills have been filed against said class, for which there has been no warrants issued. In other words the County Court has failed to keep their expense of the county in Class 1 within the sum set aside by said court for this fund.

> Under this budget law, I desire an opinion if in instances where the county court has incurred expenses in Class 1 in excess of the amount of the fund set aside by said court to take care of expense coming within this class; whether said expense incurred in excess of the fund set aside has priority over the payment of all other classes; and whether the county court is required to transfer sufficient money out of Class 2 or other classes to pay accounts chargeable against Class 1 which have been filed against the county after the date that all of the estimated revenue set aside by the county court for expenditures in Class 1 has been spent."

Your precise question has never heretofore been passed upon by this department. It would appear from your letter that the county officials have carried out their duties with regard to the County Budget Law, and yet there remains a deficit in Class 1.

We do not think the situation you outline is in any way clarified by Section 4, page 343, Laws of Mo. 1933, wherein we find these provisions: "***Less outstanding warrants for preceding years as follows: (list total by years). Less all known lawful obligations against the county December 31, last, and for which warrants were not drawn at that date (itemized list of these obligations must be attached to the estimate).***"

It is our opinion that the above quoted paragraph should be construed to mean funds remaining in certain classes but through inadvertence, neglect or inconvenience it was not possible to pay the same by December 31.

Under Section 8 of the County Budget Act, Laws of Mo. 1933, page 345, it is the duty of the court at the February Term to revise and amend, and alter or change any estimate as the public interest may require, but they have no power to reduce the amount of the estimate in Classes 1 and 3. We readily conclude that it would have the power to raise the estimate in those classes.

The purpose of the County Budget Act, as we construe the same, is to promote efficiency and economy in county government. We do not believe that the Legislature considered the county officers, whose duty it is to carry out the terms of the Budget Act, to be infallible in their judgment. We realize that it would be more miraculous than good judgment if all estimates were accurate to the last penny; however, as stated in your letter, the Legislature saw fit to classify the financial struc-

ture of the county into six classes, each class having a priority over the succeeding class. Section 1, Laws of Mo. 1933, page 431 contains the following provision: "The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

We conclude from this provision, regardless of the estimate made by the county court for the care of insane pauper patients in state hospitals, the same constitutes a first lien on the funds of the county and that the same must be paid by the county, regardless of the amount, in order that the priority may be sacredly preserved.

CONCLUSION

It is the opinion of this department that the bills in question should be paid regardless of the fact that by paying the same the gross amount will exceed the sums set aside and originally estimated by the county court, for the reason that Class 1, as stated above, constitutes a first lien on the funds of the county and the priority of the classes should be sacredly preserved. The amount of the excess bills, if any exists, in the subsequent classes, or the funds of the subsequent classes, may be used without a transfer of the same.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

COUNTY COLLECTOR: County collector must pay direct to treasurer of City, Town or Consolidated District, moneys collected by him to which said district is entitled.

6-12

June 7, 1935.

FILED
77

Hon. Nat B. Rieger
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

"I would like to have an official opinion opinion from your department on this question, 'Is it mandatory that the County Collector shall turn all school collections, including monies due the treasurers of Town, City and Consolidated School Districts, to the County Treasurer, in a county not under the Township Organization Law, or is the County Collector privileged to pay such monies direct the treasurers of town, city and consolidates school districts entitled to receive same.' This question arises under Sec. 9266 R. S. Mo. 1929.

"I should also like to have a copy of the opinion, if one is already written concerning the legality of the so-called "Cash Nights" or "Bank Nights" conducted by moving picture houses, during which cash prizes are given to the holder of a number drawn, all patrons being given registration upon the purchase of one ticket."

County collector must pay over to the treasurer of the Board of Education of a city, town or consolidated district all moneys collected by him to which said board is entitled.

Article 2, Chapter 57, R. S. Mo. 1929, relates to all classes of schools. Section 9264 of said article reads as follows:

> "It shall be the duty of the county clerk to take a receipt from the county collector for the school taxes by him placed on the general tax books; and the collector shall proceed to collect the same in like manner as the state and county taxes are or may be collected, and he shall receive, as full compensation for his services on the amount collected and paid over by him, the same per cent. as is allowed by law to collectors for collecting other taxes; and he shall pay over monthly, to the county treasurer, all such taxes collected and take his receipt therefor."

Section 9266 of the same Article provides in part:

> "The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, except in counties having adopted the township organization law. ****"

Article 4 of Chapter 57, R. S. Mo. 1929, contains the law applicable to city, town and consolidated schools.

Section 9340 of said article reads as follows:

> "The county or township collector shall pay over to the treasurer of said board of education all moneys received and collected by him to which said board is entitled at least once in every month; and upon such payment he shall take duplicate receipts from said treasurer, one of which he shall file with the secretary of said board of education, and the other shall be filed in his settlement with the county court. "

A history of the above sections shows that Sections 9264 and 9266 were first enacted in 1874 (Laws of Missouri

1874, page 162). Section 9340 was not enacted until 1879 (Laws of Missouri, 1879, page 409.)

It is a well recognized principle of law that where there are two statutes relating to the same subject, one general in its terms and the other specially applicable to the particular subject, the special statute will prevail over the general one especially where the special statute was enacted subject to the general.

In the case of Gilkeson v. Railroad, 222 Mo. loc. cit. 204, 205, the Court said:

> "**** Where there are two statutes and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that if standing alone it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception, if not a repeal of the latter or general statute, and especially is this true where the special statute was enacted subsequent to the passage of the general. This rule of statutory construction is well grounded in our jurisprudence, as is shown by the following adjudications: Ruschenberg v. Railroad, 161 Mo. 70; State ex rel. v. Dabbs, 182 Mo. l. c. 366; State ex rel. v. Frazier, 98 Mo. 426; State ex rel. v. Slover, 134 Mo. l. c. 19."

In State v. Brown, 68 S. W. (2d) loc. cit. 59, Judge Atwood, speaking for the court said:

> "It will be observed that section 4556, except the last proviso which is not pertinent to the matter here in controversy, relates to corporations in general, while section 5613 relates only to a particular class of corporations, to wit, building and loan associations. In such case the rule applicable is that 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification

of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' Tevis et al. v. Foley, 325 Mo. 1050, 1054, 30 S. W. (2d) 68, 69; State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 626, 247 S. W. 129; State ex inf. Barrett v. Imhoff, 291 Mo. 603, 617, 238 S. W. 122. If there be any repugnancy between these two statutes, the general statute, section 4556, must yield to the special statute, section 5613."

In view of the above, it is the opinion of this department that Section 9340, supra, which relates specially to city, town and consolidated district would prevail over the provisions of Sections 9264 and 9266 which relate to schools generally; and, therefore, the county collector must pay over to the treasurer of the board of education of a city, town and consolidated district all moneys received and collected by him to which said board is entitled at least once in every month.

"Bank Night".

As per your request, I am enclosing a copy of an opinion given by this office to Honorable J. C. McDowell under date of March 27, 1935, same having been written by Franklin E. Reagan, Assistant Attorney-General and approved by Attorney-General Roy McKittrick.

Yours very truly,

APPROVED:

J. E. TAYLOR
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JET/afj

TAXATION: Duty of City Collector to make up delinquent lists of lands and lots.

CITIES OF THE THIRD CLASS)

December 14, 1935.

12-16

FILED
77

Honorable J. T. Rice
City Collector
Hannibal, Missouri

Dear Mr. Rice:

Acknowledgment is herewith made of your communication of December 7, 1935, requesting an opinion of this office on the following matter:

> "There are various opinions among the officials of our City as to whether it is the duty of the City Collector or City Clerk to make the Back Tax Book, the legislative acts of 1933 and 1935 covering this matter seems confusing to many. May I have a ruling from your office to clear up this matter."

Collection of delinquent taxes due cities of the third class is provided for by Section 6781 R. S. Missouri 1929. This Section provides in part as follows:

> "It shall be the duty of the council to require the collector annually, on the first meeting of the council in April of each year, or as soon thereafter as may be, to make out, under oath, lists of delinquent taxes remaining due and uncollected for each year, to be known as the 'land and lot delinquent list' and the 'personal delinquent list.'* * * * The city council shall cause the land and lot delinquent list and the personal delinquent list to be returned to the city collector, who shall be charged therewith, and who shall proceed to collect the same in the same* * * *".

There can be no doubt but that under the foregoing Section it is the duty of the City Collector to make up the list of delinquent lands and lots and that the City Clerk is charged with no duty in respect to the same. Insofar as the Jones-Munger Act is concerned, referred to in your communication as the Legislative Act of 1933, Section 9952, page 429, Laws of Missouri 1933, provides in part:

> "Between the first of January and the first of July in the year 1934 and annually thereafter, and immediately upon the effective date of this act, the county collector shall make out and record in a book to be provided for that purpose, a list of lands and lots, returned and remaining delinquent for taxes,* * * *".

I presume your confusion in respect to the applicability of this question has arisen because of the provisions of Section 9963c, page 448, Laws of Missouri 1933, which section provides in part:

> "* * * *Where applicable the word 'county' as used in this act shall be construed 'City' and the words 'county clerk' shall be construed 'city clerk' or other proper officer."

However, because of the fact that Section 9952 above referred to lays the duty of preparing a list of delinquent lands and lots directly upon the collector rather than on the Clerk, as provided for in the former law, there should be no confusion arise because of the provisions of these two separate laws. While it has been our view that in case of a conflict the provisions of Section 6781 should prevail over the provisions of the Jones-Munger Law, yet there appears to be no conflict whatsoever in respect to the instant problem.

CONCLUSION.

It is therefore the opinion of this office that it is the duty of the City Collector to prepare the list of delinquent lands and lots and that such duty does not rest upon the City Clerk.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

COUNTY COLLECTORS, EXOFFICIO TREASURER-
Entitled to no expenses in addition to maximum allowance under first 13 subdivisions of Sec. 9935 Laws of Missouri 1933.

January 9, 1935.

FILED
78

Hon. James S. Rooney
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Rooney:

We have your request for an opinion of this office upon the following propositions:

> "Will the collector be entitled to any additional compensation for deputy hire when he assumes the duties of the treasurer's office?
>
> Is the collector allowed any of the following in excess of the $5500.00: the two per cent commission collected on delinquent taxes, commission on utility and merchants and manufacturers taxes, or the fees allowed under Senate Bill 94 for reparing and selling of back taxes.
>
> Is the collector required to pay all deputies salaries and buy a bond out of the $5500.00?"

I.

COLLECTOR AS EX OFFICIO TREASURER ENTITLED TO NO ADDITIONAL COMPENSATION FOR DEPUTY HIRE.

The occasion for this problem arising is undoubtedly due to the enactment of Senate Bill 76 by the 57th General Assembly in regular session. This law is found at page 338 Laws of Missouri 1933, and consolidates the offices of County Collector and County Treasurer in counties having less than 40,000 inhabitants. Because of these additional duties placed upon the County Collector the question has presented itself as to whether or not he will be

permitted an extra allowance for the hire of a deputy to perform these additional duties. Section 12132A, a part of said Senate Bill 76, reads as follows:

> "On and after the expiration of the term of office of the county treasurer on the 31st day of December, 1936, in all counties of this state which now or hereafter have a population of less than 40,000 inhabitants according to the last decennial United States census and not under township organization, the county collector shall take over all the duties now performed by the county treasurer and such collector shall be county collector and ex officio county treasurer and shall perform any and all duties now devolving upon the county collector and county treasurer. Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector. All duties and obligations now imposed by law upon county treasurers in counties having a population of less than 40,000 inhabitants according to the last decennial United States census are hereby set over and made a part of the duties and obligations of the ex officio county treasurer as provided for in section 12132a."

By virtue of the foregoing underlined phrase the Legislature has definitely and clearly provided that the County Collector is to receive no remuneration because of the additional duties imposed upon him than is allowed to him by the law applying to county collectors.

CONCLUSION.

It is therefore our opinion that the county collector is not entitled to an additional allowance for deputy hire to perform additional duties imposed upon him because of the consolidation of the offices of County Treasurer and County Collector in counties of less than 40,000 inhabitants.

II.

COUNTY COLLECTOR AS EX OFFICIO TREASURER IS NOT ENTITLED TO 2% DELINQUENT TAX COMMISSION, COMMISSION ON UTILITY, MERCHANTS AND MANUFACTURERS TAX ON FEES ALLOWED UNDER SENATE BILL 94 IN EXCESS OF THE $5500.00 MAXIMUM COMPENSATION ALLOWED FOR COLLECTORS OF COUNTIES FALLING WITHIN SUBDIVISION 13 OF SECTION 9935 PAGE 454 LAWS OF MISSOURI 1933.

Section 9935, page 454, Laws of Missouri 1933, is a re-enactment of Section 9935 R. S. Mo. 1929, with material changes in Subdivision 15 thereof. Under the 1929 section the maximum allowed any collector to be retained for commissions and fees for any one year in counties falling within the first thirteen subdivisions of said section was $9000.00. This maximum figure was changed and the maximum allowed the county collector of counties falling within subdivision thirteen of the section was reduced to $5500.00. This phrase was also placed in the new Section 9935:

> "Provided, that the limitation on the amount to be retained as herein provided shall apply to fees and commissions on current, back and delinquent taxes, but shall not apply to commissions on the collection of ditch and levee taxes. . . ."

It therefore appears that $5500.00 is the maximum which is to be permitted to be retained for services rendered in the collection of current, delinquent and back taxes. This phrase would include delinquent taxes and commissions on utilities, merchants and manufacturers taxes and fees allowed under Senate Bill 94. The apparent exception to this maximum is the 1% allowed to the County Collector for the collection of levee and drainage assessments which the collector is allowed to collect and retain in addition to the $5500.00 maximum.

CONCLUSION.

It is therefore our opinion that the CountyCollector is not to be allowed 2% commission on delinquent taxes, commissions on utilities, merchants and manufacturers taxes or fees allowed under Senate Bill 94 in excess of $5500.00 in counties falling within Subdivision 13 of Section 9935, but that all such commissions in excess of the stated sums must be accounted for and turned over by the Collector.

III.

COUNTY COLLECTOR MUST PAY DEPUTIES AND BOND PREMIUM OUT OF MAXIMUM ALLOWANCE.

The Legislature in its reenactment of Section 9935 supra, did not change the general method or scheme for the conduct of the collectors office or for his compensation. The material change that we are concerned with wasthat the Legislature struck out the following phrase of subdivision 15 of Section 9935 Laws of Missouri 1929:

> "That no collector shall be allowed to retain over $9000.00 of commissions and fees in any one year except as provided in Subdivision 14 herein."

And substituted the following schedule:

> "That no collector except as providedin subdivision fourteen herein, shall be allowed to retain commissions and fees in any one year in excess of the following amounts: in any county coming within the provisions of subdivisions one to seven, inclusive, hereof not more than $2500.00; in any county coming within the provisions of subdivision eight, not more than $3000,00; in any county coming within the provisions of subdivision nine, not more than $3500.00; in any county coming within the provision of subdivision ten, not more than $4000.00; in any county coming within the provisions of subdivision eleven, not more than $4500.00; in any county coming within the provisions of subdivision twelve, not more than $5000.00; in any county coming within the provisions of subdivision thirteen, not more than $5500.00;* * **

The effect of this was to scale down the maximum compensation allowed to the various county collectors depending upon the amount of taxes required to be collected, but did not change the law in respect to the expenses which the county collector was required to pay out of the commissions allowed him by law. The law in respect to this matter is as it was prior to the action of the 57th General Assembly. In those counties in which the collector in the past paid his deputy hire and bond expense from his commissions, he is still required to bear those expenses from the commissions and fees

allowed, and must pay them out of the amount allowed to be retained by him.

CONCLUSION.

It is therefore our opinion that the County Collector is required to pay deputy hire and bond expenses out of the maximum amount of commissions and fees allowed to be retained by him.

We are not unmindful of House Bill 84 of the 57th General Assembly in Extra Session, found at page 104 Laws of Missouri, Extra Session 1933-34. This act applies only to counties having a population of not less than 50,000 nor more than 80,000 inhabitants, and materially changed the compensation of the collector in such counties. However, this law is not applicable to Clay County and therefore we have not discussed it in this opinion.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM

OFFICERS - Probation officer is a county officer, and as such is entitled to receive a copy of the Revised Statutes under the provisions of Section 693, R. S. Mo. 1929.

January 9, 1935.

1-14

FILED
78

Honorable James S. Rooney
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

This is to acknowledge receipt of your letter dated December 28, 1934 requesting an opinion, which reads as follows:

> "Our Circuit Clerk has a number of Revised Statutes for 1929 which are to be by him distributed in accordance with Section 693 of said statutes. Mr. J. Bert Smith, who is our Probation Officer in this county, has made his application to the clerk for a set of the statutes. The clerk called me and stated that he did not know whether Mr. Smith was entitled to these copies or not and asked me for my opinion.
>
> "I told him that in my opinion he was entitled to the statutes basing it on the fact that in Section 693 I find the statement that he is to distribute these 'to each county officer'. I find the statement in 314 Missouri, at page 144, that the Probation Officer is a county and a public officer and that in determining his salary the statute relative to county officers apply. I cited the clerk this case, but he did not want to deliver the statute until he had an opinion from you."

We assume from your letter that Mr. J. Bert Smith is the duly appointed Probation Officer of your county and has not been superseded by a Superintendent of Public Welfare, under the provisions of Section 14182, R. S. Mo. 1929.

Section 693, R. S. Mo. 1929, provides in part as follows:

> "There shall be printed sixteen thousand copies of each volume of the Revised Statutes, which shall be received by the secretary of state, and by him held and disposed of as follows: *** To the clerks of the district and circuit courts of the United States, for the districts of Missouri, for the use of such courts, each two copies. To the clerks of the circuit court of the city of St. Louis, one thousand copies; to the clerk of the circuit court of Jackson county, five hundred copies, and to each of the circuit clerks of other counties in this state, not less than thirty-five nor more than one hundred and twenty-five copies (for which they shall given receipts), to be disposed of anddistributed by said clerk as follows: To each county officer and justice of the peace, one copy, to be by him turned over to his successor in office; the remaining copies to be sold as hereinafter provided."

Section 14171, R. S. Mo. 1929 reads:

> "The circuit judge shall designate or appoint an officer of the county or some other person to serve as probation officer under the direction of the court in cases arising under this article. The court may also designate or appoint one or more persons to act as deputy probation officers."

In Hasting v. Jasper County, 314 Mo., l.c. 148, 149, 150, the court, in passing upon the question of whether or not a probation officer was a county officer, said:

> "We have held that the words 'county officers' in their most general sense apply to officers whose territorial jurisdiction is co-extensive with the county for which they are elected or appointed. (State ex rel. Buchanan County v. Imel, 242 Mo. 293, l.c. 300)
>
> "In 15 Corpus Juris, page 481, the following language is used: 'Where the duties of an office created by law are to be wholly performed within the limits of a county and for the people of that county, the salary to be paid by the disbursing officer of the county from the funds of the county, the office is a county office, and the person lawfully filling such office is necessarily a county officer.'
>
> "The act, Chapter 21, Article VI, Revised Statutes 1919, providing for probation officers, provides for the care, custody and maintenance of the dependent and delinquent children, defines such children, gives to the circuit court of the counties, when sitting as a juvenile court, jurisdiction to determine whether or not a child is delinquent or dependent and to commit such children to a detention home or to the custody of some reputable person, and establishes the office of probation officer in every county whose duty it is to take charge of children found to be de-

linquent in the county for which he acts, make such investigations of children reported to be delinquent in such court, to be present in the juvenile court to represent the interest of any child when charges are preferred against such child, to furnish such information and be of such assistance to the juvenile court as the court might require and to file informations in said court. He is 'vested with all the power and authority of sheriffs to make arrests and perform other duties incident to their offices.' His duties are wholly performed within the limits of the county, his jurisdiction is co-extensive with the county for which he is appointed, he is appointed by the circuit court of the county sitting as a juvenile court and receives his salary monthly out of the funds of the county for which he is appointed.

****

"Our conclusion, from the foregoing, is that probation officers are public officers whose duties are created by law, are to be wholly performed within the limits of a county and for the benefit of the people of that county and whose salaries are paid by the county courts from the funds of such counties, and appellant is therefore a county officer, (Reed v. Hammond, 123 Pac. 346; Nicholl v. Koster, 108 Pac. 302) as these words are used in Section 11016, Revised Statutes 1919, and is correct in his contention that his salary is $100 per month."

We are, therefore, of the opinion that a probation officer is a county officer and is entitled to receive a copy of the Revised Statutes, under the provisions of Section 693, R. S. Mo. 1929.

Respectfully submitted,

James L. HornBostel
Assistant Attorney General

APPROVED:

Roy McKittrick
Attorney General

JLH:FE

SHERIFF: County Court can not change sheriff's fees for boarding prisoners after January 1, especially after the expiration of the November term.

1-22

FILED
1/8

January 17, 1935

Honorable Oll Rogers
Sheriff of Jasper County
Carthage, Missouri

Dear Sir:

This will acknowledge receipt of your letter dated January 9, 1935, requesting an opinion, which reads as follows:

> "When I was elected Sheriff of Jasper County for my second term in the November election, 1932, the County Court of our county consisted of Harve Dixon, presiding judge, and J. T. Burk and O.P.M. Wiley, Associate judges, and they were all three Republicans. Mr. Burk and Mr. Wiley both made the race the same time I did, in the November election, 1932, and I was elected and they were both defeated. These three Judges were all sore because I defeated their candidate for Sheriff and because they had been defeated, and at the same November term of Circuit Court these three judges set my board bill for boarding prisoners for the next year at 40¢ per day. They had been paying their Republican Sheriff various prices for each year from 55¢ to 75¢ per day. I tried to reason with them and they laughed at me and told me they had the power to make it 25¢ per day. I was afraid to say any more, afraid they might do just that.
>
> The first of January, 1933, our new County Court took office, Harve Dixon, holdover presiding Judge, and Judge Geo. Daugherty and Judge Tom Phelps, Associate Judges.

They saw the advantage the old court had taken of me through prejudice, and they rescinded the order on the 3rd day of February, 1933, and made the board bill at 50¢ per day. Judge Dixon signed the warrants for boarding prisoners for January, February and March, 1933. Then he refused to sign any more. Along in December, 1933,the County Court called me down, and they agreed to compromise by paying me the first six months at 50¢ and the last six months at 40¢, and they made an order to that effect. I am sending you a copy of the order.

Up to this time the State had just been paying me 40¢ per day for boarding state prisoners. So after the County Court made the new order I made out supplemental cost bills for 10¢ per day on all of the state prisoners on which I had 50¢ coming for the months of January, February, March, April, May and June, 1933, and had them signed up by our two Circuit Judges, Wilbur J.Owen and R.H.Davis, and by our prosecuting attorney,Ray E.Watson, and certified to by Geo. E. Masters, Circuit Clerk on October 13th, 1934, and sent them to the Auditor's office at Jefferson City.

Mr. Marion Spicer, Criminal Cost clerk in the state auditor's office has been holding up these bills. I had an interview with Mr. Spicer along the latter part of December, and he asked me if I wouldn't write to you in reference to these supplemental bills.

It doesn't amount to very much, the difference for the first six months of 1933, just $208.40, but I told him I would write to you and explain the facts just as they are.

The County Court paid me just as the order will show, 50¢ for the first six

> months of 1933 and 40¢ for the last six months, and I think the State is entitled to pay the same.
>
> Would like for you to write me and give me your opinion on this matter."

You state in your letter that the county court, at the November term, 1932, fixed your fee for boarding prisoners at forty cents a day for each prisoner for the next year. We assume for the purposes of this opinion that the county court made a valid order of record to that effect. You state further that the new county court on the 3rd day of February, 1933, rescinded the order made at the November term and fixed the fee at fifty cents per day for each prisoner. The certified copy of the order of the county court inclosed by you shows that on the 13th day of December, 1933, they attempted to make a further order allowing you fifty cents per day for furnishing board to each prisoner for the months of April, May and June, 1933, you having already received this amount for the months of January, February and March, and forty cents a day for boarding each prisoner for the months of July, August, September, October and November, 1933. Under the provisions of Section 12115 Revised Statutes Missouri 1929, the state is to pay the fees for boarding the prisoners, when, under the law, the costs of the case fall on the state. We understand your question to be, whether or not you are entitled to receive from the state fifty cents a day for boarding each prisoner, by virtue of either the order of the county court of February 3, 1933, or December 13, 1933 increasing, or attempting to increase, your fees for boarding prisoners from forty cents a day for boarding prisoners to fifty cents per day. We trust you appreciate the fact that in giving an opinion we must be guided strictly by the law and we can not be governed either by the justice or injustice of its application.

Section 11794 Revised Statutes Missouri 1929, reads as follows:

> "Hereafter sheriffs, marshals and other officers shall be allowed for furnishing

> each prisoner with board,for each day,such sum,not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state; Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

Section 11795 Revised Statutes Missouri 1929, provides:

> "It shall be the duty of the county courts of each county in this state at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of January next thereafter, and it shall be the duty of the clerk of the county court to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court for the use of the said clerk and the judge and prosecuting attorney in making and certifying fee bills."

In the case of Mead v. Jasper County 305 Mo. l. c. 476, the county court of Jasper County at the November term, 1922, on December 1, 1922, made an order allowing the sheriff seventy-five cents per day for boarding each prisoner for the term of one year, commencing on January 1, 1923 and ending December 31, 1923. During the same term of court, on January 16, 1923, the court made an order rescinding the order of December 1, 1922 and made a new order which allowed sixty-five cents a day per prisoner for board. In the above case, l. c. pages 482, 483, 484, 485, 486, and 488, the court said:

> "The sole question for determination is whether respondent is entitled to be paid seventy-five cents a day for the board of each prisoner, as provided in the order of December 1, 1922, or is entitled to be paid only sixty-five cents a day on such account, as provided by the order of January 16,1923.

It is agreed that the account has been paid in full, if the county court had the power to make and enforce the order of January 16,1923. The solution therefore rests in the determination of the power of the county court on January 16, 1923, to set aside the order of December 1,1922, and make a new order at the sixty-five-cent rate. If it had such power, the judgment of the circuit court should be reversed. If it did not have such power, the judgment should be affirmed."

"It is apparent that Section 11003 (now Sec.11795 R.S.Mo.1929) contemplates that the county court shall fix the compensation for the ensuing year during its November term and prior to January first. The use of the word 'thereafter' demonstrates that the order shall be made prior to January first. Therefore, the order of December 1,1922, was timely and authoritatively made and the only question is whether the county court had the power to set that order aside and to make a new and different order after January first, but at the same term of court.

Appellant contends that the county court is a court of record and that its orders are in the breast of the court during the term at which such orders are made and that it may set aside such orders at any time during the term and make such orders in lieu thereof as it shall deem proper and necessary and that it had such power over the order of December 1, 1922."

"Assuming that the foregoing proposition is true generally, we are satisfied that such general rule has no application here. The power which the county court has to fix the fees of the sheriff for boarding prisoners is derived from the statute,which provides that such power shall be exercised

in a certain manner (by order of record,a copy of which shall be filed with the circuit clerk) and at a definite time (at the November term and prior to the first day of January). The power of the county court to set aside its order in the premises at a later day in the November term and prior to January first is not before us and we need not consider the case from that angle. The county court attempted to set aside the order of December 1, 1922, after January first. The precise question seems never to have been before the appellate courts of the State."

"The county court, having made a valid order which was within its power and duty to make at the November term and before January first,exhausted its power in respect thereto for that year and could not set same aside after January first,particularly if rights became fixed thereby by the ensuing year."

"The general rule is laid down in 15 Corpus Juris,page 470, where it is said:

'Where a county board or court exercises functions which are administrative or ministerial in their nature and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time and manner, it may modify or repeal its action;but in no event has such court or board the power to set aside or to modify a judicial decision or other made by it after rights have lawfully been acquired thereunder, unless authorized so to do

by express statutory provision. . . .
. . . The same is the case after an appeal has been allowed, or where some special statutory power is exercised, the time and mode of the exercise thereof being prescribed by statute. Where the previous action of the board is in the nature of a contract which has been accepted by the other party, or on the faith of which the latter has acted, it cannot be rescinded by the board without the consent of the other party. Conversely, where the proposition has not been accepted or acted on by the other party, the board may restrict or rescind its action. In the absence of express statutory authority, a county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law. A county board or court may, however, at the term or session at which an order is made, revise or rescind it, provided this is done before any rights accrue thereunder, but ordinarily they have no power to do such act subsequent to such term or session!""

"The same rule of law which protects the sheriff from having his fees for boarding prisoners cut after January first protects the county from having such fees raised after January first by a new county court which might be inclined to favor the sheriff.

The cases cited by appellant go to the power of courts of record generally to set aside their orders made at the same term of court. None of them touch the question of the power of the county court, after the time fixed by statute has passed, to set aside an order, required by the statute to be made within dates explicitly fixed.

We have concluded that the judgment below was for the right party and it is accordingly affirmed."

In your letter you state that the new court, on the 3rd day of February, made an order changing the fees allowed you for boarding prisoners from forty cents per prisoner per day to fifty cents. We assume therefore that this order was made at the regular February term. If a new court has no power at the same term of court, after January 1st, to rescind an order fixing the fees to be allowed a sheriff for boarding prisoners, as the case of Mead v. Jasper County, supra, seems to hold, certainly a new court would have no such power at a later date after the expiration of the November term.

We are not unmindful of the case of Mead v. Jasper County 18 S. W. (2nd) 464, which holds that an order of the county court made on the 16th day of January, 1924, fixing the fees to be allowed the sheriff for boarding prisoners, was valid. But in that case no order of the county court prior to January 1, fixing the fees of the sheriff for boarding prisoners had been made. The court, in the case last cited, at page 466, makes this distinction between the two cases.

> "Plaintiff relies for reversal chiefly upon Mead v. Jasper County, 305 Mo. 476, 266 S.W. 467. That was an action by this plaintiff against the same defendant for balance due for boarding prisoners for the year 1923, in which plaintiff prevailed. But the facts were essentially different. Briefly, the county court had made the order of December 1, 1922, hereinabove referred to, fixing the sheriff's compensation for boarding prisoners for the year from January 1, 1923, to and including December 31, 1923, at 75 cents per day per prisoner. It was conceded that the order was timely made and valid. At the same term but on January 16, 1923, the newly elected county court, whose members had taken office on January 1, made and entered an order of record setting aside the order of December 1, 1922, and fixing the sheriff's compensation at 65 cents per day per prisoner. This court affirmed plaintiff's judgment for the balance due him according to the order made December 1, 1922, not on the theory that the county court had lost jurisdiction by failure to act prior to January 1, which was not in the case and was not considered, but on the theory that that body had acted and had made a valid order and had thereby exhausted its jurisdiction for

that year and could not thereafter set aside the order, particularly if rights had become fixed thereby for the ensuing year.

We are therefore of the opinion that the orders of the county court under date of February 3, 1933 and December 13, 1933, attempting to change the fees of the sheriff for boarding prisoners, were invalid, and it is our further opinion that you are only entitled to collect from the state for boarding prisoners forty cents a day for each prisoner, as fixed by the order of the county court at the November term, 1932.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

JET:LC

PENAL INSTITUTION: MISSOURI REFORMATORY: -- Superintendent may not receive a contagious person.

March 21, 1935.

FILED
78

Hon. Oll Rogers
Sheriff of Jasper County
Carthage, Missouri

Dear Sir:

This department is in receipt of your letter of March 12th, wherein you state as follows:

> "I am writing you for information and your opinion in reference to Mr. H. G. Gray, Superintendent of the Missouri Training School for Boys at Boonville, in refusing to receive a boy who is duly sentenced to that institution and who has the gonorrhea. I had a commitment for a boy, Howard Lee, dated March 2nd, 1935, sentenced by Hon. Wilbur J. Owen, Judge of Division #2, Circuit Court of Jasper County, Missouri, and duly signed by Geo. E. Masters, Circuit Clerk of Jasper County, Missouri, and I delivered this boy who I think is about 16 years old to the Missouri Training School for boys at Boonville last Sunday, March 10th, and because of his having this contagious disease, they refused to accept him and I had to bring him back to Carthage, Mo.
>
> "All other institutions, penitentiaries, jails and asylums receive patients and criminals under this same condition and I would like to have your opinion on this matter, in reference to accepting this boy at Boonville."

Section 8352, R. S. Mo. 1929, as it relates to the Missouri Reformatory provides that,

> "No person who is neglected or dependent

> or who is idiotic or insane, or who has any contagious disease, shall be committed to or received by the superintendent into said institution not especially appropriated."

The court in the case of Sally v. Brown, 295 S. W. (Ky.) 890, loc. cit. 891, recognized that gonorrhea was a contagious disease and with reference to it stated in part:

> "**** gonorrhea, a contagious inflammatory disease of the genito-urinary tract, caused by a specific micro-organism ****."

Our courts will take judicial notice of the fact that gonorrhea is a contagious disease, and we are of the opinion that the Superintendent of the Missouri Reformatory at Boonville, Missouri, was clearly following the statute in refusing the boy.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

MW/WOS:afj

COUNTY BOUNDARIES: Jurisdiction of Clay Co. extends to middle of main channel of Mo. River and Prosecuting Attorney of Clay Co. may prosecute for crimes committed on the Clay Co. side of main channel.

March 26, 1935. 3-27

FILED 78

Hon. James S. Rooney,
Prosecuting Attorney,
Clay County,
Liberty, Missouri.

Dear Sir:

This department is in receipt of your letter of March 20 requesting an opinion as to the following state of facts:

> "A small pleasure boat having a bar for the sale of beer is docked on the Missouri River and on this side of the main channel. I have two questions on which I would appreciate an expression of your opinion:
>
> 1. When this boat is docked and tied up to the land on this side of the river, do I have any authority to prosecute the owner and manager for the operation of slot machines on the boat?
>
> 2. When the boat is carrying passengers on the river and even though it is on the Clay County side of the main channel, do I have authority to prosecute for this offense?"

Section 3377, R.S. Mo. 1929 provides as follows:

> "Offenses committed against the laws of this state shall be punished in the county in which the offense is committed, except as may be otherwise provided by law."

Section 11901, R.S. Mo. 1929, establishing the county boundaries of Clay County, provides:

> "Beginning at a point in the middle of the main channel of the Missouri River, where the prolongation south of the line between ranges twenty-nine and thirty would intersect the same; thence north with said range line to the northeast corner of section thirty-six, township fifty-four, range thirty; thence west with the subdivisional lines to the old state line; thence south with said line to the middle of the main channel of the Missouri river; thence down the Missouri, in the main channel thereof, to the place of beginning."

Section 12005, R. S. Mo. 1929 provides:

> "Whenever a county is bounded by a watercourse, it shall be construed to be the middle of the main channel thereof; and range, township and sectional lines shall be construed as conforming to the established surveys."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the jurisdiction of Clay County extends to the middle of the main channel of the Missouri River and that you as Prosecuting Attorney of Clay County may prosecute for any crime committed on the Clay County side of said main channel.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

COUNTY BUDGET ACT: Salary of Secretary of Farm Bureau Agent should be placed in Class 6.

4-26

April 16, 1935.

FILED
78

Hon. C. H. Robards,
Presiding Judge County Court,
Kennett, Miossouri.

Dear Sir:

This department is in receipt of your letter of March 30, wherein you make the following inquiry and request an opinion regarding the same:

> "Confirming our telephone message today, we have a budget problem here. In making our budget we placed the salary of the Secretary of the Farm Agent in Class 4. We have such a heavy load on Class 5 that there will not be sufficient funds there, as all our pauper expense and health unit expense come out of Class 5.
>
> Our Treasurer refused to 'refuse' the warrant. Our warrants are protested, saying he thought it should be in Class 5.
>
> Is there anything illegal in budgeting this salary in Class 4 so long as it does not take funds that would belong to any other claimant?"

Class 4 of the County Budget Act, referring to in your letter (Laws of Mo. 1933, p. 341) provides as follows:

> "Class 4: The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated

> amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under Class six."

Section 5 of the County Budget Act, (Laws of Mo. 1933, p. 344) under "Classes of Expenditures", states:

> "Class 4: Pay or salaries of officers and office expense. List each office separately and the deputy hire separately.
> * * * * *"

Section 12616, R.S. Mo. 1929, which gives county courts the power to appropriate money, is as follows:

> "For the purpose of promoting the public welfare by assisting in the general betterment of farm and home practices and conditions, the county court of any county is hereby authorized and empowered to appropriate out of the general funds of the county such sums as it may deem proper for the support of county farm organizations and to pay out such moneys under the condition hereinafter specified."

Section 12619, R.S. Mo. 1929 designates the use of the funds, and is as follows:

> "For the purpose of carrying out the provisions of this article, all funds appropriated by any county court to a county farm bureau shall be used to pay the salaries and necessary expenses of men and women, either or both, trained in agriculture and home economics, respectively, to serve as county agricultural agents,

> county home demonstration agents and county boys' and girls' club agents, and to provide such clerical assistance and office equipment as may be necessary to the effective conduct, through these agents, of such educational activities as are specifically authorized by state and federal legislation providing for cooperative extension work in agriculture and home economics as defined by the Smith-Lever Act of Congress."

Sections 12616 and 12619, supra, do not place a mandatory duty on the county court to make any appropriation of funds, but merely authorize and empower the county court to appropriate funds if it so desires. We cannot read into the sentence in Class 4 "The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county" that it shall include the salary of the Farm Agent or the Secretary to the Farm Agent. The amount, if appropriated for county farm organizations or county farm bureaus, under Sec. 12623, R.S. Mo. 1929 is for a period of not less than three years and appears to be in the nature of a lump sum. No part is designated for secretaries, stenographers, salaries or wages of any one.

As stated above, it is not mandatory upon the county court to appropriate in the first instance for a county farm bureau; we are therefore of the opinion that the county farm bureau may not be paid from the funds under Class 4.

Class 5 of the County Budget Act (Laws of Mo. 1933, p.342) is as follows:

> "The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

The above class specifically mentions contingency and emergency expense of the county, and specifically excludes salaries, fees, wages or any other emoluments. The funds appropriated by the county court for the county farm bureau cannot be classified as contingent and emergency expense, for if funds are appropriated, the amount is definitely known--there is not an emergency; therefore, it cannot be said that they are contingent upon anything and we are of the opinion that the salary of the Secretary to the Farm Agent cannot be paid out of the funds in Class 5.

Class 6 is as follows: (Laws of Mo. 1933, p. 342)

> "After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under Class six. Provided, that if there be outstanding warrants constituting legal obligations, such warrants shall first be paid before any expenditure is authorized under Class 6."

Having heretofore decided that the appropriation for the County Farm Bureau cannot be paid out of the funds of the first five classes, it is the opinion of this department that the same should be paid from the funds in Class 6.

It was clearly the intention of the Legislature to provide for the first five classes, and after that has been done, under the provisions of Class 6, the county court may expend any balance for any lawful purpose.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

Attorney General

OWN:AH

SHERIFFS FEES: Allowable only where he serves papers officially and not recoverably where he attempts and fails to serve.

5-13

May 8, 1935.

FILED 78

Hon. C. H. Robards
Presiding Judge
Dunklin County Court
Kennett, Missouri

Dear Sir:

This acknowledges receipt of your letter of April 29, which is as follows:

> "We have a question like this--The sheriff was given a warrant for a man supposed to be insane living thirty miles away from the county seat. He made two trips failing to find the man. On the third trip, he got him. The sheriff turned in mileage for the 90 miles or $18.00 mileage. I held that he is only entitled to mileage for the one trip.
>
> Will you please give us the law."

Section 11789 R. S. Mo. 1929, among other things provides:

> "Fees of sheriffs shall be allowed for their services as follows:" * * * * *
>
> For each mile actually travelled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip.....$.10"

This appears to be the nearest provision of the statutes providing for pay of the sheriff for services referred to in your inquiry.

The compensation allowed the sheriff for his official services performed is allowed only where there is statutory provision for the payment thereof. If there is no statute providing for his compensation he is not entitled to compensation notwithstanding the law may make it his official duty to perform certain services.

In the case of State ex rel. Troll vs. Brown, 146 Mo. 401, l. c. 406, the Supreme Court of this State says:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed vs. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

In the case of State ex rel. vs. Gordon, 245 Mo. 12, l. c. 27, the Supreme Court of this State declares as follows:

> "Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.

Throop on Public Officers (Sec. 443) says: 'It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the State. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract but because the law attaches it to the office.'

Mechem on Public Offices and Officers says: 'Sec. 856. Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth,'* * * *

In Bank v. Refrigerating Co., 238 Mo. 414, Brown, J., speaking for the court says: 'When the law requires a specific service to be performed by a public officer, he must perform that service regardless of whether any provision has been made to pay him for same.'

Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefore is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or

> to any different mode of securing the same.'* * * * *"

And at page 29 the Court says:

> "As the Legislature may fix such compensation to a public office as it sees fit, or none at all, we can see no constitutional objection to its attaching such conditions as it deems proper to the payment of the compensation, such conditions to be binding upon any one who thereafter enters upon such office and performs its duties. As stated above, the compensation has no relation to the amount or value of the service. There can be no application of the doctrine of quantum meruit. The officer takes the office cum onere. Having accepted it with the conditions imposed by the Legislature, upon whose will he must depend for any compensation at all, he cannot afterwards challenge the power of the Legislature to impose such conditions.* * * * *"

In the case of King vs. Riverland Levee District, reported at 279 S. W. 195, the Court says, l. c. 196:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office.* * * * * * * Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking vs. McCracken, 60 Mo. App. loc. cit, 656, to the effect that

> the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

We do not find where the courts in this State have construed the particular question involved in your inquiry. However, in other states the question appears to have been passed on. In the case of Yavapai County vs. O'Neal, 29 Pac. 430, an Arizona case, the Court held that under a statute fixing fees of a sheriff for executing a warrant of arrest and allowing him mileage for each mile necessarily traveled in executing a warrant of arrest, no mileage can be allowed where an unsuccessful attempt has been made to execute a warrant of arrest. And in the case of Braughton vs. Santa Barbara County, 65 Cal. 257, 3 Pac. 877, under a statute there authorizing the sheriff to charge mileage in going and executing a warrant of arrest or for mileage in any criminal proceeding, the Court held the sheriff is not entitled to mileage for going in different directions to look for a person when he is not arrested.

In the case of Vannatta vs. Brewer, 85 Ill. 144, the Court holds that if the officer fails to make service he cannot charge any mileage and if he has to travel beyond the residence of the witness he cannot charge except for the distance of his residence and return.

It will be noted that the statutory provision relating to payment of sheriff's mileage states "for each mile actually traveled in serving;" It does not state for each mile traveled in attempting to serve.

Bearing in mind that these statutes providing for payment of fees are strictly construed, it is our opinion that the sheriff is not entitled as a matter of law to the statutory fees for trips made in search for the party, and when he failed to serve the papers. The statutory provision only provides for payment of fees when service is made.

Respectfully submitted,

James L. HornBostel
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JLH/DW:MM

PROBATION OFFICER: County Court has authority to pay salary of Probation Officer by virtue of Class 4, Section 2, Budget Law 1933, maximum salary allowable.

May 23, 1935.

FILED
78

Mr. Cecil W. Roberts,
Editor, Farmington Press,
Farmington, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of May 3rd as follows:

> "Some time ago when you came through Farmington on your campaign you told me not to hesitate when I had a favor to ask of you. Well that time has come, but don't be alarmed. I don't want a loan or a job. Merely a legal opinion on a matter that has arisen here.
>
> "Prior to this year this Judicial District was blessed with a Republican Circuit Judge who, quite naturally, appointed a Probation Officer for St. Francois County at a monthly salary of $100.
>
> "In the last election we put Taylor Smith over for Circuit Judge and in return for our help Taylor offered myself the appointment of Probation Officer in this County. However, our County Court is undergoing a wave of economy and they have refused to pay any salary for the office of Probation Officer.
>
> "St. Francois County has an official population of more than 35,000 and because of the terrible conditions in the lead belt there is a great need for a Juvenile officer. Only this week the Bonne Terre paper carried an editorial on the need of such an officer.

> "Now I wish you would send me your opinion as Attorney-General of Missouri, as to whether the County Court shall pay the salary of a duly appointed Juvenile Officer, and if so, what the maximum salary is."

We are assuming the following statement of facts to be correct: First, that the juvenile officer is duly appointed, as stated in your letter, and, second, that the county court has not appointed a superintendent of public welfare, as provided in Section 14182, R. S. Mo. 1929.

Section 14174, R. S. Mo. 1929, provides:

> "The probation officer may receive such salary as the circuit court may with the approval of the county court prescribe, not exceeding one thousand dollars per annum in counties of twenty thousand inhabitants and less than fifty thousand inhabitants, and not exceeding three hundred dollars per annum in counties of less than twenty thousand inhabitants. Deputy probation officers may receive such salaries as may be prescribed by the circuit court with the approval of the county court, not exceeding five hundred dollars per annum in counties of twenty thousand and less than fifty thousand inhabitants, and not exceeding two hundred dollars per annum in counties of less than twenty thousand inhabitants."

The above section clearly provides for an appointment of a probation officer and the maximum salary allowed such officer in counties of twenty thousand inhabitants and less than fifty thousand. St. Francois County, having only thirty-five thousand inhabitants, comes within this classification.

You will notice the following statement in the above Section 14174: "The probation officer may receive such salary as the circuit court may <u>with the approval of the county court</u>

prescribe, not exceeding one thousand dollars per annum". The question now arises, how to interpret the phrase "with the approval of the county court". Does this confer on the county court a reasonable or arbitrary power of approval?

In State ex rel. Thomas Adamson v. The Lafayette County Court, 41 Mo. 221, this same question arises. The sheriff shall give bond to the state to the satisfaction of the county court. The court in this case said:

> "There is nothing presented before the tribunal for adjudication, and its action is not the exercise of a judicial discretion or judgment within the meaning of the rule.
>
> "The approval or rejection of the bond is essentially a ministerial act, though coupled with a discretion. When the law devolves upon an officer the exercise of a discretion, it is a sound legal discretion, not a capricious, arbitrary or oppressive one.
>
> "A hostile court could remove any sheriff in the state and vacate his office by declaring his bond insufficient, and arbitrarily refusing to hear any testimony in regard to the solvency and pecuniary responsibilities of his sureties.
>
> "A discretion delegated to an officer is a sound legal discretion, the meaning of which is well known and understood in the law, and is not an unlimited license to the officer to act and do as he pleases, irrespective of restraint."

Also in Riesland v. Bailey, County Clerk, 31 Pac. Rep. (2d) 183, the court said:

> "It is stated in High's Extraordinary Remedies (3d Ed.), Sec. 238, in effect that it is held, but not always, that if a particular court is designated, whose duty

> it is made to approve a bond, this approval is not the exercise of such a judicial function as to preclude control by mandamus. The approval or rejection of the bond in such case, although coupled with some degree of discretion, is held to be essentially a ministerial act, and hence subject to control by mandamus."

Therefore, from the above decisions, we are of the opinion the phrase, with the approval of the county court, indicates this approval must be reasonable and not capricious, arbitrary or oppressive.

The 57th General Assembly enacted the so-called County Budget Law in 1933. Section 1 of this act, found on page 340, Laws of Missouri 1933, provides:

> "All counties now or hereafter having a population of 50,000 inhabitants or less, according to the last federal decennial census, shall be governed by Sections 1 to 8 inclusive, of this act."

Section 2, Class 4, of the County Budget Law, provides:

> "The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

The above section merely designates under which classification the county court shall pay such officer.

Therefore, it is the opinion of this department that the county court is authorized to pay the salary of the probation officer out of Class 4, Section 3, Budget Law of 1933, and the maximum salary shall not exceed one thousand dollars per annum, as of Section 14174, R. S. Mo. 1929, and shall be of such amount as the circuit court may with the approval of the county court prescribe. Furthermore, such approval of the county court shall be reasonable and not arbitrary.

Yours very truly,

FRANKLIN E. REAGAN,
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK,
Attorney-General.

ARH:HR

INITIATIVE AND REFERENDUM: Legislature may determine the percent, not in excess of eight per cent of petitioners, required to initiate measures.

June 26, 1935. 6-27

FILED 78

Hon. T. H. Rogers
Director, Legislation and Tax Bureau
St.Louis Chamber of Commerce
St.Louis, Missouri

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "The Chamber of Commerce has had inquiry as to the wording of the provision in Section 57 of Article IV of the State Constitution relating to the initiative. The clause in the Constitution reads 'the first power reserved by the people is the initiative, and not more than eight per cent of the legal voters in each of at least two-thirds of the Congressional Districts of the State shall be required to propose any measure by such petition.' The inquiry is as to the phrase in the foregoing quoted sentence 'and not more than eight per cent of the legal voters.' Is that sentence accepted to mean not less than eight per cent, or is the quotation as given exact. The inquiry is based on the thought that if a petition submitting a measure through the initiative is 'not more than eight per cent' then a petition of a few signatures in each district would be sufficient to get a proposition before the people under the initiative.

> "It is probable that the Legal Department of the State has rendered an opinion on this question. If it has, may I ask that you have someone of your force give us the thought in such a rule?"

We have inquired of the Secretary of State for the original records of the enactment of the initiative section of the Constitution and are informed by that office that they were destroyed in the fire which destroyed the Capitol some twenty-five years ago and that the only record that office has with reference to the adoption thereof is the vote by which the above provision was adopted by the people at the general election held in 1908. The 1909 Session Acts at page 906 show the same provisions as are shown in the Revised Statutes of 1929 and we feel sure that the printed section now appearing in the statutes is a correct recording of the act.

We note that Section 57 of Article 4 of the Constitution of Missouri relating to the initiative and referendum provides as follows as to the initiative:

> "The first power reserved by the people is the initiative, andnot more than eight per cent of the legal voters in each of at least two-thirds of the congressional districts in the State shall be required to propose any measure by such petition."

With reference to the referendum it provides as follows:

> "The second power is the referendum, and it may be ordered (with certain exceptions not pertinent to your inquiry) either by the petitions signed by five per cent of the legal voters in each of at least two-thirds of the congressional districts in the State."

The same rules apply to the initiative as to the referendum with respect to the efficacy of the petitions. In the initiative the people have the constitutional right to legislate without any official act performed by the General Assembly, that is, the people to the extent of "not more than eight per cent of the legal voters

in each of at least two-thirds of the congressional districts in the State" shall sign the petitions proposing the measure, and upon said petitions being filed with the Secretary of State at a time so that at least four months will elapse before the election occurs at which the measure is to be voted upon, it then becomes his official duty to place said measure upon the election ballot. The Constitution further safeguards the initiative by requiring that said petitions "shall include the full text of the measure so proposed." Doubtless a sufficient and perhaps controlling reason for the latter requirement is to prevent unscrupulous persons circulating petitions from taking advantage of the people who signed the petitions.

When voted on at the oncoming election, such measure is adopted and becomes a law provided it receives a majority vote at the election.

The second power reserved therein to the people is the referendum. This is the power to suspend until the next election a law passed by the Legislature and signed by the Governor.

In order to so suspend it and have the opportunity presented to the people to express themselves and to accept or reject it, the "petitions signed by five per cent of the legal voters in each of at least two-thirds of the congressional districts in the State" shall be presented, or the referendum may be ordered by the legislative assembly, etc.

Referendum petitions likewise shall be filed with the Secretary of State, but under this course the time to so file "shall not be more than ninety days after the final adjournment of the session of the Legislature at which the bill was enacted."

It will be noted that there is a different constitutional requirement as to the number of petitioners required with respect to the initiative from those required with respect to the referendum. The former is "not more than eight per cent" and the latter is that "thepetitions signed by five per cent" shall be filed.

Volume 12, Corpus Juris, page 735, par. 126, states the law as follows:

> "Constitutional provisions reserving to the people the power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independently of the legislature, are self-executing to the extent that they prescribe the rules for the exercise of the rights reserved; but where such provisions merely create rights to be exercised in the manner prescribed by general laws, they do not become operative until the enactment of legislation."

The same Volume, at page 742, par. 156, says:

> "All national authority is derived from the constitution of the United States, in which the powers of the federal government are enumerated. But not so with the governments of the several states; their original powers they received through charters from the British crown, which charters served as their constitutions during the colonial period, and up to the time of the framing and adopting of state constitutions by them or by their peoples during or after the revolutionary period; and all powers that are not expressly or by necessary implication granted to the United States, in the federal constitution, remain with the several states or with the people, being necessarily inherent in the state governments or in the people who have established such governments."

At page 745, par. 157, is declared the following:

> "The constitutions of the several states, unlike the federal constitution, are not grants of power. On the contrary, they are limitations on the legislative powers of the states. A state constitution is the supreme written will of the people of the State who have adopted it as a framework or basis of their government subject only to the

> limitations to be found in the federal constitution.* * *The generally accepted doctrine is that they (the legislature) may pass any acts that are not expressly, or by necessary implication, inhibited by their own constitutions or by the federal constitution."

And at page 749:

> "The legislature needs no specific constitutional authorization for its enactments, as all the legislative authority of the state which is not denied to the legislature by the constitution of the state resides in that body.* * *The only test of the validity of an act regularly passed by a state legislature is whether or not it violates limitations imposed by the state or federal constitutions in express terms or by clear implication."

In speaking of express and implied limitations on the legislature, at page 750, par. 169, it is stated:

> "Such limitations on the power of the legislature, however, will not be raised by implication unless this intention clearly appears from the instrument itself, and no implied limitation will be extended beyond the legitimate meaning of the terms employed."

And at page 752:

> "The generally accepted rule is that courts will not declare a statute void merely because in their opinion it is opposed to the spirit supposed to pervade the constitution."

And at page 791:

> "A presumption in favor of constitutionality is raised by the mere fact of the enactment of a statute by the legislature."

The Supreme Court of Missouri in the case of State ex rel. vs. Board of Curators of University of Missouri, 268 Mo. 598, speaking of limitations on the legislative power, says:

> "The legislative power, subject to the limitations contained in the Constitution, is vested in the General Assembly of the State of Missouri. The General Assembly retains all legislative power not expressly or by necessary implication forbidden it by the Constitution."

And quotes approvingly from Cooley's Const. Limitations (7 Ed.), pp. 236 et seq., as follows:

> "The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being prima-facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution and the case shown to come within them". Further, 'when the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument."

The section under construction provides that the

> "Petitions and orders for the initiative and for the referendum shall be filed by the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor."

Thus it will be noted that the act itself contemplates that the Legislature has the right to enact such legislation as is not inconsistent with the constitutional provision to the end that the people, through the Legislature, may from time to time alter the requirement with reference to what per cent, not greater than eight per cent, of the legal voters in the given number of congressional districts shall be required in order to invoke the initiative.

Pursuant to the same, the Legislature, by Sections 10702 to 10711 inclusive, R. S. Missouri 1929, enacted provisions applicable to the administration of the initiative. One of those provisions in Section 10703 is as follows:

> "Provided, that the minimum number of petitioners to either an initiative or referendum petition, when filed with the secretary of state, shall be five per cent of the legal voters in each of at least two-thirds of the congressional districts in the state."

The provision of Section 57 aforesaid that "not more than eight per cent of the legal voters", etc., with reference to invoking the initiative, means that the Legislature has no power to enact a law requiring a greater number of signers than "eight per cent" as therein stated, but the Legislature does have the constitutional right to enact a law prescribing such per cent, not in excess of eight per cent, as the Legislature deems proper. In other words, the field is open for the Legislature to exercise its discretion as to what per cent of signers they desire or require in order that the initiative may be invoked, but the Legislature can not require a greater number than the eight per cent provided in the Constitution as the maximum that may be required. The Legislature was clearly within its constitutional authority when it enacted the law providing that the minimum number of petitioners to the initiative petitions should be five per cent.

CONCLUSION.

We are of the opinion that the necessary number of signers of initiative petitions in order to invoke the initiative in this state is at least five per cent of the legal voters in each of at least two-thirds of the congressional districts of the state, and that when petitions have so been filed with the Secretary of State, then the law insofar as it requires signers of petitions therefor has been fully complied with.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
Acting Attorney General

DW:MM

Statute of limitations on delinquent taxes.

7-9

July 9, 1935

FILED
78

Honorable J. Monroe Robins
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Mr. Robins:

We are in receipt of your inquiry which is as follows:

> "At the request of Sam A. Baker, Collector of the Revenue of Bollinger County, I will ask you a question as follows: Can the back taxes for the year 1929 and prior years be legally collected?"

Replying thereto, it appears that there has been for many years a five year limitation against the collection of delinquent taxes in this state.

In 1933 the Legislature repealed Section 9961 of Article IX, Chapter 59, R. S. 1929 (See 1933 Laws, page 154) and enacted the section there found in lieu.

By the terms of this last enactment it is provided as follows:

> "No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid

> unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, provided that proceedings for the sale of lands and lots on which taxes are delinquent for theyear 1928 may be commenced at any time prior to December 31, 1934."

It will be noted that this section withdraws the assistance of the courts from the collection of delinquent taxes which have been delinquent more than five years prior to the institution of "initial proceedings", except that the taxes that were delinquent in 1928 have a little longer extension of time for filing suit, to-wit, until December 30, 1934.

We think the term "initial proceedings" means the filing of suit for collection of such taxes.

CONCLUSION

The back taxes for the year 1929 became delinquent January 1, 1929 and the five year limitation laws above mentioned applies as to them, and they are barred if suit was not filed thereon prior to five years from January 1, 1929.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, JR.
ACTING ATTORNEY GENERAL

DW:SW

SPECIAL ROAD DISTRICTS: Refund by State Highway Commission.

8-20

August 13, 1935

FILED
78

Mr. Daniel C. Rogers,
Attorney at Law,
Fayette, Missouri.

Dear Sir:

We wish to acknowledge your letter of recent date requesting an opinion wherein you state in part as follows:

> "About 1920 or 1921, different people (most of them living along the road mentioned) contributed a total of about $6,200.00 for the construction of a mile of highway leading northward out of Fayette towards Glasgow. This is now the first mile of highway out of Fayette on No. 5 highway. There is some conflict of evidence with reference to whether the State Highway engineer on the job, and the members of the commission of the Special Road District (all of whom are now dead) promised the donors that this money would be given back to them individually in the event it was ever refunded to the Fayette Special Road District.
>
> "Since that time the refund law has passed, and the Special Road District commissioners, whom I represent, have convinced the State Highway Commission that this $6,200.00 should be refunded to the Special Road District. It took some time to show from the incomplete records that were kept in 1920 that this sum of money was officially paid by the Special Road District to the

State Highway Commission. But we finally made our case. Thereupon the State Highway Department ordered the refund and issued its check for $6,200.00. During the time of the application for the refund the individuals who are the true original contributors or who are legally entitled to receive moneys from deceased contributors protested paying the money to anyone except themselves individually. In due time, after they learned that the Highway Commission would not make a refund to individuals, they withdrew their objections. Thereafter our case was completed and the above check issued to the Fayette Special Road District.

"Although these donors of this money have not one bit of writing that it was the promise or understanding that this money should be paid to them individually, they are pressing the Commissioners of the Fayette Special Road District to refund to them the amounts which each of them contributed. Certainly there was no written contract to that effect. And in fact, there was no writing of any kind that it was the intention that the money if refunded should go back to the people who contributed it. Furthermore, I do not believe the individuals can make a very strong case of competent evidence that there was any legal promise to return the money to them.

"But assuming that at the time they paid their money into the hands of the Committee that received it and delivered it to the Special Road District for payment to the contractor there was an oral promise or understanding in each and every case that if the money should ever be refunded by the State Highway Department, would the Special Road District now be liable for return of the money to each

> individual? Some threaten to bring suit to force the Special Road District to make payment to the individuals. The Commissioners are willing to pay it back to the individuals if it is legal to do so, and if under the law they would be liable to an adverse judgment in a suit brought by the individuals to collect their respective individual shares. But on the other hand the Commissioners do not want to dish out $6,200.00 to individuals unless it is legal to do so. Please give us your opinion as to whether or not the Special Road District would be liable for refund of this money to the individuals under these circumstances."

The question that first presents itself is, assuming an oral agreement or understanding that the respective donors would be given their money back in the event it was ever refunded to the Fayette Special Road District, does the statute of frauds apply?

Section 2967, R. S. Mo. 1929, sets out what agreements must be in writing and provides in part as follows:

> "No action shall be brought * * * upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized."

Our court in the case of See v. See, 237 S. W. (Mo.) 795, l. c. 799, in construing the above section, said:

> "Appellant claims the original oral contract was within the statute of frauds and therefore is no defense.

> There are many reasons why this point is not well taken, one or two of which may be mentioned. Even if this were construed as a contract for rental for the term of the plaintiff's life, it would not be within the statute of frauds because it might be performed within a year. The statute of frauds, section 2169, R. S. 1919, applies only to contracts which by their terms cannot be performed within a year. Wynn v. Followill, 98 Mo. App. 463, 72 S. W. 140; Mathews v. Wallace, 104 Mo. App. 96, 78 S. W. 296; Suggett's Adm'r. v. Cason's Adm'r., 26 Mo. 221; Green v. Whaley, 271 Mo. loc. cit. 654, 197 S. W. 355."

From the facts presented us it is impossible to determine whether the contract might have been performed within a year. The oral agreement or understanding was made in 1920 or 1921, and the Laws of Missouri, Extra Session, 1933, page 164, shows that no provision was made for refunds until August 4, 1921. If it can be shown that it was made in 1921, it could have been performed within a year, and hence would not come within the statute of frauds, and this is true even though the contract might not have been made until sometime in August, 1920.

Assuming then for the basis of this opinion that the oral agreement could have been performed within a year, and hence that the statute of frauds does not apply, the next question that arises is whether the Fayette Special Road District could enter into such an agreement.

Special road districts, by virtue of the statutes of this state, are "capable of suing and being sued" and of "contracting and being contracted with" regardless of whether organized under Articles 9 or 10 of Chapter 42 as they relate to special road districts. (Sections 8025 and 8061, R. S. Mo. 1929.) In the instant case we see no reason why a contract of the nature herein set out could not be made under the above sections. If the future condition, viz., the refund of the moneys contributed, was forthcoming, the individual contributors were to have same returned to them. If no refund was made, no liability attached to the district to repay same.

We have noted that special road districts are capable of suing and being sued, and hence if it can be established that the oral agreement does not come within the statute of frauds, we are of the opinion that the Fayette Special Road District, having received a refund of the aforementioned funds, must now, under the terms of the agreement, pay same over to the individual donors, and on refusal to comply makes itself subject to suit.

Yours very truly,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:HR

INSURANCE DEPARTMENT: Rate filing held in violation of Article VIII, Chapter 37, Revised Statutes Missouri 1929.

8-26

August 24, 1935

FILED 78

Insurance Department
State of Missouri
State Capitol Building
Jefferson City, Missouri

Attention: George A. S. Robertson
Deputy Superintendent

Dear Sir:

This Department is in receipt of your request for an opinion, as to the following state of facts:

> "We have a fire insurance company which has been issuing a fire insurance policy for a term of 3 or 5 years at the usual reduction in rate for such term. This policy contains a provision which allows the insured to pay the premium annually and therefore permits the termination of the contract at the end of any year.
>
> It appears to us that under this term policy the insured is, in effect, only insured for one year at a time but pays a less rate per year than an insured who buys a one year policy of insurance. Such a practice also seems unfair to the policyholders who pay the full term premium at the time the term policy is issued.
>
> This department has held in the past that such an arrangement of premium payment results in unfair discrimination among policyholders, and also constitutes

rebating under the Missouri Statutes.

Will you kindly give us your opinion as to the legality of this practice of commuting termed premiums to the annual basis."

On May 15, 1933 this department rendered an opinion to the effect that a filing of this nature was not in violation of the Missouri Statutes, and, therefore, should be accepted by the Superintendent of Insurance. Since the rendition of that opinion however, a case specifically deciding the question has been decided by the Supreme Court of Ohio (Merchants' Fire Ins. Co. of Indiana v. Bowen 196 N. E. 774.), and we therefore hereby overrule our former opinion on this point.

In the general insurance company case heretofore referred to, the court said:

"The Merchants' Insurance Company has been issuing a fire insurance policy for a term of five years, with a provision therein which enabled the insured to pay the premium yearly and terminate the policy at the end of any year. Under such a five-year policy the policyholder was in effect only insured for one year at a time, but in this way paid a less rate per year than an insured who took out a one-year contract of insurance. At the same time the insurance company issued policies for a five-year term that had the same rate for five years as the five-year contract referred to above, but the premium for the full term was payable in advance and the contract was effective for the full term.

The General Insurance Company of America was issuing similar policies but somewhat differently worded.

Some time prior to April 16, 1935,there were 'special deviation filings' covering such long-term contracts.

On the date mentioned, the superintendent of insurance made an order and finding that such filings 'result in a different annual rate for the same risk or similar risks in the same class,' and that such deviation filings were contrary to the Bureau of Rating Law of Ohio (section 9592-1 et seq., General Code), and especially in violation of section 9592-9, General Code, which provides that any deviation 'shall be uniform in its application to all of the risks in the class for which the variation is made;' and all such filings were declared null and void.

Notice of this order was given to each fire insurance company, but policies then written were allowed to remain in force until the next anniversary date of their inception.

The court holds that the deviation is not uniform, as required by section 9592-9, General Code, and the fixing or charging or such rates constitutes a discrimination, within the meaning of section 9592-8, General Code. The order of the superintendent of insurance was therefore strictly according to law."

CONCLUSION

The provisions of the Ohio Statutes, with respect to discrimination between fire insurance rates, are substantially similar to the Missouri Laws on this question.

It is, therefore, the opinion of this department that the rate filing as described in your letter to this

department, results in an unfair discrimination among policyholders and is in violation of Article VIII, Chapter 37 Revised Statutes Missouri 1929.

Respectfully submitted,

JOHN W. HOFFMAN,Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

SALES TAX: Sales made by post exchanges to members of the camp are not subject to the tax. The original purchase made by the post exchange from the merchant or wholesaler is subject to the tax

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10-21

October 7, 1935

FILED
78

Captain W. G. Robinson
J A G Reserve, Special Inspector
Fort Leavenworth, Kansas

Dear Sir:

This Department is in receipt of your letter of September 24, wherein you request an opinion as to the following:

"Query 1: Are sales conducted by a post exchange operated in CC Camps in the State of Missouri subject to the Missouri sales tax?

Query 2: If subject to such a sales tax, is the tax payable by the enrollee, who is the ultimate consumer, or is it payable by the post exchange in its transactions of purchase with various jobbers and wholesalers? "

I

We are impressed with the argument and logic as presented in your letter, namely; that camp exchanges are instrumentalities of the Federal Government and not subject to state taxation. However, it appears that by custom and by the fact that such exchanges have existed and played such an important part in various ways in the camps, that the Government recognizes their existence and, perhaps, in many ways, treats them as instrumentalities of the Federal Government, but the question of such camps being instrumentalities of the Federal Government has been decided by three members of the Court sitting

as the Circuit Court of Appeals of the Fifth Circuit of the United States Court, in the following language: (67 Fed.(2nd) 591)

> "It is to be conceded that an excise tax on the sales of gasoline is inoperative as to sales made to the United States, either directly, or indirectly through one of its departments, for government use. Panhandle Oil Co. v. State of Mississippi, 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 56 A. L. R. 583. There a sale of gasoline was made direct to the United States for the use of the coast guard and a government hospital. No doubt the ruling would have been the same if the sales had been made directly to these instrumentalities of the government, for then also the United States would have been the real purchaser. But the tax here is not on the sale but is on the withdrawal of the gasoline. Furthermore, a post exchange is, of course, not the government; nor is it a department or instrumentality thereof. On the contrary, a post exchange is a voluntary, unincorporated, co-operative association of army organizations in which all share as partners in the profits and losses. The government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to the post exchanges at Camp McClellan and Maxwell Field are not exempt from the state excise taxes. People v. Standard Oil Co. (Cal. Sup.) 22 P. (2d) 2. "

Therefore, regardless of any argument to the contrary, we are of the opinion that post exchanges maintained in CCC Camps are not instrumentalities of the Federal Government, and, hence, are not exempt from the tax undertaken to be imposed by the State of Missouri on sales at retail for that reason.

II

Having determined that post exchanges are not

instrumentalities of the Government and cannot be exempt from the tax on that ground, we shall next consider the question from other angles. The Missouri Sales Tax Act, Laws of Missouri 1935, page 413, sub-section (c), defines 'business' as follows:

> " 'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect and the classification of which business is of such character as to be subject to the terms of this Act. The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business, within the meaning of this act."

Sub-section (e) relating to sales at retail, is defined as follows:

> " 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this Act and the tax imposed thereby, it shall be construed to embrace:
>
> (1) Sales of admission tickets, cash admissions, charges and fees to places of amusement, entertainment and recreation, games and athletic events.
>
> (2) Sales of electricity, electrical current, water and gas (natural or artificial), to domestic, commercial or industrial consumers.
>
> (3) Sales of service to telephone subscribers and to others through equipment

of telephone subscribers for the transmission of messages and conversations, both local or long distance, and the sale, rental or leasing of all equipment or services pertaining or incidental thereto.

(4) Sales of service for transmission of messages by telegraph companies.

(5) Sales or charges for commercial laundry, cleaning, pressing and dyeing service.

(6) Sales of tickets, fares and services by every person operating a railroad, any sleeping car, dining car, express car, and such buses and trucks as are licensed by the Public Service Commission of Missouri, engaged in the transportation of persons or freight for hire.

(7) Sales of or charges for advertising of whatever kind or character to be published in newspapers or magazines or to be displayed on billboards or other kind of indoor or outdoor advertising devices or to be broadcast over radio stations, or to be displayed by any stereopticon or motion picture.

(8) Sales or charges for all rooms, meals and drinks furnished at any hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist camp, tourist cabin, or other place in which rooms, meals or drinks are regularly served to the public."

The tax contemplated in the Act, without deciding the character or type of tax it really is, is to be paid by a person receiving or purchasing the tangible personal property for use or consumption. In the case of post exchanges in the CCC camps the question arises who is the user or consumer. You state in your letter that no one but an enrollee or official of the camp is allowed to do business at the exchange, and there is no business done with civilians.

Your letter again states that the post exchange is conducted and governed by a council consisting of company officers and two of the enrollees. We assume that the two enrollees are members of the CCC Camp; that limited profits can only be made and that such profits are to be paid into a company fund for the purpose of improving the morale and contributing to the happiness and well-being of the men.

We think by the definition of the word 'business' defined in the Act, the Legislature contemplated the tax to be collected by persons engaged in a general retail business or retail sales without restriction as to who are the purchasers. It also appears that no individual receives any profit, gain, benefit or advantage personally from the post exchanges; that the profits belong solely to the camp; that every member of a camp, including the officers, technically has an interest in the profits, not accruing to him personally but to the camp as a whole; that the camp is the purchaser of merchandise for the purpose of retailing it to themselves, the individual members. Therefore, the post exchange being the user and consumer the tax would be on the transaction when the post exchange acquires or purchases the tangible personal property from the merchant or person selling such tangible personal property.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

OWN:LC

SPECIAL ROAD DISTRICTS: Oral agreements with municipal corporations and executed on both sides cannot be repudiated.

10-31

October 10, 1935.

FILED
78

Honorable Daniel C. Rogers,
Attorney at Law,
Fayette, Missouri.

Dear Sir:

We acknowledge your recent letter wherein you state as follows:

> "Receipt is acknowledged of letter dated August 13th, containing an opinion written by Assistant Attorney General John W. Hoffman, Jr. This opinion pertains to the question of whether or not the Fayette Special Road District may make several refunds to individuals who contributed various amounts of money in 1920 or 1921 for the building of a mile of Chat road running North of Fayette one mile.
>
> "I agree with the opinion in respect to what it presents with reference to the Statutes of Fraud, Section 2967, R. S. Missouri 1929. However, after studying the matter, it would seem that it is necessary to take Section 2962 into consideration. This Section provides that:
>
> "'No county, city, town, ...or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, ...; and such contract including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto ....."
>
> "Is not the Fayette Road District a municipal corporation? If so, it would seem that even

> if an oral promise was made by the Special Road District at the time to repay the individuals who made the donations, it would not be legal so to do.
>
> "We would much rather pay these refunds than not to pay them. But if the statutes concerning oral promises applies in this case, as it so clearly seems to me to apply, it would seem that a district cannot make refund to these individuals. If you will supplement your opinion in a manner which reasonably shows that I am mistaken with reference to the application of Section 2962 concerning an oral promise, I shall be only too glad to recommend to the Fayette Special Road District that these individual refunds should be made, provided that there was not more than one year elapsed between the time the oral promise was made and the effective date of the Refund."

Supplementing our opinion of August 13 holding "that the Fayette Special Road District, having received a refund of the aforementioned funds, must now, under the terms of the agreement, pay same over to the individual donors, and on refusal to comply makes itself subject to suit", we respectfully call your attention to the very recent case of the State of Missouri, at the Relation of the County of St. Louis, Missouri vs. State Highway Commission (not yet reported), wherein the court had the following to say with reference to oral agreements:

> "Two questions have been suggested, (1) a verbal agreement that the county would secure and pay for the right-of-way if the state would take the road over is not binding on either party, and (2) * * *.
>
> "Answering the first question, the agreement, if verbal, was not binding on either party and was therefore non-enforcible so long as it remained executory. But as both parties acted thereunder and completely performed the agreement, neither can now repudiate it."

In the case at bar the verbal agreement between the individuals who contributed various amounts of money to the

building of the road and the Fayette Special Road District was non-enforcible so long as it remained executory, but under the reasoning of the foregoing case, we are of the opinion that since "both parties acted thereunder and completely performed the agreement, neither can now repudiate it", and the Fayette Special Road District should now pay over to the individuals the various amounts due them under the agreement.

Yours very truly,

ROY MCKITTRICK,
Attorney General.

MW:HR

TAXATION; Right of Redemption from tax sale.

10-16

October 15, 1935.

FILED
78

Honorable J. K. Robbins
Collector New Madrid County
New Madrid, Missouri

Dear Mr. Robbins:

Acknowledgment is made of your request for an opinion of this office reading as follows:

"I have advertised for sale on Monday Nov. 4, 1935, under Senate Bill #94 of the 1933 Session Acts of Mo. a number of tracts of land with 5 years delinquent tax. Some of these tracts have also Drainage taxes, Levee taxes and mortgages under deed-of-trust for the same period.

I well understand that the purchaser at my sale will get a "tax certificate" and that the owner has the right, or equity of redemption for two years, but the situation is not clear to me about the following:

Will this sale for the Co. & State tax knock out these improvement taxes and the mortgage? If not--

In case the same land is sold for drainage or levee tax that is now due at some future date how will that affect the holder of the tax certificate or the one who has the superior equity of redemption?

Who has the superior rights of the equity of redemption, the senior improvement district, the mortgagee or the record owner of the land?"

I.

Sometime ago this office rendered an opinion to the Honorable R. F. Baynes, Tax Attorney, New Madrid County, in which it is held:

> "It is therefore the opinion of this office that a sale for state and county taxes under the Jones Munger Act does not in itself cut out the lien of drainage districts for drainage taxes."

This opinion is dated January 8, 1935, and I enclose a copy thereof for your information in respect to that holding. This opinion effectively answers your question "Will this sale for the county and state tax knock out these improvement taxes?"

II.

The statutes applicable to drainage districts provide for the levying of drainage taxes. Section 10828 R. S. Missouri 1929, in regard to county court drainage districts is an example and provides in part:

> "All drainage taxes provided for in this article, including maintenance taxes, together with all penalties for default in payment of the same, all costs in collecting the same* * * * * shall from date of the levying of the same by the county court* * *until paid, constitute a lien, to which only the lien of the state for state, county, school and road taxes shall be paramount, upon all of the lands assessed* * * *."

So it appears that by the very provisions authorizing the levying of the tax it is provided that the lien for state and county taxes shall be superior. That being the case, a sale of land for drainage or levee taxes cannot effect this superior lien of the state and county but the purchaser at that sale takes the property subject to the lien for state and county taxes but with right to redeem the property from such sale as provided for in Section 9956a, page 437, Laws of Missouri 1933.

III.

You last question is "Who has the superior rights of the equity of redemption, the senior improvement district, the mortgagee or the record owner of the land?" It is not exactly clear as to what is meant by the term "superior rights" in this question, but suffice to say it appears that under the law anyone of the three parties named would have the privilege of redeeming the property from the sale for state and county taxes. This conclusion is apparent because of Section 9958a, page 437, Laws of Missouri 1935, which provides in part:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten per centum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption." * * * *

These conclusions are supported by opinions of our Supreme Court in the cases of Little River Drainage District vs. Sheppard, 7 S. W. (2d) 1013, and Dyer et al. vs. Harper et al, 77 S. W. (2d) 106. In the former case the Court stated:

> "the state's lien for taxes is superior to a prior mortgage lien, and a sale under such tax lien conveys title to the purchaser but does not affect the mortgagee's right to redeem." * * * *

And in the latter case the Court stated:

> "At a sale under a judgment for drainage taxes, the purchaser would acquire the right to redeem in an action against the holder of the tax title, by making a proper tender of the amount due the holder of the tax title."

Without question, in the event the improvement district or the mortgagee exercised their right of redemption, the record owner of the land could within the statutory time redeem from the improvement district or the mortgagee.

Respectfully submitted

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General

HGW:MM
Enclosure.

CIRCUIT CLERK--DRAINAGE DISTRICT: Fees allowable to Circuit Clerk in drainage cases under special Act of the Legislature.

October 29, 1935.

11-4

FILED 78

Hon. J. Monroe Robins
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

We acknowledge your request for an opinion dated September 25, 1935, which reads as follows:

> "Upon the request of Loren A. Shell Circuit Clerk of Bollinger County, Missouri, I will ask you a question as follows:
>
> "What are the Circuit Clerks fees (per 100 words and figures) for the copies of petitions in Drainage Districts, where the Drainage Districts furnishes the Circuit Clerk with the copies?"

Article IV, Chapter 64, R. S. Mo. 1929 is a special Act of the Legislature pertaining to fees for services rendered in organizing drainage and levy districts in Missouri. Section 10878 of said Act and Chapter provides:

> "That it is understood that the ordinary fee statute does not apply to services rendered by any county or township officer or witness in the organization, incorporation or administration of any drainage or levee districts heretofore organized, in process of organization at the time of passage of this article, or that hereafter may be organized under any general or special law of Missouri permitting the organization of drainage or levee districts, but that such officer or witness, except as is otherwise provided for in the subse-

quent sections of this article, shall receive only a reasonable compensation to be fixed by the courts for services actually rendered, that petitioners for formation or incorporation of drainage and levee districts and the officers of such districts after the same have been organized may prepare, write or print all copies of petitions, writs, orders and decrees of courts and other papers pertaining to such districts and furnish the same to the county and circuit clerks or other officers for their use, and in such event such officer shall be entitled to only a reasonable compensation for services actually rendered the districts in issuing such writs and copies of decrees, orders or other papers."

Section 10879 R. S. Mo. 1929, provides:

"The county and circuit clerks, except as limited in section 10878 and otherwise specified in statutes governing the organization and administration of drainage and levee districts, shall receive (in addition to the fees and deputy hire allowed under the provisions of section 11811, R. S. 1929), for filing each paper relating to a drainage or levee district, five cents; for issuing each subpoena, summons or notice, and for approving and filing each bond, twenty-five cents; for recording or copying each one hundred words and numbers, eight cents, any number consisting of more than three figures to be considered as two numbers. The fees of the sheriffs and witnesses shall be the same as allowed in section 10878 of this article."

CONCLUSION.

Public officers in the performance of their official duty are allowed only those fees as the Legislature specifically provided. This is elemental law. Since the Legislature has limited, but otherwise specifically enumerated the allowable fees to a Circuit Clerk in officiating in the incorporation or administration of drainage or levee districts in Missouri, we must look to the law quoted, supra, for an answer to your question.

We are of the opinion that petitioners or officers of drainage and levee districts may prepare copies of their petitions, writs, orders and decrees of courts, and copies of any other papers pertaining to drainage or levee districts, and may furnish said copies to the Circuit Clerk, in which case the Circuit Clerk isnot entitled to a fee for making said copies. In the handling of said copies of petitions, writs, orders and decrees of court, and copies of other papers pertaining to drainage or levee districts, which are furnished the Circuit Clerk by petitioners or officers of a drainage or levee district, the Circuit Clerk can charge a fee only for services which his office actually rendered, and where copies are prepared and furnished the official service of copying cannot be said to be a service which the Circuit Clerk actually renders. The Legislature so intended in plain language. Where copies are not furnished, then the Clerk, when required to make copies, is entitled to charge on a basis of eight cents for each one hundred words. For recording he is entitled to eight cents for each one hundred words. For filing each paper he is entitled to five cents. For issuing subpoenas, summons or notices, and for approving each bond, he is entitled to twenty-five cents. For issuing writs other than subpoenas, summons or notices, he is entitled only to a reasonable compensation in an amount fixed by the Court.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

January 18, 1935.

1-28

FILED
79

Hon. V. C. Rose, Jr.,
Prosecuting Attorney
Putnam County
Unionville, Missouri

Dear Mr. Rose:

This is to acknowledge receipt of your letter of recent date in which you request an opinion of this office; which letter is as follows:

> "As the prosecuting attorney elect of Putnam county I have been asked about the legality of holding dances on Sunday night, which would not be affected by municipal ordinances. My judgment is that this is not a violation of the law. May I have your opinion?"

We do not find any criminal statute against the holding of dances on Sunday night. Of course, cities and towns could enact ordinances whereby reasonable regulations could be placed on public dances, but no statute prohibits holding dances on Sunday.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

CRH:EG

CONVICTS: Status of a person with legal residence in Missouri who has been convicted and sentenced in a United States District Court for a felony.

January 23, 1935.

FILED
79

Honorable Alfred L. Rottman
Chief Assistant
Board of Election Commissioners
St. Louis, Missouri

Dear Sir:

This department is in receipt of your letter of recent date wherein you state in part as follows:

> "Will you please advise me what is the status with respect to civil rights of a person with legal residence in Missouri, who has been convicted and sentenced in the United States District Court for committing a felony.
>
> "I am aware of the disqualifications in the case of a person who is sentenced in the state courts as a state felon, but would like definite information in the case of a Federal felon."

Section 12968 provides:

> "A sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the person so sentenced during the term thereof, and forfeits all public offices and trust, authority and power; and the person sentenced to such imprisonment for life shall thereafter be deemed civilly dead."

In the case of Presbury v. Hull, 34 Mo. 29, the defendant was convicted in the United States District Court for the District of Missouri of a felony and sentenced to the penitentiary. While serving his sentence his business partner, the respondent, agreed

with him to dissolve the partnership, and the defendant signed a bond protecting the respondent against any claims that might arise against their business. Upon a suit on the bond against Hull who acted as security, Hull set up the defense that the bond was void in that the law imparted notice to the respondent that Wolff, the defendant, was incapacitated to make a contract concerning the closing up of the partnership. The Court in its opinion said:

> "The transcript of the record of the conviction of Wolff of a crime, and judgment thereon, by the Circuit Court of the United States for the Missouri district were properly rejected.
>
> "The statute of Missouri, which enacts that a sentence of imprisonment in the penitentiary for a term of less than life, suspends all civil rights of the person so sentenced during the term thereof, applies only to sentences in the State courts."

In the case of Ward v. Morton, 294 Mo. 408, l. c. 417, the Court in its opinion said:

> "Plaintiff contends that the court erred in finding for defendant, for the reason that the judgment rendered in the tax suit of Pierce, Collector, against plaintiff and others, and the deed from plaintiff and others to Dorothy McLarty, are both void, because plaintiff was under sentence to the penitentiary at the time said judgment was rendered and said deed was made.
>
> "In support of the contention urged, plaintiff cites Section 2291, Revised Statutes 1919, which provides that 'a sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of the

> persons so sentenced during the term thereof,' etc. Plaintiff also cites Williams v. Shackleford, 97 Mo. 322, which holds that a mortgage executed by a convict while in the penitentiary is void; McLaughlin v. McLaughlin, 228 Mo. 635, which rules that in a divorce suit by a wife against her husband who is confined in the penitentiary, no valid decree can be entered investing the wife with title to the husband's real estate unless the husband is represented in court by a trustee; and Murphy v. Barron, 275 Mo. 282, which holds that a judgment for taxes obtained against an owner of land incarcerated in the penitentiary is void and a sale under execution does not affect the legal title.
>
> "In all of the cases cited by plaintiff the person whose property was affected was actually confined in the penitentiary at the time the judgment was rendered or the conveyance was executed. The underlying reason upon which each of the adjudications was predicated was that, while in custody, a convict is prevented from attending to his affairs and the statute has therefore provided a method by which his property may be protected and preserved. This method finds expression in Section 2297, Revised Statutes 1919, which provides for the appointment of a trustee to care for the estate of the convict while incarcerated. Subsequent sections define the powers and duties of the trustee."

From the foregoing we are of the opinion that such civil rights, as executing a mortgage and making a contract are not suspended in Missouri by reason of the fact that a man has been convicted and sentenced in the

United States District Court for committing a felony, but they are only suspended if he be convicted, sentenced and confined in the penitentiary by the State courts.

Article VIII, Section 2, page 122, of the Missouri Constitution provides in part as follows:

> "* * * *no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Section 10178, R. S. Mo. 1929, provides the qualification of voters and reads in part as follows:

> "* * * *no person* * * *while confined in any public prison, shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting.

Section 4471, R. S. Mo. 1929, defines the term "felony," thus:

> "The term 'felony,' when used in this or any other statute, shall be construed to mean any offense for which the offender, on conviction, shall be liable by law to be punished with death or imprisonment in the penitentiary, and no other."

Section 4472, R. S. Mo. 1929, defines the term "infamous crime" thus:

> "Whenever the term 'infamous crime' is used in this or any other statute, it shall be construed as including every offense for which the offender, on conviction or sentence, is declared to be disqualified or rendered incompetent to be a witness or juror, or to vote at any election or to hold any office of honor, profit or trust within this state."

Section 4473, R. S. Mo. 1929, defines the term "misdemeanor" thus:

> "The term 'misdemeanor,' as used in this or any other statute, shall be construed as including every offense punishable only by fine or imprisonment in a county jail, or both."

From the foregoing we are of the opinion that unless a man has been granted a full pardon from a conviction for the commission of a felony, his right of suffrage is suspended, and that the same applies if he be convicted in a Federal District Court, and further, if there be a further conviction, he is forever excluded from voting in Missouri.

Section 3928, R. S. Mo. 1929, provides that a conviction for perjury forfeits citizenship, including the right to serve as juror in any cause, both criminal and civil, and the right to hold any office of honor, profit or trust within this State.

Section 4035, R. S. Mo. 1929, provides that every person who shall be convicted of murder in either degree, or manslaughter in the first degree, rape, carnally knowing a woman above fourteen years, forcing a woman to marry, taking away a female under fourteen years of age, enticing a female to a house of ill fame, seduction, guardian defiling a ward, mayhem, assault with intent to kill, and poisoning, forfeits citizenship which includes the right to serve as a juror and hold office.

Section 4172, R. S. Mo. 1929, provides the above disqualifications for arson, burglary, robbery, larceny in any degree, and numerous other felonies.

Section 4212, R. S. Mo. 1929, provides for the loss of citizenship and for offenses affecting records, currency, instruments and securities.

Section 8787, R. S. Mo. 1929, deals with juries in counties having sixty thousand (60,000) nor more than two hundred thousand (200,000) inhabitants, and section 8803, R. S. Mo. 1929, deals with juries in counties containing two hundred thousand (200,000) nor more than four hundred thousand (400,000), and provides as follows:

> "None of the following persons shall be permitted to serve as jurors* * * *, any person who has been convicted of a felony* * * *."

Section 3947, R. S. Mo. 1929, provides for the disqualification of the right to hold office for offenses by persons in office or affecting public trust and rights and concerning elections, and section 4404 R. S. Mo. 1929, provides the same disqualification for various offenses.

From the foregoing we are of the opinion that if a man be convicted of felony or any of the crimes above set out, whether in a State or Federal Court, he forfeits his right to serve as juror in any cause, both criminal and civil, and the right to hold an office of honor, trust or profit within this State.

Section 4462, R. S. Mo. 1929, sets out the effect of conviction in another state and reads as follows:

> "Every person who shall have been convicted in any of the United States, or in any district or territory thereof, or in a foreign countyy, of an offense which, if committed in this state, would be

> punishable by the laws of this state by imprisonment in the penitentiary, shall, upon conviction for any subsequent offense, within this state, be subject to the punishment herein prescribed upon subsequent convictions, in the same manner and to the same extent as if such first conviction had taken place in a court in this state."

The above provisions recognize a conviction in any of the United States or in any district or territory thereof, or in a foreign country of an offense which if committed in this State would be punishable by the laws of this State by a punishment in the penitentiary. Although the above conviction relates only to those offenses which would be punishable by the laws of this State by punishment in the penitentiary, how much more reason is there to give effect to a conviction for a felony in a United States District Court. It is true that the District Courts might declare that the commission of a certain act by statutes constitutes a felony and the State might not have a provision coverihg punishment of such offense, yet if a man loses his citizenship for a federal offense, it cannot be said that he retains it as to the State merely because the State has failed to consititute its action an offense punsihable by imprisonment.

We are, therefore, of the opinion that with respect to the civil rights of a person with legal residence in Missouri, who has been convicted and sentenced in the United States Court for committing a felony, they are the same as that of a person convicted in the State Courts, except as to such civil rights as executing a mortgage and making a contract which are not suspended in Missouri by reason of the fact that a man has been convicted and sentenced in the United States District Court for committing a felony.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

ROY McKITTRICK
Attorney General.

WOS.MW.H

COUNTY BUDGET ACT: Cost of administering Federal relief on part of county may be classified as Contingent and Incidental expenses or expense of paupers not otherwise classified and paid out of Class 5.

March 16, 1935

FILED
79

Hon. Casey Rose,
Prosecuting Attorney,
Unionville, Missouri.

Dear Mr. Rose:

Some time ago this department received a request from you for an opinion regarding the County Budget Act, as follows:

> "In a number of counties in this state I am advised that the counties are paying a part of the cost of administering federal relief agencies as a part of the cost of relieving poor persons.
>
> The county court here has requested me to write and ask you what classification this expense should come under in the county budget."

The two sections of the Act, Laws of Mo. 1933, p. 341 relating to paupers which we think are broad enough to include relief are Class 1, which is as follows:

> "The county court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes",

and Class 5 (Laws of Mo. 1933, p. 342), which is as follows:

> "The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise

> classified. No payment shall be allowed from the funds in this class for any personal service (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

It is obvious that this fund could not be placed in Class 1, as that class deals solely with insane pauper patients in state hospitals. Class 5 contains this sentence: "From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified", which would include the relief you mention.

Class 4 of the County Budget Act (Laws of Mo. 1933, p. 341-342) provides:

> "The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under Class six."

We quote the above class for the reason that you refer, we assume, to the cost of administering Federal relief agencies, which would include salaries, wages and office expense of those administering the relief, and said Class 4 is the only class that has any reference to salaries of county officers. Those administering Federal relief could not be paid out of the funds in that class, because those administering Federal relief are not county officers as contemplated by the Budget Act.

CONCLUSION

It is the opinion of this department that the cost of administering Federal relief on the part of the county could be classified as Contingent and Emergency or Incidental Expense, as set forth in Class 5, as well as indirect expense of paupers not

otherwise classified. Of course, any funds which remain or come into Class 6 may be used for the cost of administering Federal relief, as Class 6 contains this provision: "After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

BLIND PERSONS: It is a misdemeanor to cause a blind pensioner to unwillingly part with pension funds.

July 11, 1935. 7-13

FILED 79

Mrs. Mary E. Ryder
Executive Director
Missouri Commission for the Blind
4342 McPherson Avenue
St. Louis, Missouri

Dear Mrs. Ryder:

This is to acknowledge your letter dated July 10, 1935, concerning the coercion of blind pensioners into parting with their pensions by relief agencies. Your letter is lengthy and we shall not quote it in its entirety. However, we shall refer to it from time to time.

You state:

> "* * * the unfortunate recipient of the pension, when to comply with the regulations of relief agencies the pensioner is actually forced to falsify to the statement that the pensioner has the free and exclusive use of the pension, when in reality it is diverted to the needs of the entire family, or some other relative or friend with whom the pensioner lives."

And you desire to know if such violates the letter as well as the spirit of the statutes concerning the giving of a pension to a blind person, particularly, Article 1 of Chapter 51, R. S. Mo. 1929.

On March 19, 1935, an opinion was rendered by this Department to Miss Lucile Bruner, Assistant Social Director of Missouri Relief and Reconstruction Commission, wherein we detailed the purpose of a pension to a blind person and under

what circumstances the blind persons would be liable for the support of other persons. In said opinion we said:

> "It is our opinion, (1) that the blind pension is a gratuity not founded on contract and is to be used in the supplying of the daily wants of the pensioner, (2) that if the pensioner has a lawful wife, then he is under liability to her support insofar as he is able, (3) that if the pensioner has minor dependent children, then he is liable for their support to the extent only as far as he is able, (4) that the blind pension fund, then, would only be considered a resource in the case where a blind pensioner had the duty and obligation imposed upon him to support other people, and this duty and obligation only goes to the extent of his ability, in other words, so that he does not deprive himself and place himself on the charity or alms roll."

You have a copy of this opinion, so we will not attach it hereto.

In view of the above opinion, we cannot understand why relief agencies are coercing and forcing blind pensioners to part with and share the pension received from the State with persons where there is no legal or moral duty or obligation placed upon the pensioner to support or contribute to the support of such persons. In fact, the statutes fully protect a blind pensioner in regard to such coercion or taking from him any part of the pension.

We invite your attention to Section 8902, R. S. Mo. 1929, which in part provides as follows:

> "It shall be unlawful for any person, organization, society, group or association to request, require, coerce,

> solicit or induce any pensioner under this article to contribute, donate, give, allot or part with, unwillingly, for any purpose whatever, any moneys received as a pension under this article; * * *."

Your attention is also invited to Section 8899, R. S. Mo. 1929, which in part provides as follows:

> "The state auditor shall supply to all persons appearing upon the blind pension roll, suitable blank forms for quarterly requisitions for pensions containing, among other things, a statement that requisitioner is the recipient of the pension personally and that he or she has the free and full use of such pension, and that the same is devoted exclusively to his or her needs, * * * *."

We understand that the pensioner makes affidavit to said requisition for the blind pension, in which said requisitioner swears that the pension is devoted exclusively to his or her needs.

Referring to Section 8902, supra, the following is also found:

> "* * *; and any person, agent or representative of such organization, society, group or association who commits any such act or acts shall be guilty of a misdemeanor; and it shall be the duty of the commission for the blind to investigate all such cases coming to its attention and report same to the proper authorities."

It is thus seen that the statutes place a duty upon the Commission for the Blind to see to it that no person, agent or representative of any organization, society, group or association shall request, require, coerce, solicit or induce any pensioner to constribute, donate, give, allot or part with, unwillingly, for any purpose whatever, any moneys received as a pension. You are simply doing your duty when you cause investigations to be made whenever the pensioner is taken advantage of and the moneys received by virtue of the statute are taken from him unwillingly. If the facts show that any person is causing the pensioner to unwillingly part with any of the moneys received by virtue of the pension, then said person would be guilty of a misdemeanor and said facts should be reported to the prosecuting attorney, and to him pointed out said violation of the statute so that said practice will be stopped and the guilty parties be made to account in a court of justice for any wrong doing.

You state, and desire to know if "a father who was actually forced to take care of a married daughter and her child, relief being denied them on the basis of his income, that he was coerced into parting with that income so badly needed for himself?", is a violation of Section 8902, supra. In our opinion it is a violation.

Our answer to your question, namely:

> "Do you not believe that an aged sister who was the recipient of the pension and who was forced to meet the needs of her aged, sighted sister with whom she lived, that the pension has again been actually diverted and that the notarized statement that it is for her sole use is necessarily false?",

is in the affirmative.

In answer to your question:

> "Is it not in violation of Section 8902 to ask a pensioner to actually turn over the check to relief agencies so that they might budget same?",

we also answer in the affirmative.

In answer to your question:

> "Are blind pensioners, boarding in families that are kind enough to board the blind pensioner giving them care and attention in addition to room and board for low sums of $3.00 and $4.00 per week, to be asked to pay the rent of the house in addition to help meet this family's other expenses?",

would also, in our opinion, be answered in the affirmative. That is, that the blind pensioner should not be compelled to unwillingly pay rent of the house in which he is boarding.

We agree with you that if the facts exist, as stated by you, namely:

> "These are conditions that are constantly occurring, bringing misery and want to the poor blind pensioners who might otherwise live in fair, decent comforts with the amount allowed for their sole use and according to their sworn statement to be used for their needs.",

that the Commission for the Blind should see to it that said pensioner's allowance be not diverted or taken from him, but said allowance should be used solely for the pensioner's support and/or the support of persons dependent upon him insofar as he is able to support said persons, so that he does not deprive himself and place himself on the charity or alms roll.

You request that we notify all relief agencies to desist in inducing the pensioners to unwillingly give or part with their pension money, which we refuse to do, but if you desire you may have copies made of this opinion and use it in any manner you wish.

We again reiterate that this Department represents the Missouri Commission for the Blind and if you need any aid or assistance in enforcing the provisions of Section 8902, supra, against any person violating said statute, we stand ready to cooperate with you in trying to stamp out the unwilling diversion of pension funds from deserving blind people.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

SHERIFFS: Sheriff must feed prisoners and County must reimburse him for feed up to 75¢ per day per prisoner in Putnam County.

October 10, 1935.

10-11

FILED
79

Honorable V. C. Rose, Jr.
Prosecuting Attorney
Putnam County
Unionville, Missouri

Dear Sir:

We acknowledge your request for an opinion dated September 11, 1935, which reads as follows:

> "Until last fall a deputy sheriff of this county had been feeding and seeing after prisoners confined in the county jail. At or about that time the county court reduced the compensation for food from a higher figure to sixty cents per day. As I understand the facts the deputy Sheriff and Sheriff of the county refused to perform such service further, but irrespective of that feature, it seams the county court made a verbal agreement with a restuarant keeper here to furnish the board and he and his wife have been in the habit of so doing.
>
> "I have no personal interest in the matter one way or the other, but last night the restuarant keeper and "jailer" lost his keys in the jail which were discovered by an inmate and two of the prisoners let themselves out.
>
> "It seems to me that the foregoing business is being conducted too loosely. I wish to do something to tighten it up.
>
> "My opinion is that it is the duty of the Sheriff of a county of this size, (11,502 population), to either person-

ally keep charge of the jail or in a legal manner appoint a suitable jailer to do so. That he cannot relinquish this duty even though he may feel that the compensation awarded for board of prisoners in inadequate. I base my conclusion on sections 8526 and 8527, R. S. Mo. 1929 and on the case of State ex rel Price 246 S. W. 572, as well as on a reading of sections 11794 and 11795 R. S. Mo. 1929.

"I have in mind requesting the Sheriff to personally look after the jail and feeding of prisoners or to appoint some suitable person to do so who is responsible to him. Do you agree with me on the law of the matter?"

Section 11794 R. S. Mo. 1929, provides:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

Section 11795 R. S. Mo. 1929 provides:

"It shall be the duty of the county courts of each county in this state at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of January next thereafter, and it shall be the duty of the clerk of the county court

to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court for the use of the said clerk and the judge and prosecuting attorney in making and certifying fee bills."

Section 12115 R. S. Mo. 1929 provides:

"Hereafter when any person or persons shall be confined in the common jail for any criminal offense, the sheriff or jailer may make out and present to the county court at its regular session, a bill for all board due him for the board of such prisoners; such bill shall specify the offense with which each prisoner is charged, and shall be audited and allowed by such county court, and the clerk thereof directed to draw a warrant for the aggregate amount thereof. When the final determination of any criminal prosecution shall be such as to render the state liable for costs under existing laws, it shall be the duty of such county clerk to certify to the clerk of the circuit or criminal court in which the case was determined, the amount due the county for boarding such prisoners; it shall then be the duty of the clerk of the circuit or criminal court in which the case was determined, to include in the bill of costs against the state, all fees for board of prisoners theretofore paid by the county, setting forth the fact that such fees are due the county, and the fees for board which have accrued since the last payment by the county, shall be stated separately as being due the sheriff or jailer. Such fees due the county when collected by the clerk of the circuit or criminal court shall be immediately paid into the county treasury."

It will be presumed that Putnam County maintains a jail as provided in Section 8524 R. S. Mo. 1929 which reads as follows:

> "There shall be kept and maintained, in good and sufficient condition and repair, a common jail in each county within this state, to be located at the permanent seat of justice for such county."

Section 8526 R. S. Mo. 1929 reads as follows:

> "The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

Section 8527 R.S. Mo. 1929 reads as follows:

> "It shall be the duty of the sheriff and jailer to receive, from constables and other officers, all persons who shall be apprehended by such constables or other officers, for offenses against this state, or who shall be committed to such jail by any competent authority; and if any sheriff or jailer shall refuse to receive any such person or persons, he shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in the discretion of the court."

Section 8533 R. S. Mo. 1929 reads as follows:

> "Whenever any person, committed to jail upon any criminal process, under any law of this state, shall declare, on oath, that he is unable to buy or procure necessary food, the sheriff

> or jailer shall provide such prisoner with food for which he shall be allowed a reasonable compensation, to be fixed by law; and if, from the inclemency of the season, the sickness of the prisoner or other cause, the sheriff shall be of the opinion that fuel, additional clothes or bedding, medicine and medical attention are necessary for such prisoner, he shall furnish the same, for which he shall be allowed a reasonable compensation."

Section 8535 R.S. Mo. 1929, reads as follows:

> "Every sheriff and jailer, and other person or persons whatsoever, to whose custody or keeping any person or persons shall be committed by virtue of any writ or process, or for any criminal offense, except on conviction for felony, shall permit and suffer him, her or them, so committed, at his, her or their will and pleasure, to send for and have any necessary drink or food, from what place and whom they please, and, also, to have and use such bedding, linen and other things as he, she or they shall think fit, without detaining the same, or any part thereof, or enforcing or requiring him, her or them to pay for the having or using thereof, or putting any manner of restraint or difficulty upon him, her or them in using thereof or relating thereto."

In the case of State ex rel. v. Price 296 Mo. 130; 246 S.W. 572, l. c. 574, the Court had under consideration the above Statutes and said:

> "In this capacity it became his duty to see that the prisoners confined there were provided with food, bedding, and medical attention.

> Section 11003 makes it the duty of the county court at the November term of each year to fix the fee for furnishing each prisoner with board for each day during the following calendar year. During the entire term of the defendant Price, the amount of this daily charge was limited to 50 cents, and the sheriff or jailer was forbidden to make any contract for the boarding of prisoners for a less sum."

The above case proceeded further and held that money received by a sheriff for the expense of boarding prisoners is not strictly a sheriff's fee, and is intended only to indemnify the sheriff for money spent in feeding prisoners, in spite of the fact that Section 11795, supra, terms this allowance of board money as a fee.

In the case of Lefman v. Schuler 317 Mo. 671; 296 S. W. 808, l. c. 814, the Supreme Court held that in Missourithe Sheriff is ex officio keeper of the jail except in St. Louis where the Legislature has ordained otherwise, and in that case the Court said:

> "In this state and city all process and commitments affecting the custody of state prisoners, both before and after conviction, are directed to the sheriff, and he in the first instance takes charge of all such prisoners and thereafter places them in the said city jail. He is likewise required to have such prisoners before the court at the time of arraignment, trial, and sentence. It would therefore appear that he would be the logical person to have charge of the city jail, but be this as it may, it is quite evident that the lawmaking power (namely, General Assembly of Missouri, the voters of the city and county of St. Louis in adopting the scheme of separation by virtue of

> section 20, art. 9, Constitution of 1875, and the municipal assembly of the city of St. Louis) has ordained otherwise. * * * *.
>
> "We agreed and still agree with Judge Rosskopf that the sheriff is the logical person to have charge of the jail in the city of St. Louis, in which are confined prisoners confided to his custody by the circuit court. But the question of policy is one for legislative action and not for this court. That argument cannot be considered by us in determining the rights of the sheriff under existing expressions of the legislative will."

In the case of State ex rel. v. Trotter, 142 Tenn. 160; 218 S. W. 230, under statutes allowing the jailer to receive 50¢ per day for keeping and feeding prisoners in his jail, and providing: "That the sum of 50¢ shall only be allowed after the County Court Committee shall report that that sum shall be so paid, it being the discretion of the County Court as to whether the sum of 50¢ shall be allowed", where the County has changed the new elected sheriff's allowance after he was inducted into office, said Court said at l. c. 232 when they gave the sheriff the full statutory allowance over the protest of the County Judges:

> "We are of the opinion that it is contemplated by the act that the prisoner must be fed three meals by the sheriff or jailer before he is entitled to receive the full sum of 50 cents. If he furnishes less than three meals, he is only entitled to receive pay for the meals actually furnished the prisoner on the basis of 50 cents for three meals.

Again at l. c. 233 the same Court said:

> "* * * *in the cause under consideration, that this is the interpretation given these statutes by the officials

of every other county in the state, and was the construction placed upon said statutes by the officials of Knox county prior to the election and induction into office of the relator."

CONCLUSION.

The Statutes say that the sheriff may appoint a jailer, but the word "may", as used in the Statutes places no mandatory duty on the Sheriff to appoint a jailer. Where the sheriff does not appoint a jailer in Putnam County, the Sheriff is ex officio jailer, and as jailer he is keeper of the jail in the light of Lefman v. Schuler, supra. No other construction can be placed on Sections 8524, 8526, 8527, 8533 and 8535, supra.

As keeper of the jail it is the duty of the Sheriff of Putnam County to supply the necessities of life to the prisoners, such as wholesome food and water, and his right to be reimbursed is wholly derived from and dependent on the Statutes.

A prisoner committed to the County jail for trial or for examination, or upon conviction for a public offense, must be actually confined in the jail until he is legally discharged. It follows that the Sheriff is compelled by law to physically supply such prisoners with the necessary food and board in the jail. This would be true if the Statutes were silent as to who is to pay the bill for their board, but the Missouri Statutes 11794 and 11795, supra, indicate that the County shall pay the bill, within limitations. These Statutes say that for furnishing each prisoner with board that the Sheriff or ex officio jailer be allowed not to exceed 75¢ for each day, and that the County Court make an annual order of record fixing the amount for furnishing each prisoner with board in an amount as circumstances might indicate as reasonable. If 60¢ is an amount in Putnam which the courts will say the circumstances indicate as reasonable, then 60¢ per day is legal and any more is illegal.

These Statutes above quoted construed together do not mean that a County Court can fix a sheriff's allowance for board at an arbitrarily small figure below 75¢ per day, thereby indirectly detering and hampering the Sheriff in his official duty to keep the jail and give the prisoner proper board, including such food and water reasonably fit for human consumption, nor can the figure be reasonably fixed so low as to cause riot, mutiny or escape among prisoners in order to be on the outside where the pangs of hunger can be stilled. It is common knowledge that most prison riots are caused by poor feeding.

The 50¢ limit per day was increased by the Legislature of 1917 to the 75¢ limit per day because the Legislature recognized that the prisoner in many counties could not be fed on 50¢ per day. The County Treasury, under the law, stands to be reimbursed for money allowed to feed prisoners in State cases. In St. Louis where hundreds of prisoners are fed daily the statutory limit is 30¢ per day, but said prisoners are fed in mass and by reason of volume of meals the per diem cost is recognized to be less. The fewer the prisoners in any jail the cost per day for board is bound to be greater. That is what the Legislature had in mind when they changed the rate from 50¢ to 75¢ per day. The law was progressing with the times as Legislators wanted to offer no hindrance to sheriffs in performing their statutory duties in keeping jail, especially so when in the long run the State and not the County pays the bill. By these Statutes the County Courts are not charged with the duty of running the County jail or feeding the prisoners in jail. When they make their order of record, and the same is reasonable, they have exhausted their official prerogative. They may personally obligate themselves beyond the amount which they have allowed the Sheriff for furnishing each prisoner with board, but this personal liability is not a public State or County obligation, but is merely the price they should pay for trying to run the Sheriff's business. We cannot find any statutory authority for the County Courts rights to contract with a restaurant keeper to attend to the feeding of prisoners incarcerated in the County jail. It is true, the sheriff does not have the right to pledge the credit of the County to feed prisoners.

In fixing the per diem allowed to the Sheriff for feeding prisoners, the Court should not establish an arbitrary figure within the 75¢ limit. As in the Tennessee case quoted, the County Court may get some indication of

what a reasonable figure would be by determining the figure allowed to predecessors. The Court may get some idea of what figure is reasonable by considering the general price of food stuffs, as the Supreme Court of Missouri suggests in the Price case. The number of escapes and riots might indicate to the Court that they are not allowing enough for food.

Whether or not the 60¢ per diem allowed the Sheriff for feeding prisoners in Putnam County is so arbitrary and unreasonable as to be an abuse of power is a matter which calls for facts not at our disposal, which only a jury could pass upon in any event. We merely call your attention to the law of such cases.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

CONVICTS: Sentence to Boonville is not a bar to commitment to intermediate reformatory.

February 14, 1935. 2-16

FILED 80

Honnorable J. M. Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

Your request of February 8, 1935, for an opinion is as follows:

> "On October 30, 1934, Dallas Arnell was received from Pettis County to serve 2 years at the Intermediate Reformatory at Algoa, from August 27, 1934, for the crime of Larceny of Automobile. His papers appear regular and the statement of fact of the Prosecuting Attorney accompanying his commitment recites that aside from minor offenses he was convicted of Possession of Stolen Property and sentenced to the Reformatory at Boonville, to serve two (2) years from December 7, 1929,
>
> "We frequently have a condition of this kind and considerable confusion has been brought about in the minds of officials of this prison as well as officials of the Intermediate Reformatory concerning the status of offenders of this kind. Most of the officials have been of the opinion that convicts of this class are not eligible to be committed to the Intermediate Reformatory on account of the provisions of Section 8474 of the Revised Statutes of 1929. Some are of the opinion that the former sentence to Boonville is not a bar to his admission to the Intermediate Reformatory.

"A written opinion from your office would go far to settle in the minds of the officials the uncertainty of their acts, and I would appreciate an opinion from you."

Section 8474 R. S. Mo. 1929, provides as follows:

"If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term prescribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials in charge of said reformatory to receive all such convicted persons."

Section 8475 R. S. Mo. 1929, provides under paragraph (a) as follows:

"a. As soon as the construction of the intermediate reformatory is to be undertaken, or as soon as its agricultural or industrial activities require laborers, the commissioners of the department of penal institutions shall have power, with the consent of the governor to transfer to the tract of land upon which the intermediate reformatory is to be located any or all inmates of the Missouri reformatory at Boonville

> and of the Missouri penitentiary, who at the time of their last conviction were between the ages of seventeen (17) and twenty-five (25) years and who are serving their first sentence for conviction of a felony. The number of convicts thus to be transferred at any time is to be limited to the number that can be properly housed, guarded and cared for and that can be employed efficiently, and economically in the construction and operation or maintenance of the intermediate reformatory. In so far as practicable the construction of the intermediate reformatory shall be carried on by means of the labor of such offenders eligible to admission to it. In making such transfers as are herein authorized preference shall be given to those inmates of the Missouri reformatory at Boonville and who are eligible to transfer to the intermediate reformatory. In making the transfer of inmates of the Missouri penitentiary who are eligible to transfer to the intermediate reformatory preference shall be given to the younger ones and those who for good reason are most worthy or in need of such a transfer."

Section 8350, Laws of Missouri 1933, page 331, provide as follows:

> "Any person under the age of seventeen years, convicted of a crime, the punishment of which, under the statutes of this state, when committed by persons over the age of seventeen years, is imprisonment in the penitentiary for a term of not less than ten years, may be punished in the same manner and to the same extent as provided by the statutes for the

punishment of persons over the age of seventeen, or, if a boy, he may be imprisoned in the penitentiary or committed to the Missouri Training School for Boys; and any boy under the age of seventeen years convicted of any other felony, either upon plea of guilty or upon trial, may be committed to the Missouri Training School for Boys. Any boy under the age of seventeen years convicted of a misdemeanor in any court of record, either upon the plea of guilty or upon trial, may, in the discretion of the court, be committed to the Missouri Training School for Boys. No boy under seventeen years of age convicted of a felony shall hereafter be committed to the county jail as a punishment for such offense. Any court having a criminal jurisdiction, in which any male person, between seventeen and twenty-five years of age, shall, upon a plea of guilty, or by the verdict of a jury, be convicted of a felony, and his punishment assessed at imprisonment in the penitentiary, may, in its discretion, at the same term at which such plea of guilty is entered or conviction occurs, and before such person is transferred to the penitentiary, commute the punishment to the confinement of the Missouri intermediate reformatory for such term as the court may deem proper, but not for a longer time than that fixed in the sentence to the penitentiary; but such court shall first ascertain and determine that said conviction or plea of guilty is the first conviction or plea of guilty of such person for a felony, and that the previous conduct, habits and associations of the person so convicted or pleading guilty warrant such commutation."

Section 8351, Laws of Missouri 1933, page 332, provide as follows:

> "The governor shall have power to commute the punishment of any male person under twenty-five years of age who may heretofore have been, or may hereafter be sentenced to the penitentiary, whom he may deem suitable to be sent to the Missouri intermediate reformatory, to commitment in said intermediate reformatory for such term as he may think proper, not exceeding the time for which said person may have been or may be sentenced to the penitentiary. If any male person between the ages of seventeen and twenty-five years who shall have been sentenced to confinement in the penitentiary, upon his first conviction or plea of guilty of a felony, and whose punishment shall have been thereafter commuted by the governor, or by any court of criminal jurisdiction, as heretofore provided in this chapter, to confinement in the intermediate reformatory, shall be found to be incorrigible, and not amenable to reformation by the opportunities and advantages afforded him in such intermediate reformatory, the governor may annul, cancel and revoke the commutation granted such person and order and direct the said board to transfer such person to the state penitentiary where the said board shall confine him until he shall have served the remainder of the sentence, in accordance with the terms of the original judgment against him, which had not been served upon the date of the commutation of said sentence to confinement in such intermediate reformatory."

There is nothing in Section 8474 that would prevent the court, in the case suggested in your letter, from sentencing said convict to the intermediate reformatory for Larceny of an Automobile. The fact that he had been previously convicted of possession of stolen property and sentenced to the reformatory at Boonville to serve two years does not mean necessarily that his conviction for larceny of an automobile was otherwise than a conviction of a felony for the first time."

Section 8475 gives the Governor power to transfer from the penitentiary to the intermediate reformatory, boys between the proper ages "who are serving their first sentence for a conviction of a felony." In such transfer the Legislature had in mind that Algoa be for benefit of first offenders and also for those boys who have been previously convicted of a felony but never incarcerated for punishment on said previous conviction.

Section 8350, supra, provides that trial courts can commit to the intermediate reformatory boys between seventeen and twenty-five years of age, provided the court first ascertain that the conviction is the first conviction of said person for a felony. In spite of all facts of your letter it must be presumed by you as warden that said court performed its duty and that the commitment to the intermediate reformatory was issued only after the court determined that the conviction is the first conviction of said person for a felony. The court, no doubt, determined that the prior conviction and sentence to Boonville was not for a felony.

Section 8351, supra, provides for commutment of sentences to the penitentiary; to sentences to the intermediate reformatory; and the governor's right to commute need not be measured by any other yard stick than age limitations. With a Governor's commutation under Section 8351, the Governor does not have to consider former convictions of felonies as conditions precedent to his power to commute to a sentence to intermediate reformatory.

CONCLUSION.

From the facts submitted in your letter, it is the opinion of this office that Dallas Arnell is

properly committed to the intermediate reformatory for the crime of Larceny of an Automobile, and that the statement of the prosecuting attorney as to a prior conviction and sentence to Boonville for two years for the crime of possession of stolen property does not in any way nullify the commitment of the trial court.

It was intended by the Legislature that Algoa be a penal institution for selected convicts who may be susceptible to reformation. Through the whole act it is evident that said reformatory was intended for others besides first offenders, where the facts and circumstances measured by the trial judge or the governor, in the exercise of discretion, wish to disregard a prior conviction. From the facts stated in your letter it is not for us to say that the trial court abused his discretion. Considering the purpose for which the intermediate reformatory was founded it may well be said that the trial court exercised good discretion when he sentenced Dallas Arnell to the intermediate reformatory.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK.
Attorney General.

WOS:H

CONVITS--WARDEN: Imprisonment shall never be computed from a date in the judgment which is prior to the date of sentence.

February 20, 1935.



Honorable J. M.Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

Your request of February 8, 1935, for an opinion is as follows:

"On November 23, 1934, one Robert Lindsey, our register #45636, was sentenced by the Circuit Court of Pemiscot County, Mo., to serve two (2) years in this penitentiary from that county for the crime of Attempted Robbery, upon his plea of guilty to said charge on the aforementioned date. Accordingly a certified copy of the said sentence and judgment of said circuit court was issued by the Circuit Clerk of Pemiscot County and was placed in the hands of the Sheriff of said county. With this sentence and judgment in his possession, the said Sheriff delivered the said Lindsey to this prison on November 29, 1934. This proceeding was had at the November 1934 Term of said Circuit Court.

"Later, on December 31, 1934, the Judge of the said Pemiscot County Circuit Court, issued a duly certified copy of his order allowing the said Lindsey 241 days of time spent in the New Madrid and Pemiscot County jails prior to the date of sentence, the purpose being to apply this

time on the sentence previously imposed by the said Court. This order was also made at the said November 1934 Term, but no mention of the order was made in the original sentence and judgment, and the order for the allowance was not received by this prison until after the prisoner had already been delivered and his status fixed.

"It is the contention of this office that the Board is not bound to observe the requirements of the said order, and I would respectfully ask that you give a written opinion as to the validity of the order for allowance of the 241 days."

In State v. Gartrell, 71 S. W. 1045, 171 Mo. 489, l. c. 504, our Supreme Court said:

"It is the settled law of this State that during the whole of the term in which any judicial act is done, the proceedings are considered in fieri, and this applies even to adjourned sessions of the same term, and the record remains, so to speak, in the breast of the judge or judges of the court, and hence is subject to amendment or alteration as he or they may direct, but after the lapse of the term, or its final adjournment, the judge has no power to change the record further than by nunc pro tunc entries to make the record speak the exact truth of that which actually did occur during the term, and then only when there is sufficient record or minutes of the judge or clerk to authorize such amendment, as it has been repeatedly ruled by the court that such corrections can not be made 'from outside evidence or from facts existing alone in the breast of the judge, after the end of the term at which the final judgment was rendered' ".

There is no doubt but what the trial court could make an effective order changing the record of a judgment and sentence rendered during term time if the prisoner be not in custody of the warden, for this court said in Ex parte Simpson, 300 S. W. 491, l. c. 493:

> "The right of the circuit court at the same term to set aside its judgment of January 8, 1936, and to enter a new judgment, before petitioner was taken to the penitentiary, is not and could not well be questioned."

A judgment in pro tunc may be made in and after term time and in the absence of defendant.

In State v. Primm, 61 Mo. 166, l. c. 170 the Supreme Court said:

> "There is nothing in the argument that the judgment was written up after proceedings in the court, and during the absence of the accused. The formal judgments are usually transcribed by the clerks afterwards, and are taken from the minutes or docket entries made by the officers at the time; and if they are truly stated, they are not objectionable on that account."

In the case of Ex parte Meyers, 44 Mo. 279, l. c. 283, the Supreme Court said:

> "As a general rule, the day on which a prisoner is sentenced will be reckoned as a part of his term of imprisonment;"

The above case is authority for computing punishment from day of sentence, but it does not touch on the problem of allowing jail time served before the date of sentence.

In the case of Ex parte Thornberry, 254 S. W. 1087, l. c. 1090; 300 Mo. 661, the Supreme Court said:

> "* * * *after sentence has been pronounced, the court has no power to indefinitely stay the execution of same, either in whole or in part, and any order made to that effect is void."

In R. C. L, page 248, Section 252, we find the law stated thus:

> "The power to suspend sentence and the power to grant reprieves and pardons, as understood when the constitution was adopted, are totally distinct and different in their origin and nature. The former was always a part of the judicial power; the latter was always a part of the executive power. The framers of the federal and state constitutions were perfectly familiar with the principles governing the power to grant pardons, and it was conferred by these instruments on the executive with full knowledge of the law on the subject, and the words of the constitution were used to express the authority formerly exercised by the English crown, or by its representatives in the colonies. As this power was understood, it did not comprehend any part of the judicial functions to suspend sentence, and it was never intended that the authority to grant reprieves and pardons should abrogate, or in any degree restrict, the exercise of that power in regard to their own judgments, that criminal courts had so long maintained. The two powers, so distinct and different in their nature and character, were still left separate and distinct, the one to be exercised by the executive, and

the other by the judicial department. The principal reason for the rule denying the power of a court to suspend a sentence indefinitely, as for the rule denying a court power to stay the execution of a sentence, is that to permit it to be done would be to allow the judicial department to exercise the power of commuting or pardoning which belongs to the executive branch of the government. This is on the theory that when a defendant is found guilty the duty of the court is to impose sentence, and that if, for considerations which can appeal only to the pardoning power, the court is permitted to suspend indefinitely the imposing of sentence the result or effect is the same as a pardon by the executive."

16 Corpus Juris at page 1372 states the law thus:

"The time imprisonment is to commence ordinarily is no part of the sentence; and where the judgment fixes the date that imprisonment shall begin, it should be construed to mean that the period of imprisonment shall begin from the date named unless the execution of the sentence is stayed for the time being in some of the ways provided by law, in which event it ought to be computed from the time the prisoner is actually incarcerated.

"According to the statutes in some jurisdictions the term of imprisonment commences on the day that sentence is pronounced.

"In the absence of a statute the time which defendant has spent in jail awaiting trial, or the time

> which he spends after conviction and before sentence awaiting a dedision on his plea in bar to another indictment forms no part of the term for which he is sentenced. However, the time defendant suffers imprisonment while awaiting trial is, under some statutes, credited upon the period fixed in the sentence.

Article V, Section 8, Missouri Constitution provides in part:

> "The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.* * * *"

In the case of State v. Sloss, 25 Mo. 291, l. c. 293, the court said:

> "All the departments of our government are confined in their operations. They have prescribed limits, which they cannot transcend. The union of the legislative, executive and judicial functions of government in the same body, as shown by experience, had been productive of such injustice, cruelty and oppression that the framers of our constitution, as a safeguard against those evils, ordained that the powers of government should be divided into three distinct departments, and that no person charged with the exercise of powers properly belonging to one of these departments should exercise any powers properly belonging to either of the others, except in the instances expressly directed or per-

mitted by the constitution.

"Although questions have sometimes arisen whether a power properly belonged to one department of government or another, yet there is no contrariety of opinion as to the department of the government to which the power of pardoning offenses properly appertains. All unite in pronouncing it an executive function. So the framers of our constitution thought, and accordingly vested the power of pardoning in the chief executive officer of the state.

"There can be no question as to the nature of the act under consideration. It is as effectually a pardon as though it were one in form under the great seal of our state."

CONCLUSION.

Under the facts presented in your letter, Missouri has no statutes providing that the court may or shall state in the judgment or sentence the date when imprisonment must start or may be computed from. Missouri has such statutes applicable to other facts, but such statutes are not pertinent to the facts presented for this opinion.

There seems to be no question but what the first judgment and sentence rendered be sufficient in form and substance upon which to support incarceration in the penitentiary and by the terms of same, incarceration would date from the day of sentence, unless perchance this last order is to be given effect.

What you want to know is how does this subsequent order, which purports to start the date that imprisonment is to be computed from a date prior to the date of sentence, in fact at a date prior to the date of sentence starting on the date of original incarceration in jail where defendant was awaiting his day in court, effect the original judgment and sentence of the court?

The new order in short is an attempt on the part of the trial court, after judgment and sentence, to allow jail time by an order which he expects the warden to enforce as a stay of execution is enforced. In short it is a judicial reprieve if it is to be given any force at all.

By its operation it is an infringment on the exclusive executive power of the governmor to issue an edict of pardon, as allowable under the Missouri Constitution, and would have exeeeded the courts jurisdiction if given as a part of the original judgment and sentence.

The subsequent court order is not a temporary suspension of sentence allowable to enable an appeal to be perfected or to allow for time to apply for a pardon or parole or any other allowable relief against immediate enforcement of a sentence, but was a permanent suspension of execution based on considerations extraneous to the legality of the conviction and in excess of the power of the trial court in enforcing the sentence.

It is the opinion of this office that said order was rendered beyond the jurisdiction of the trial court and is unconstitutional and void and of no legal force and effect. Such an order attached to this original judgment and sentence would have been void, and the fact that it came during the same term of court as the original judgment and sentence does not add to its validity. Such an order would be void if made by the trial court nunc pro tunc at a subsequent term.

The time when imprisonment should be computed from is no part of the judgment and sentence in the case under consideration, and should not be considered by the warden when booking the prisoner.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

PUBLIC OFFICERS - Same person cannot hold position of road overseer and committeeman under corn-hog program.

#27

April 16, 1935.

FILED
80

Hon. William H. Sapp,
Prosecuting Attorney,
Boone County,
Columbia, Missouri.

Dear Sir:

We are in receipt of your letter of March 16, wherein you make the following inquiry, and request an opinion from this office regarding same:

> "A few days ago the county court appointed a gentlemen in this county as road overseer of a certain district. This same man had been elected by his township as one of the committeemen to handle the corn-hog program. You perhaps are familiar with the organization which takes care of and administers this program. I would like to have an opinion as to whether or not this man can hold both of these positions at the same time."

In an opinion recently rendered to the Honorable Walter Stillwell, Prosecuting Attorney of Marion County, Mo. this department ruled that a person appointed road overseer under Section 7870, R.S. Mo. 1929 was a public officer within the meaning of the law.

A commiteeman appointed to handle the corn-hog program is acting under the direction of the Federal government or a Federal agency; therefore, the office of road overseer constitutes a county public officer, while the office of committeeman to handle the corn-hog program would constitute a Federal appointment.

Several sections of the Constitution of Missouri have an indirect bearing on the question involved, among them being Section 12, Article IV, Section 18 Article IX, and Section 4 Article XIV. Section 12 deals with the question of members of the General Assembly holding other offices and therefore cannot be pertinent to our question. Section 18, Article IX relates to persons holding state offices and offices in a county, city or municipality, but pertains to counties and cities having a population of not more than 200,000 inhabitants and therefore constitutes no prohibition against a person holding the two offices now under discussion. Section 4, Article XIV is as follows:

> "No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

We know, as a matter of fact, that a road overseer receives certain compensation for his labor and that a committeeman receives certain compensation for handling the corn-hog program; therefore, both are offices of profit.

We are concerned primarily with the meaning of the words "hold any office of profit under this State". The meaning of the various expressions used in our Constitution, such as "officers under this state", "under a municipality thereof", "state officers", etc., are discussed in the case of State ex rel. v. Bus, 135 Mo., l.c. 335-336 in the following language:

> "Under this section all officers (except those under the United States) are divided into two classes, viz.: 'officers under the state' and officers 'under a municipality thereof.' The language 'officers under the state' would include justices of the peace, or they would not have been excepted. Officers of a county, though not named, would be included under the expression 'officers under the state.'
>
> We come now to the section in question. It expressly divides the officers into three classes, 'state officers', 'officers of any county', and 'officers of a municipality.' This section was quoted by Judge Sherwood as making plain the intention of the convention in the use of the expression 'state officer'

> in section 12, article 6, and as convincing that a sheriff was not a state officer within its meaning. The learned judge says: 'If there is any reliability in plain words, this language must set the point discussed at rest and 'make assurance double sure. ' State ex rel. v. Spencer, supra.
>
> When we find the constitution using in different connections the same words to designate certain officers, we ought to infer that they were used on every occasion in the same sense. If the expression 'state officers' as used in this section was intended to mean the same as 'officers under the state', as used in other sections, then it would include all officers (except municipal) from constable up to governor. What officers would then be included in the class 'officer of any county'? Can we say that the language is tautological, and should be rejected in order to construe the section as we think it should have been written? As written it has a clear meaning and effect should be given to the words used. Constitutions are supposed to be carefully prepared and effect should be given to every word if possible."

The meaning of the words "under this State" is determined by the Supreme Court of Arkansas in the case of Wood v. Miller, 242 S.W. 573, wherein the Court said (l.c. 575):

> "The words 'under this state', as used in the Constitution, mean under the laws of this state, or by virtue of or in conformity with the authority conferred by the state as sovereign. It embraces all offices created by the laws of the state as contradistinguished from other authority. Municipal offices are created by the statutes of the state, and are therefore civil offices 'under this state.' Our

conclusion is that appellee is ineligible to hold the office in controversy."

CONCLUSION

In view of the foregoing, it is the opinion of this department that to hold the office of road overseer and also of committeeman on the corn-hog program would be a violation of Section 4, Article XIV of the Constitution of the State of Missouri.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

DEAD BODIES: WARDEN: Prisoners who die in the Penitentiary should be turned over to Anatomical Board when they are to be buried at public expense.

May 7, 1935.

59

FILED
80

Honorable J. M. Sanders
Warden of Penitentiary
Jefferson City, Missouri

Dear Mr. Sanders:

This is to acknowledge your letter as follows:

"Under date of April 8th last, I received from the Hon. S. B. Hunter, Director State Penal Board, a letter written to him by M. D. Overholser, M. D., Secretary, Missouri State Anatomical Board, concerning the disposal of unclaimed bodies of inmates of this institution.

"Since the entire matter is in question, allow me to quote from the letter of M. D. Overholser, M. D. Quote:- 'In my letter of April 2nd I did not mean that we were to take the body before it had been reasonably established that it was unclaimed. When a death occurs in the Penitentiary it can usually be ascertained within a few hours whether the body is to be claimed or not. If the body is claimed it is turned over to the undertaker; however, if no claimant is found (within 24 hours at the most) I should be notified and a truck will be sent for the (unembalmed) body. In other words the undertaker is not to be called unless the Warden has established that the body is to be claimed. In only exceptional cases is a body re-claimed from the Anatomical Board. For instance, when the Warden has

reasonably established that the body is unclaimed by having the body refused by the known relatives it is then turned over to us. However, should some unknown relative make a claim for the body at a later date it may be re-claimed from us. This, as I say, happens very rarely - once or twice out of every 100 unclaimed bodies in our experience." End of quote.

"We have been in the practice of calling the undertaker immediately upon the death of an inmate; the undertaker embalming the body and locating the relatives by wire. If the body is not claimed, the State Anatomical Board is notified accordingly.

"The undertaker is called and the body embalmed for two reasons: - 1. We do not have a place to keep an unembalmed body for any length of time. 2. The time necessary to locate the relatives of a deceased inmate is rather indefinite, in that it takes at least a day and oftentimes several days. This is due to the fact that many of the inmates live in rural districts and where telegraph service, etc., is rather slow. In all fairness to the deceased, we feel that the relatives should be located and informed of the death, even though it take several days to do so.

"Under these circumstances and in view of the contents of Mr. Overholser's letter, we feel that some legal decision is necessary in the matter. Must I, as Warden, comply with the request of the State Anatomical Board as set down in the letter; or, am I within my duties to handle the bodies of deceased inmates of this institution, as stated above?

"A reply at your earliest convenience will be appreciated."

This department has twice previously, to-wit, on May 15, 1934 and on April 23, 1935, rendered opinions concerning disposition of dead bodies. As these opinions are exhaustive it is unnecessary to again establish the premises as to the disposition of dead bodies. Copies of these opinions are herewith enclosed.

The question presented in your letter is whether or not the Warden of the Penitentiary has a right to direct the embalming of a dead body pending the determination of whether or not the body of a deceased convict shall be buried at public expense, that is, whether or not the relatives of the deceased convict will bury the body or whether or not the body of the deceased convict will be buried at public expense.

If the body of the deceased convict will be buried by the relatives, then of course, under our previous rulings, the Anatomical Board has no right or authority over the body except, perhaps, if an autopsy is to be performed. If the body of a deceased convict is to be buried at public expense, then, clearly, under the statutes the Anatomical Board has a right to the body and the disposition thereof.

You desire to keep the body until you determine to your own satisfaction whether or not the relatives of the deceased, if any, will claim the body and bury it. The establishing of the fact as to whether or not an inmate's body is to be buried at public expense is a question of fact, and under your powers and regulations as to inmates of the Penitentiary, you undoubtedly have the right to establish that fact before you dispose of the body in any particular, that is, whether or not you turn it over to the Anatomical Board or hold the body pending determination as to whether or not the body is to be buried at public expense.

However, in your investigation to determine if the body is to be buried at public expense or by relatives of the deceased, you have no right to incur indebtedness to the state by embalming, purchase of casket, outfittings, etc. It neces-

sarily follows that if you cause the body to be embalmed, then someone will have to, or should, pay the undertaker. In other words, if you order a body embalmed and the relatives claim the body for burial, such would not have to pay for the unauthorized embalming if they did not wish to do so, and if the body is to be buried at public expense the State, likewise, would not have to pay for the embalming, because bodies buried at public expense must be turned over to the Anatomical Board. It thus follows that in no event will the State ever be liable for the payment of any burial expense rendered to dead bodies in your custody.

Thus, if you order a body embalmed and it turns out that the body is to be buried at public expense, we know of no way that the embalmer could be reimbursed unless you be personally liable for the charges. Therefore, we suggest that you follow the suggestions outlined in Dr. Overholser's letter, as such appears to us to be the most practical solution of your problem.

While it seems to be a harsh rule that one who has departed this life and has to be buried at public expense, must be turned over to the Anatomical Board to have such person's dead body done with at the will of such Board, yet, the Legislature has prescribed such a course and we do not comment on the justness or unjustness of such a law. We are only interpreting the law as it is written, without regard to any sentimental feeling entering into the discussion.

Respectfully submitted,

WILLIAM ORR SAWYERS
Assistant Attorney General

APPROVED:

HOY McKITTRICK
Attorney General

WOS:H

PENITENTIARY --) (1) Penitentiary liable for fees of Circuit Clerk for furnishing certified copies of Information and Judgment, requested by it.

CIRCUIT CLERK.) (2) Fees of Circuit Clerk for furnishing certified copies of Record to Penitentiary necessary to return a fugitive from justice, should be paid out of fund provided for apprehension of criminals.

S-22

May 20, 1935.

FILED 80

Mr. J. M. Sanders
Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "In preparing requisition papers for the return of Arthur Powers, our Reg. #33984, who is a parole violator from this prison and who is now confined in the United States Penitentiary at Leavenworth, Kansas, it was necessary to get certified copies of the Prosecuting Attorney's Information and also to have certified copies of the original sentence and judgment. It was necessary for the Circuit Clerk of Nodaway County, from which county the man was sentenced, to prepare these papers. He submitted a bill for his services to the prison authorities.
>
> "This office would like to know if the penitentiary is liable for these fees; and, if so, whether such fees are properly chargeable to ordinary operating expenses of the institution or if the expenses should be paid out of the fund provided for the apprehension of criminals.
>
> "An opinion from your office at your earliest convenience will be appreciated."

Section 11787, R. S. Mo. 1929, specifies the fees a clerk of a court possessing criminal jurisdiction is entitled to for his services in criminal proceedings. Said section reads in part as follows:

> **********************************
>
> "For copies of records and papers, for every hundred words..... .10
>
> **********************************
>
> "For each certificate and seal authenticating a copy of a record..... .50
>
> **********************************
>
> "No fee shall be charged by any clerk in any criminal case against the state or any county, unless it is expressly allowed in this section: *********"

The above section expressly allows a clerk of a court, possessing criminal jurisdiction, to charge for all copies of records and for authenticating said copies.

Section 11814, Laws of Missouri, 1933, makes it the duty of the clerks of all courts of record to charge and collect every fee accruing to their offices except such fees as are chargeable to the county. Said section reads in part as follows:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices under the provisions of sections 11785, 11787, and 11788, or of any other statute, except such fees as are chargeable to the county, *****."

In view of the above, it is the opinion of this department that it is the duty of the circuit clerk to charge and collect the fees specified in Section 11787, supra, for furnishing a certified copy of an Information and Judgment at the request of the Department of Penal Institutions and that said Department is liable for the payment of said fees.

You inquire whether such fees are chargeable to ordinary operating expenses of the institutions or to the fund provided for the apprehension of criminals. It is evident that it was necessary to secure the certified copies in question in order to apprehend and bring back the prisoner to the State Penitentiary. It is therefore our opinion that fees of the circuit clerk for making out and furnishing certified copies of the record, necessary to return a fugitive from justice to this State, should be charged against and paid out of the fund provided for the apprehension of criminals.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/afj

HABEAS CORPUS AD TESTIFICANDUM: A circuit court has power to issue and may only keep said prisoner as long as necessary for such to testify.

1.16

July 15, 1935

FILED
80

Hon. J. M. Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter dated July 8, 1935, as follows:

"On May 31st, 1934 Harry Newbold, Deputy Sheriff of St. Louis County, Missouri, delivered to me a Writ of Habeas Corpus Ad Testificandum, with reference to the above named party.

The writ was issued out of Judge Robert W. McElhinney's Court, Division # 4 of St. Louis County, demanding me to deliver to the Sheriff of St. Louis County the body of the above mentioned, Edna Booker, to be delivered in the Circuit Court, in and for the County and State aforesaid, at Clayton, Missouri on the 7th day of June, 1934 at 9 A.M., then and there to testify to the best of her knowledge and belief in Case entitled Bart Davitt, et al.

It is my understanding Rosegrant and Cecil McDonald, two of the defendants in the case have been tried, each receiving a prison sentence. The case against two other defendants, Bart Davitt and Mrs. Nellie Muench is still pending and the said Edna Booker is still retained by the Sheriff of St. Louis County.

> The question has arisen as to whether or not that I should request her return, pending the date of trial of the other defendants.
>
> Please advise me whether I have any authority to demand her return to prison, pending the date of trial of the other defendants."

We assume that Edna Booker, number 36619, was a witness for the State and was taken from your custody under and by virtue of Section 3618 R. S. Missouri 1929, which reads as follows:

> "Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for witnesses in his behalf; and whenever any convict, confined in the penitentiary, shall be considered an important witness in behalf of the state,upon any criminal prosecution against any other convict, by the attorney-general or prosecuting attorney conducting the same, it shall be the duty of the court, or judge thereof in vacation, in which the prosecution is pending, to grant, upon the affidavit of such attorney-general or prosecuting attorney, a writ of habeas corpus, for the purpose of bringing such person before the proper court to testify upon such prosecution; such convict may be examined, and shall be considered a competent witness against any fellow convict for any offense actually committed whilst in prison, and whilst the witness shall have been confined in the penitentiary."

In Ex parte Marmaduke 91 Mo. 228, the Supreme Court of Missouri, in a divided opinion, said, page 238:

> "Compulsory process, for a witness, signifies and means a process that will compel the attendance of such witness - a process that will bring a witness into court who refuses to come without it."

The facts in the instant case being that Edna Booker was confined in the penitentiary, hence, she could not attend and testify as a witness without being taken from her confinement and by process of court. The dissenting opinion of Judge Sherwood, page 250, in the Marmaduke case, supra, points out the purpose of a writ of habeas corpus ad testificandum, having the following to say:

> "The writ of habeas corpus ad testificandum is a very ancient one, and was grantable at the discretion of the courts at common law. It was a process whereby the attendance of witnesses was compelled, and it was employed to bring the witness before the court, whether in custody awaiting trial, or when undergoing sentence. (cases cited)* * * * * * * * * * * * * And there are instances where the state courts have issued the writ in question, where the witness was in custody or undergoing sentence. The instances of the issuance of such a writ are not frequent in the state courts, but whenever they occur, or are referred to, they distinctly recognize the principle, and the undoubted right of a defendant in a criminal case to have it enforced. (cases cited)* * * * * * *."

Corpus Juris, Vol. 29, page 6, has the following to say concerning habeas corpus:

> "The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce

> the body of the prisoner at a designated time and place, with the day and cause of his caption and detentionm to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. The name is derived from the significant words which it contained when the writs issued by the English courts were in the Latin language. There are several varieties of this writ, * * * * * *."

The writ of habeas corpus ad testificandum is for the purpose of bringing a witness before a court for the purpose of testifying in said cause and for no other purpose. Ex parte Marmaduke, supra.

We conclude that the Circuit Court of St.Louis County had a right to issue a writ of habeas corpus ad testificandum, commanding you to produce said prisoner to testify in a cause pending in said court. We note that this writ was served on you and you delivered said prisoner on the 7th day of June, 1934, and to date she has not been returned to your custody. It is our further opinion that the court does not have a right to obtain custody of a person under your jurisdiction, by writ of habeas corpus ad testificandum, and retain said custody indefinitely, but, that the court may compel a witness confined in the penitentiary to be delivered for the purpose of testifying and when the purpose for which said prisoner was delivered has been completed, then said prisoner is to be returned to your custody to be dealt with according to law, that is, for the purpose of serving out the sentence imposed upon said prisoner.

It is our opinion,that if the sheriff will not voluntarily relinquish the custody of said person to you that you should file a motion in the circuit court, setting out the facts,and ask that the sheriff be commanded to deliver possession and custody of said prisoner and if said court will not so direct the sheriff, then it is our further opinion that you may apply for a writ

of habeas corpus, the purpose of which is to regain custody of the person so that the sentence imposed upon such may be complied with. State ex rel. v. Rudolph 17 S. W. (2nd) 932.

A circuit court, by writ of habeas corpus ad testificandum, may obtain jurisdiction and custody of a person confined in the penitentiary, and if said court could retain such custody or control for an indefinite period, then it could be that a prisoner would never have to serve the sentence imposed as such would be held in the county jail or by order of the circuit court.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JLH:LC

TAXATION: (1) Amount of taxes if sold under Jones-Munger Law.
(2) Amount of taxes if judgment taken.
(3) Operation of 1935 act.

1-24

July 19, 1935

FILED
80

Hon. Henry C. Salveter,
Prosecuting Attorney,
Pettis County,
Sedalia, Missouri.

Dear Mr. Salveter:

We acknowledge receipt of your inquiry which is as follows:

> "We understand that Senate Bill Number 143 places the 1933 and prior real estate and personal taxes on the same basis as if they were a 1934 tax, with the exception of fees due the County Clerk and the County Collector, and except the Collector's additional commission on back tax collections.
>
> "What is the status of interest upon taxes where property was advertised for sale last fall under the Jones-Munger law?
>
> "What is the status of interest upon taxes where suit was brought in 1931 but where no judgment was taken?
>
> "What is the status of interest upon taxes where suit was brought and where judgment was taken?
>
> "Would the old rate of 10% per year apply on taxes placed in suit in 1931 or has that been completely abolished and the interest computed on the basis of the 1933 tax? Or does the remission on the interest penalty as provided for in Senate Bill Number 143 apply upon

ALL tax collections made upon back taxes, whether not in suit; whether placed in suit; and whether placed in suit and judgment taken?

"Do those items placed in suit in 1931 wherein the collector's commission was computed upon a basis of 4% still apply, or should the same be computed upon a basis of 2% the same as at the present time?

"We have numerous instances of properties that were offered for sale last fall under the Jones-Munger bill; some of which were previously sued upon in the Circuit Court in 1931; and some taxpayers expecting to take advantage of the penalty remission bill on back taxes wish and expect to pay such taxes and penalties on the same basis as the 1934 back tax.

"We would appreciate a letter from your office giving us an opinion on these matters so that we may govern ourselves accordingly."

We shall attempt to answer your several questions seriatim:

First, what is the status of interest upon taxes where the property located in Pettis County was advertised and sold last fall under the Jones-Munger law, in view of Senate Bill No. 143, 58th General Assembly?

We assume you mean that the property was sold in the fall of 1934, for instance, on December 10, for taxes that became delinquent, for illustration, on January 1, 1932.

Section 9914, R. S. Missouri 1929, provided a penalty for failure to pay taxes when due. This was repealed by the law found in Session Acts 1933, page 449, and a new section was then enacted which provides that if a taxpayer fails or neglects to pay his taxes at the time and place required by certain notices, then it becomes the collector's duty after January 1, next thereafter, to collect and account for as other taxes an additional tax as penalty in the amount provided for in Section 9952, provided that said interest shall not be charged a person if he

pays his taxes to the collector "before the first day of January in each year." It further provides that if the collector fails to collect the penalty provided for in the section on state and county taxes, it shall be the duty of the State Auditor and of the County Clerk to charge the collector with the amount of interest due thereon as shown by the returns.

Section 9952, R. S. Missouri 1929, prior to its repeal in 1933, said that if on January 1 of any year, lands in the back tax book are not redeemed, the collector must sue to enforce the lien for taxes and may, with the consent of the county court, employ attorneys at certain fees, the amount of which is "not to exceed 10% of the amount of taxes actually collected and paid into the treasury", which fees and costs shall be taxed as costs and so collected.

Section 9949, R. S. Missouri 1929, at that time, provided the method of redeeming and paying back taxes by paying the tax as there charged and "interest on the same from the day upon which said tax first became delinquent at the rate of 10% per annum, and the costs." And further, that if suit has been filed he shall pay in addition "all necessary costs therein, and * * * such attorney fees as the court may allow."

The last above section was repealed, 1933 Session Acts, page 427, and a new section enacted which provides that a party may redeem lands which have a back tax against them by paying the collector the "amount of the original taxes * * * together with interest on the same from the day upon which said tax first became delinquent at the rate specified in Section 9952."

Section 9956-a of the Jones-Munger Law, Session Acts 1933, page 437, provides the method of redeeming lands that are sold under its provisions, the same being as follows:

> "By paying to the county collector, for the use of the purchaser * * * the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser * * * with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition

> thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption."

Section 9962-b of the Jones-Munger Law, 1933 Session Acts, page 444, provides that the taxes on all lands which were levied or assessed prior to the passage of this law and which are unpaid and have not been reduced to judgment prior to the effective date of this act

> " * * * shall be deemed to be delinquent under the provisions of this act, and the same proceedings shall be had to enforce the payment of such unpaid taxes, with interest, penalty and costs, and payment enforced and liens foreclosed under and by virtue of the provisions of this act and the same rights of redemption shall attach. For the purposes of foreclosure under this act, the date of delinquency shall be construed to mean the date when the taxes first became delinquent; provided however, that nothing herein contained shall be construed to affect the right of the county collector to proceed to final judgment and foreclosure for taxes upon which suit had been instituted prior to the effective date of this act, but not in final judgment, nor to prejudice the rights of collection of any costs or commissions attaching in such cases which were valid under the tax law existing at the time of institution of such suits. As to taxes merged in judgment at the effective date of this act the foreclosure of the tax lien and proceedings relative thereto shall be had under the provisions of the law as such law existed prior to the passage of this act, and as to suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the

> provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

House Bill No. 124, Extra Session Acts 1933-34, page 166, approved January 18, 1934, provides that all penalties on delinquent taxes for the year 1932 and prior years "shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

This act was construed by this office in an opinion dated April 4, 1934, to provide and mean that "personal and real estate taxes for the year 1932 and prior years are to be treated as though they were taxes for the year 1933 insofar as the assessment of interest and penalties are concerned, and that no greater interest or penalty is to be collected upon such taxes than would be collected upon 1933 taxes of the same amount." That construction was followed generally over the state by the officers having to do with the collection of such taxes, etc.

That act was by necessary implication repealed by Senate Bill No. 143 passed by the 58th General Assembly, and a similar law passed then, the difference being not in the principle, but in the application to the 1934 taxes and the collection thereof. The construction, therefore, placed on House Bill No. 124 by the Attorney General and other officials was adopted and applies to the construction of Senate Bill No. 143. 23 C. J., p. 102; 25 R. C. L., p. 903; State v. Adams, 19 S. W. (2d) l. c. 673; State ex rel. v. Baker, 316 Mo. 853, l. c. 863, 293 S. W. 399, l. c. 404.

We therefore hold that under Senate Bill No. 143, taxes for 1933 and prior years which are now delinquent and unpaid are calculated and paid as though they were taxes that were first due in the year 1934. If the property was sold under the Jones-Munger Act, the holder of the collector's tax certificate of purchase is not affected by the passage of the 1935 act, but is entitled to receive the rate of interest specified in his certificate of purchase.

II.

Your second inquiry is: What is the status of interest or what rate of interest should be collected where suit was filed in 1931 for delinquent real estate taxes in Pettis County, and such suit is pending and has not been reduced to judgment? We reply to it as follows:

Section 9962-b, page 444, Laws of Missouri 1933, providing that nothing in the Jones-Munger Law contained shall be construed to affect the rights of the collector to proceed to final judgment and foreclosure for taxes upon which suit had been brought prior to the effective date of the Jones-Munger Law, nor to prejudice the right of collection of any costs and commissions attaching in such cases which were valid under the tax law existing at the time the suit was filed, means that the collector may proceed to final judgment under the old law as though the Jones-Munger Law had never been enacted.

Our opinion is that absent the dismissal of said suit (as the collector has the right to use his discretion under the Jones-Munger Law), the compensation therefor is determined under the old law and the interest is computed at 10% per annum up to the time the same is reduced to judgment. The interest and penalty are both eliminated by the 1935 act as to such as accrued prior to December 31, 1934, on taxes that were delinquent for the year 1934, i. e., on January 1, 1935, and regardless of whether the taxes became delinquent on January 1, 1935, or any year prior thereto. The tax is paid in full by payment of the original tax and such penalties as would and do accrue on taxes that became delinquent on January 1, 1935, if paid after the 1935 act became operative on April 29, 1935.

This 1935 act, being the last act passed and being general in its nature and effective operation, is construed to supersede the Jones-Munger and other prior acts insofar as they are inconsistent.

III.

Your third inquiry is: What interest is chargeable on the delinquent taxes where suit has been filed and judgment obtained?

In the case of State ex rel. McKittrick v. Bair, 63 S. W. (2d) 64, the Supreme Court held that there was no vested

right in the penalties, interest, fees or attorney's fees, and that the legislature had the right to relieve the taxpayer of payment of them prior to the rendition of judgment. From the court's opinion therein it appears that the determinative step is whether judgment has been rendered and that, if so, then the rights have become vested and can not be altered by legislation.

It is therefore our opinion that such fees, interest and penalties as are included in the judgment are not affected by Senate Bill No. 143.

As to interest accruing after judgment is rendered, generally in Missouri it is held that the rate fixed by the contract, provided it is lawful, shall be allowed on the judgment rendered thereon. Gilsonite Roofing & Paving Company v. St. Louis Fair Ass'n., 231 Mo. 589, 132 S. W. 657; Catron v. Lafayette County, 125 Mo. 67, 28 S. W. 331; Corley v. McKeag, 57 Mo. App. 415; Section 2841 R. S. Missouri 1929.

In the case of St. Francis Levee District v. Dorrah, 289 S. W. 925, regarding matters raised by your inquiry, the Supreme Court of Missouri said, l. c. 933:

> "The judgment, as entered below, is made to draw 10 per cent. interest from the date of its rendition, and appellant claims the judgment is erroneous in that respect. It is said that penalties, as a general rule, do not bear interest, and there are some judicial authorities to that effect. However, the statute under review provides for the entry of a judgment for the amount of the delinquent levee taxes and penalty. In other words, the statute contemplates a money judgment. Our statute regulating interest on all money judgments (section 6493, R. S. 1919) provides:
>
> 'Interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment, accord or sale of property; all such judgments and orders for money upon contracts bearing more than six per cent. interest shall bear the same interest

> borne by such contracts, and all other judgments and orders for money shall bear six per cent. per annum until satisfaction made, as aforesaid.'
>
> "The aforesaid statute has been held to be applicable to money judgments for recovery of penalties, but it is also held that such judgments should only bear 6 per cent. interest. City of St. Louis to Use of Seibert v. Allen, 53 Mo. 44; City of St. Joseph v. Forsee, 110 Mo. App. 237, 84 S. W. 1138; Paving Co. v. Realty Co., 168 Mo. App. 468, 151 S. W. 479. The judgment is erroneous in that it purports to bear 10 instead of 6 per cent. interest per annum from the date of its rendition."

Senate Bill No. 143 passed by the 58th General Assembly and approved April 29, 1935, with an emergency clause, provides as follows:

> "That all penalties and interest on personal and real estate taxes delinquent for the year 1934 and prior years shall be computed after December 31, 1934, on the same penalty and interest basis as the taxes delinquent for the year 1934 until paid."

Section 9969 of the Jones-Munger Law, Laws 1933, page 429, provides that the collector's fee, with certain exceptions, not relevant here, shall be "two per cent on all sums collected."

We are of the opinion that interest is chargeable at the rate of six per cent per annum from the date of rendition of the judgment.

IV.

Your fourth inquiry is: What commission may the collector receive for collecting delinquent 1931 taxes, if collected at this time?

Prior to 1933 the law allowed the collector four per cent of all sums collected. This law was changed to allow two per cent for such collections. Section 9969, Laws of Missouri 1933, page 429.

In the foregoing observations it is pointed out that the right to receive penalties, interest, commissions or fees is not a vested right and that it may be changed, reduced or eliminated at the will of the legislature, and by the 1933 act the legislature has reduced the commission allowable to the collector to two per cent. This reduction applied to all taxes that were delinquent at the time this law became effective, and applies to all taxes that thereafter became delinquent.

We therefore conclude that the collector is not entitled to more than two per cent commission on delinquent taxes which were not reduced to judgment prior to July 24, 1933, the effective date of Senate Bill No. 94 of the 57th General Assembly, page 425, Laws of Missouri 1933.

If judgment had been obtained prior to July 24, 1933, including a collector's commission of four per cent, such judgment was not affected by the 1933 act reducing the collector's commission for the reasons hereinbefore set forth.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

COUNTY TREASURER - Entitled to such compensation as county court deems advisable not exceeding ½ of 1% on all school moneys disbursed by him.

FILED
81

February 26, 1935.

Hon. Otto G. Schell,
Treasurer of Miller County,
Tuscumbia, Missouri.

Dear Sir:

This department is in receipt of your letter of January 29 requesting an opinion as to the following state of facts:

> "I am asking you for your opinion on section 9266 (County Treasurers and their duties--bond required as custodian of school moneys--compensation).
>
> When I was elected Treasurer of this county, the court set my salary at $80 per month plus ½ of 1% commission for handling the school funds, and not being thoroughly posted on the law, I did not collect on school moneys that I handled for the various high schools, but only on rural schools. The former Treasurer informs me that he always collected this commission on all school moneys, including that disbursed to the various high schools, and says that I am also entitled to that, which would cause me to be able to collect the back commissions for the past two years.
>
> I would appreciate your opinion on this, whether I am entitled to collect on all school moneys handled, and in my case, am I entitled to the back commissions that I have not collected?"

Section 9266, R.S. Mo. 1929 provides in part as follows:

> "****and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent. of all school moneys disbursed by him, and to be paid out of the county treasury."

It is plain from a reading of this statute that the Legislature, recognizing the nature of the services rendered by the county treasurer to a county, intended to leave the fixing of compensation for such treasurer to the discretion and judgment of the county court of that county; however, the Legislature expressly stated the maximum percentage that could be allowed the county treasurer under this section. This provision of the law did not limit the county court as to the minimum amount, but did prescribe the maximum amount to be paid such officer as compensation.

From the facts as stated in your letter, it would appear that you viewed Section 9266, supra, as entitling you to one-half of 1% on all school moneys disbursed by you as county treasurer. We are unable to concur in this view of the statute, however, for a county treasurer is entitled only to such compensation for his services as the county court may deem advisable not exceeding the percentage heretofore referred to.

This question was settled in this state by the Supreme Court in the case of Sanderson v. Pike County, 195 Mo. 598, wherein Judge Brace said (l.c. 604, 605):

> "****It will thus be seen that the Legislature has vested in the county court the power to fix the compensation of the treasurer for his general services and for his services in disbursing the school moneys of the county. With this discretion neither this court nor the circuit court has any right to interfere.
>
> * * *
>
> Such compensation is not the creature of contract nor dependent upon the fact, or value of services actually rendered (State ex rel. v. Walbridge, supra, and authorities cited on pp. 203 and 204), and cannot be recovered upon quantum meruit. (Wolcott v. Lawrence Co., 26 Mo. 272, and cases supra).

> This suit was brought upon the theory that under the provisions of section 9849, supra, the plaintiff was entitled to 'one-half of one per cent of all school moneys disbursed by him', when, in fact, he was only entitled 'to such compensation for his services as the county court may deem advisable', not exceeding that amount.
>
> There was no legal evidence tending to prove that the county court deemed it advisable to pay him for such services any more than they did in fact pay him. ****"

CONCLUSION

In view of the foregoing, it is the opinion of this department that a county treasurer is entitled to such compensation for his services as the county court may deem advisable, not exceeding one-half of one per cent of all school moneys disbursed by him.

In this connection, it must be remembered that"the county court is a court of record and its actions and proceedings can only be known by its record. A contract with such court cannot be established by parol evidence." (Sanderson v. Pike Co., supra)

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

COUNTY COURT: Legal procedure for the removal of the judges of the county court from office.

March 8, 1935.

FILED
81

Dr. W. F. Schlicht
Niangua
Missouri

Dear Sir:

This department is in receipt of your letter of February 27th wherein you state as follows:

> "I wish to ask you for a legal opinion on the following questions:
>
> "First, Can the legal qualified voters of the county by petition ask for a re-call election of the present members of the county court.
>
> "Second, Upon sufficient charges to justify such an election.
>
> "Third, What per cent of the voters are required to petition for a re-call election.
>
> "Fourth, If not permitted to vote on a re-call election what procedure would be necessary to remove the court from office, upon the grounds of sufficient charges."

The first three questions contained in your letter may be answered simply by stating that the State of Missouri has not provided any legal procedure whereby the qualified voters of a county may petition for a special election to vote on the re-call of the members of the county court.

Article VI, Section 36, page 116 of the Constitution of Missouri provides that,

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

It will be noted that a county court is a court of record in the State of Missouri.

Section 2072, R. S. Mo. 1929, sets out the composition of the county court thus:

> "The county court shall be composed of three members, to be styled judges of the county court, of whom the probate judge may be one, and each county shall be districted by the county court thereof into two districts, of contiguous territory, as near equal in population as practicable, without dividing municipal townships."

Section 2073, R. S. Mo. 1929, provides the election of, and tenure of office as follows:

> "At the general election in the year eighteen hundred and eighty, and every two years thereafter, the qualified voters of each of said districts shall elect a county court judge, who shall hold his office for a term of two years and until his successor is duly elected and qualified; and at the general election in the year eighteen hundred and eighty-two, and every four years thereafter, the presiding judge of said court shall be elected by the qualified voters of the county at large, who shall hold his office for the term of four years and until his successor is duly elected and qualified. Each judge elected under

> the provisions of this article shall enter upon the duties of his office on the first day of January next after his election."

It will further be noticed that the judges of the county court are elective officers.

Article VII, Section 1 of the Constitution of Missouri, sets out the officers who are liable to impeachment, and states that,

> "The Governor and Lieutenant-Governor, Secretary of State, State Auditor, State Treasurer, Attorney-General, and members of the State Board of Education, Judges of the Supreme Court, the Courts of Appeals and the Circuit Courts shall be liable to impeachment for high crimes or misdemeanors and for misconduct, habits of drunkenness or oppression in office.

Judges of the county court are specifically omitted, and hence are not subject to impeachment.

Section 11202, R. S. Mo. 1929, provides for the removal of county officers, and reads as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

Section 11203, R. S. of Mo. 1929, sets out the duty of the prosecuting attorney relative to a complaint against county officers thus:

> "When any person has knowledge that any official mentioned in section 11202 of this article has failed, personally, to devote his time to the performance of the duties of such office, or has been guilty of any willful, corrupt or fraudulent violations or neglect of any official duty, or has knowingly or willfully failed or refused to perform any official act or duty which by law it was his duty to do or perform with respect to the execution or enforcement of the criminal laws of this state, he may make his affidavit before any person authorized to administer oaths, setting forth the facts constituting such offense and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney or deposit it with the prosecuting attorney, furnishing also the names of witnesses who have knowledge of the facts constituting such offense; and it shall be the duty of the prosecuting attorney, if, in his opinion, the facts stated in said affidavit justify the prosecution of the official charged, to file a complaint in the circuit court as soon as practicable upon such affidavit, setting forth in plain and concise language the charge against such official, or the prosecuting attorney may file such complaint against such official upon his official oath and upon his own affidavit."

The above section is not the only legal procedure for the removal of the judges of County Courts. Article VI, Section 41, page 117 of the Constitution of Missouri provides still another method in case of inability, etc. and reads thus:

> "In case of the inability of any judge of a court of record to discharge the duties of his office with efficiency, by reason of continued sickness, or physical or mental infirmity, it shall be in the power of the General Assembly, two-thirds of the members of each house concurring, with the approval of the Governor, to remove such judge from office; but each house shall state on its respective journal the cause for which it shall wish his removal, and give him notice thereof, and he shall have the right to be heard in his defense, in such manner as the General Assembly shall by law direct."

We are of the opinion that the above methods constitute the legal procedure for the removal of the judges of county court from office.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

MW/WOS:afj

IN RE: COUNTY CLERKS: COUNTY DEPUTIES: Salary of County Clerk and his deputy in counties having a population of 10,000 and less than 11,500 persons. Salary not to be fixed by county court.

January 21, 1935.

1-22

FILED
82

Honorable J. B. Searcy
Prosecuting Attorney
Shannon County
Eminence, Missouri

Dear Sir:

This department acknowledges your letter of recent date wherein you state as follows:

"I desire an opinion of law on the following:

"Section 11811. Fees of county clerk in certain counties. -- Page 370 - Laws of Missouri, 1933.

"In said section will be found the following lines, 'in counties having a population of 7,500 and less than 10,000 persons, the clerks shall be allowed to pay for deputies and assistants $900.00; in counties having a population of 10,000 and less than 11,500 persons, the clerks shall be allowed to retain $1250 for themselves and not to exceed $900 for deputy hire.'

"Shannon County comes under the last named clause.

"The first above mentioned clause states that the clerks mentioned therein shall be allowed to pay the sum of $900.00 for deputy hire and the last mentioned states that said deputy hire cannot exceed $900.00. By reading both together I believe that our County Clerk can pay his deputy $900.00.

"In your opinion can the County Court of

Shannon County, Missouri, cut the salary of the Deputy Clerk of Shannon County, Missouri, under the sum of $900.00 provided the Deputy and Clerk does not want same reduced."

Section 11808, Laws of Missouri, 1933, page 370, reads as follows:

"The last previous decennial census of the United States shall be the basis for determining the population of any county in this State, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants."

The population of Shannon County, according to the United States census of 1930, is 10894 inhabitants -- Official Manual of the State of Missouri, 1933-34, page 546.

Section 11811, Laws of Missouri, 1933, page 370, deals with fees of County Clerk in certain counties, and reads in part as follows:

"**** in counties having a population of 7,500 and less than 10,000 persons, the clerks shall be allowed to retain $1100.00 for themselves, and shall be allowed to pay for deputies and assistants $900.00; in counties having a population of 10,000 and less than 11,500 persons, the clerks shall be allowed to retain $1250 for themselves and not to exceed $900. for deputy hire; ****"

The statutory authority to appoint deputy county clerk in Shannon County is found in Section 11,680 R. S. Mo. 1929, which provides:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of

their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

It will be noted from a reading of Section 11811, supra, that the county clerk of Shannon County "**** shall be allowed to retain $1250.00 **** and not to exceed $900.00, for deputy hire; ****". The county clerk is not only permitted to retain the above fees for his own personal services but also the fees allowed for the pay of deputies and assistants, It is true that Section 11680, supra, does provide for the approval of the deputy or deputies appointed by the county clerk but it is limited to an approval of the appointment and not as to salary.

In view of the foregoing, we are of the opinion that such sum as above permitted to be retained for deputy hire cannot be reduced by the county court.

Respectfully submitted,

JAMES L. HORNBOSTEL
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

MW/JLH:afj

TAXPAYER - Definition of, for voting purposes.

March 29, 1935

FILED
82

Hon. J. B. Searcy,
Prosecuting Attorney,
Eminence, Missouri

Dear Sir:

A request for an opinion has been received from you under date of March 19, 1935, such request being in the following terms:

> "I should like to have an opinion of the following questions pertaining to legal voters on certain questions at Annual School Meetings.
>
> Is a man's wife entitled to vote on questions calling for legal taxpayers if she does not hold in her own name property either real or personal and who does not have a tax receipt in her own name?
>
> Is a man who has only household goods a taxpayer even though he has not a receipt for having paid taxes? Is this man's wife also entitled to vote on questions where a legal taxpayer is a requirement to vote?"

Before answering the specific questions raised in your letter we shall refer you to certain decisions of courts of last resort of this State in which the term "taxpayer" is construed, because we believe that the enunciations of the principles there set out will point to the answers to all of your questions.

In the case of State ex inf. Bellamy v. Menengali, 307 Mo. 447, 270 S.W.101 (1924), an attempt was made to oust a school director on the ground that she was not a taxpayer who had paid a state and county tax within one year next preceding her election, in violation of a statute. The court analyzed the meaning of the term "taxpayer" and said:

> "In Webster's New International Dictionary, a taxpayer is defined as: 'One who pays a tax.' In Funk & Wagnall's New Standard Dictionary, "a taxpayer is defined as: 'One who pays any tax, or who is liable for the payment of any tax.' The evidence is clear and undisputed, that respondent on June 1, 1920, was the legal owner of the property heretofore described, and that it was not exempt from taxation."

In the case of Castilo v. State Highway Commission, 312 Mo. 244, 279 S.W.673 (1925), the status of the plaintiffs as taxpayers having a right to bring an injunction suit on their own behalf and on behalf of others similarly situated, was questioned, and the court in discussing the meaning of the term "taxpayer" said:

> "In Black's Law Dictionary a taxpayer is defined as 'a person chargeable with a tax.' In State ex rel. Sutton v. Fasse, 71 S.W. (Mo.) 745, Goode, J., speaking for the St. Louis Court of Appeals, defines a taxpayer as 'a person owning property in the State subject to taxation and on which he regularly pays taxes.' This definition is adopted in Pope's Legal Definitions."

In deciding whether a person is a taxpayer or not so as to entitle him to some statutory right, it has been held that it makes no difference whether the property on which he claims to be a taxpayer is assessed in his name or not. In the case of State ex rel. Circuit Attorney v. Macklin, 41 Mo.App. 335 (1890), the court said:

> "A person is not relieved from paying taxes on property owned by him, simply because it is erroneously assessed to another, nor is he under any legal obligation whatever to pay a tax on realty in which he has no interest, simply because it is assessed to him. The assessment of a tax creates no debt in the ordinary sense of the term. City of Carondelet v. Picot, 38 Mo. 125; Peirce v. City of Boston, 3 Met. 520; Green v. Wood, 7 Ad. & Ell. N. S. 178. If a person owns an interest in property and pays a tax thereon, he pays his tax regardless of the fact to whom the property is assessed."

From the above cases it is apparent that one who owns property liable for taxation and who has paid or caused to be paid taxes thereon, is within the usual meaning of the term "taxpayer". The Menengali case referred to above concerned the status of a married woman as a taxpayer, and the court held that the fact that the property which had been paid for with her money and was in fact wholly or partially hers, was assessed in her husband's name, would not prevent her from being a taxpayer. This case makes it clear that whether a married woman is a taxpayer or not depends on whether she owns any taxable property of her own on which she causes taxes to be paid, regardless of the name in which the property was carried, and this case further shows that the fact that a husband owns property does not of itself make his wife a taxpayer.

In conclusion, it is our opinion that in construing a statute making the right to vote dependent upon whether or not one is a taxpayer, without any further qualifications, the answers to your questions are as follows: (1) A married woman is entitled to vote if she owns any property subject to taxation, regardless of whether it is held in her own name or not, (2) if household goods are subject to taxation and a tax has been paid on the same, the owner thereof is a taxpayer, and (3) if the owner of the goods referred to in (2) above was a married man, his wife is not a taxpayer unless she owns other goods which would make her a taxpayer. The possession of a tax receipt would only be one method of proof that a person was a taxpayer, and any other method of establishing the fact that the person claiming to vote was the owner of goods on which a tax had been paid would be likewise efficacious to qualify the claimant as a taxpayer.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BEES: Power of City of fourth class to prohibit possession of, within city limits.

5-2

April 18, 1935.

FILED
83

Mr. W. A. Sharp, Jr.,
City Clerk,
Craig, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of March 8, 1935, such request being in the following terms:

"The Board of Aldermen of the City of Craig have requested me to obtain the following information:

Is there a statute in the State of Missouri which prohibits a City of the fourth class from regulating, by ordinance, the possession of bees within the city limits of such City?

An ordinance duly passed by the Board states, in part:

'It shall be unlawful for any person to have in possession on his own premises or premises leased by him, or on any other ground or premises, any stand, hive, colony or colonies of bees within the corporate limits of the City of Craig.'

Can we safely prosecute under this ordinance for an infringement thereof?"

The ordinance recited above is an absolute prohibition, regardless of circumstances, against keeping bees within the city limits.

R. S. Missouri, 1929, Section 7021, gives the board of aldermen of a city of the fourth class certain powers in connection with regulating animals and fowls, in the following language:

> "The board of aldermen may also regulate or prohibit the running at large of cattle, hogs, horses, mules, sheep, goats and all other domestic animals, also geese, ducks, chickens, turkeys and all other domestic fowls and cause such animals or fowls as may be running at large to be impounded and sold in such manner and at such time as may be prescribed by ordinance. They may also provide penalties for the owners or keepers who shall permit such animals or fowls to be at large."

This statute, however, relates to regulation and prohibition of animals and fowls running at large, and not such as are kept on leased or owned premises. Likewise, it might be doubtful if bees would come within the meaning of this section. However, the matter would seem to be settled by the case of Hays v. City of Versailles, 82 S.W.(2)162 (1935), in which an injunction against the enforcement of an ordinance similar to this, except that the keeping of swine instead of bees was its subject, enacted by a city of the fourth class, was sustained on appeal. The court said:

> "Section 5478, R. S. Mo. 1919, authorizes the board of aldermen of cities of the fourth class, within which the city of Versailles falls, to regulate or prohibit the running at large of live stock, including hogs. Section 5477, R. S. Mo. 1919, authorizes the board of aldermen to regulate and suppress pigpens 'and to pass ordinances for the prevention of nuisances and their abatement.' But the Legislature has never empowered cities of this class to prohibit the keeping of animals within the city when such keeping does not constitute a nuisance per se. Brown v. Carrollton, 122 Mo. App. 278, 281, 99 S.W. 37. 'A nuisance at law or a nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surrounding.' 46 C.J. pp. 664, 649."

Mr. W. A. Sharp, Jr.,
City Clerk,
Craig, Missouri.
April 13, 1935.

In view of the above definition of a nuisance per se, we do not believe that bees come within this classification, although bees could, under some circumstances, be a nuisance, as was indicated in the case of Olmsted v. Rich, 5 Silv. Sup. 826, 6 N.Y.S. 826.

Our conclusion, therefore, is that a city of the fourth class cannot impose an absolute unqualified prohibition against the possession of bees within its city limits, and that the ordinance in question, which attempts to do this, is void.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

Probate Court - Demands must be allowed by court in order for executor to receive credit therefor.

6-13

June 12, 1935.

FILED
83

Honorable Robert F. Sevier,
Judge of Probate Court,
Clay County,
Liberty, Missouri.

Dear Sir:

This department is in receipt of your letter requesting an opinion as to the following state of facts:

> "A little controversy has arisen on which I should like a ruling from your office.
>
> "Section 198 of R.S. 1929 states 'that the probate court shall hear all claims presented in a summary way, provided in claims under one hundred dollars, or one hundred dollars or less, if the administrator, either in open court or in his waiver of notice, shall certify that he is satisfied with the correctness of said demand, the same may be allowed without further proof.
>
> "Now the Sec. 206, R.S. 1909 states the same as above only it says 'ten dollars' in place of 'one hundred dollars'. It has been the fule here that if the demand is under ten dollars it may be paid without an allowance from the probate court, however, if it is an allowance or claim for any more than ten dollars, it should be waived upon by the administrator. And no matter how large the sum, if the administrators shall waive, it has been the custom to allow it, without proof.
>
> "Now, it is my contention that now under the present statute if the claim is under one hundred dollars, the administrator may waive on it, and the court allow it without any

> further proof, however if it is over $100.00, proof must be heard on same.
>
> "For fear I do not make myself clear, take this illustration, a party has a claim against an estate for three dollars; the attorneys here tell the administrator to pay it without an order from the probate court; however, if the claim is over $100.00, they say that an order from the probate court is necessary before it can be paid.
>
> "Now if that estate should not be fully solvent, would not the administrator be just as liable on those claims which he paid under ten dollars as those upon which he paid over ten dollars without an order or allowance?"

Section 198, R.S. Mo. 1929 provides:

> "The court shall hear and determine all demands in a summary way without the form of pleading, and shall take evidence of competent witnesses or other legal evidence: Provided, in cases where the amount claimed is one hundred dollars or less, if the administrator, either in open court or in his waiver of notice, shall certify that he is satisfied of the correctness of said claim, or the claimant shall file the affidavit of a competent withess to the correctness of said demand, the same may be allowed without further proof."

In the case of Langston v. Canterbury, 173 Mo. 122, the Court said (l.c. 128):

> "The requirements of our statutes in reference to the presentation and allowance of demands against the estate of a deceased person are so plain and unequivocal that one can scarcely misconstrue them. Claims must be exhibited to the administrator, presented to the probate court for allowance and established by proof. (Secs. 183 to 191, R.S. 1889; same secs. 184 to 193, R.S. 1899) Until

> a claim has been so allowed by the probate court or established by judgment of a circuit or other court of competent jurisdiction and classed by the probate court, an administrator has no right to appropriate any of the assets of the estate to its payment."

In the case of Judson v. Bennett, 233 Mo. 607, l.c. 646, Judge Woodson said:

> "If the claim paid was in fact a legitimate demand against the estate, and could have been legally probated against it, then the mere fact that it was not first presented to and allowed by the probate court would not of itself bar the executor's right to a credit for such payment.
>
> * * *
>
> "But where the assets are ample to pay all the legal demands existing against the estate, and none but such have been in fact paid by the executors, then the heirs and devisees are not injured and have no legal grounds for complaint. However, in all such cases, the executors pay all such demands at their own risks; that is, if they should pay a demand presented against an estate without first requiring it to be probated, when, in fact, the claim was not a legal demand against the estate, then the loss would fall upon the executors, and the probate court would not be warranted in allowing the executors credit for such payment; whereas, upon the other hand, if the claim had been properly probated, and, after payment, it should develop that the claim was not in fact a lawful demand against the estate, nevertheless the executors should be allowed credit for the payment so made, for the reason that in such case they followed the law and performed their full duty, and the error which resulted in the loss could not be charged against them."

CONCLUSION

In view of the foregoing, it is the opinion of this department that in order for an executor to be allowed credit for the payment of any claim, the claim must be presented to and allowed by the Probate Court unless it be that the assets are ample to pay all the legal demands existing against the estate and none but such have been in fact paid by the executor.

If the claim be $100.00 or less, the demand may be allowed without proof if the administrator certify as to the correctness of the claim or an affidavit of a competent witness be filed as to the correctness of said demand.

Respectfully submitted,

HARRY G. WALTNER,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

HGW:AH

RECORDER - Agreements must be acknowledged by both parties before same can be recorded.

November 1, 1935.



Honorable Oliver Senti
Associate City Counselor
St. Louis, Missouri

Dear Sir:

We have your request of September 28, 1935 for an opinion, which request is as follows:

"Enclosed is a photostatic copy of what purports to be an agreement for an extension of a loan, the original of which was presented to the Recorder of Deeds by the Prudential Insurance Company for recording. As the instrument is signed by only one of the parties, the Recorder is doubtful whether it is a proper one to record under Section 11543.

"Since his question involves the construction of a statute which should be uniformly construed throughout the State, we feel that the Recorder should, for his own protection, be guided by your advice.

"Will you please inform this department whether, in your opinion, the instrument is a proper one for recording, so that we can advise the Recorder of Deeds accordingly?

"If, in your opinion, the instrument should be recorded, the Re-

> corder would also like to know whether, in indexing it, he should describe it as an agreement or as a notice."

The photostatic copy attached thereto appears to be "an agreement for an extention of city loan." It appears that the person receiving the extension of the loan has signed the agreement, but that the grantor of such extension has not signed the agreement.

As to a construction of Section 11543, R. S. Mo. 1929 requested in your letter, we quote the pertinent part thereof:

> "It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices * "

It is well settled that a contract relating to the sale of real estate must be signed by both parties, the buyer and seller, and if signed only by the buyer, the recording of such will not be constructive notice to a subsequent purchaser from said owner without actual notice. Heintz v. Moore, 246 Mo. 226.

The failure of both parties to sign and acknowledge the purported agreement for extension of city loan, is open to the same objection that could be made to a deed which was not properly acknowledged.

In Williams v. Butterfield (1904), 182 Mo., l.c. 185, the court said:

> "The record of this deed, as offered in evidence, does not show any certificate of acknowledgment by Henry Bohlcke, the grantor in said deed. Under the statute, it must be conceded that this deed was not entitled to be recorded, by reason of the absence of such acknowledgment.
>
> "It follows from this, if the general rule is applicable to this deed, that in the absence of the certificate of acknowledgment required by the statute, it had no place upon the land records of Stoddard county, and if improperly recorded, would not impart constructive notice to a subsequent purchaser in good faith, for a valuable consideration."

It is, therefore, the opinion of this office that the purported "agreement for extension of city loan", executed and acknowledged only by the debtor is not entitled to be recorded in this state.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

Appropriation to Kansas City Court of Appeals not sufficient to cover payment of insurance.

11-6

November 5, 1935.

FILED
83

Honorable Hopkins B. Shain,
Presiding Judge,
Kansas City Court of Appeals,
Kansas City, Missouri.

Dear Judge:

This department is in receipt of your request for an opinion as to the following state of facts:

> "State Auditor Smith has returned insurance bills and refuses to pay same upon my certificate without an opinion by you.
>
> "My position is that a Constitutional court has the right to decide upon questions of whether or not it protects its library by insurance.
>
> "We have always concluded that Insurance came under the head of 'General Expense'; that in the appropriation bill you will note there is a semi-colon after 'For General Expense'; for communication, printing and binding, etc., a comma appears after each other item mentioned.
>
> "Our conclusion is that as to matters of general expenses that a court of record can be trusted with exercising sound discretion. By noting Section 1904, R.S. 1929, you will note this language: 'All of which expenditures as also for stationary and other necessary outlay * * * shall be paid by the State, etc.'
>
> "It is our conclusion from the reading of the language following the above that the certificate of the Presiding Judge constituted such a voucher as makes it mandatory upon the Auditor to issue the warrant.

"It appears to us that to deny this court the right to determine as to small matters of 'necessary expense', is to deny this court is a constitutional court. Let me cite for your consideration, Ewing v. Vernon County, 216 Mo. l.c. 687 (a). The case is not directly in point, but in that the officials were ministerial officers you can summarize as to the Court's language had the matter have hinged upon the right of a court of record to determine matters of necessary expense been involved.

"The Kansas City Court of Appeals have for years concluded that insurance of our excellent library was a necessary expense in that if destroyed, we could, with the insurance, supply the absolutely necessary tools with which we work without awaiting convening of the legislature which meets but biennially, and further await the pleasure of that body when it met.

"We are sending the certified bills herewith in the hope that you will immediately attach thereto such official mandate as will allow us to dispose of this matter. Please send the bills, with your approval, if approved by you, direct to the State Auditor. * * * *"

Article X, Section 19 of the Constitution of the State of Missouri provides:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Section 11421, R.S. Mo. 1929 provides as follows:

> "No warrant shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

Laws of Missouri 1935, Section 5, subsection D, page 416, provides:

> "For general expense; for communication, printing and binding, transportation of things, and contingent and other general expense, including rent and the expense of removing to new court house building. Materials and supplies; laundry, cleaning and sanitation supplies, light, heat, power and water, stationery and office supplies...$8,280."

If it is possible for the insurance bills that you speak of to be paid under the appropriation to the Kansas City Court of Appeals, it necessarily must be paid under the foregoing section of the Appropriation Act.

It is true, at the outset, that the Legislature used the term "general expense". Immediately after the use of this term, however, it said that such term would include various items and proceeds to enumerate such items. The term "general expense" is a broad term and used by itself would have been broad enough to include all of the items enumerated in Section D. When the Legislature, however, followed the words "general expense" by the enumeration of the expenses found in Section D, we believe that such enumeration limited and qualified the scope of the term "general expense". If the Legislature had not intended to limit the term "general expense" and to confine it to the enumerated items, then it would have been useless for the legislature to have made such enumeration, because the term "general expense" unrestricted would have been sufficiently broad to cover all of the items listed in Section D.

In the third line of subsection D appear the words

"contingent and other general expense"; we do not, however, believe that these words are of any assistance in making the appropriation cover the question of insurance. The general rule is that where general words are followed by particular words, the general words will be restricted and limited to the particular words used. This rule has been applied in the construction of appropriations. In State ex rel. v. Dierkes, 214 Mo. 578, the Supreme Court had for consideration an appropriation under the St. Louis Charter. The words in that appropriation which the relator relied upon were "other expenses of the House of Delegates". The court, in discussing the matter, said at page 591:

> "Now take either of the two appropriation ordinances in evidence, for they are both the same in words, except as to the last clause, we have no specific appropriation for this work or for this relator. Relator contends that the words 'other expenses of the House of Delegates', are sufficient to authorize the payment of this money out of the unexpended balance in that fund. The whole clause of the ordinance reads:
>
> 'Publishing proceedings, printing, stationery, office expenses, furniture, rent or telephone and other expenses of House of Delegates..$8,000.'
>
> "To our mind the rule of ejusdem generis fully applies here. The term 'other expenses' means expenses of the character theretofore mentioned in that clause of the appropriation act and does not include an appropriation for work of the character performed by relator. To hold that it did include such would be to nullify the provisions of Section 14, Article 5 of the city charter, supra."

Following the above decision, therefore, we are of the opinion that money appropriated by Section D can only be used for the purposes enumerated in Section D, or for items by reason of the similarity of which can be said to come within the enumerated classes under the rule of ejusdem generis. We do not believe that premiums for insurance, whether it be fire, liability, theft or otherwise, are similar enough to the enumerated items to bring them within the provisions of the appropriation.

CONCLUSION

In view of the foregoing, it is the opinion of this department that the Appropriation Act to the Kansas City Court of Appeals does not include the payment of premiums for insurance on the library of the Kansas City Court of Appeals.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

SAL.) FEES: Constable entitled to commitment fees only when person committed is a criminal.

Sheriff entitled to commitment fees regardless of whether person committed is adjudged a criminal.

11-16

November 14, 1935.

FILED
83

Judge Arthur S. Shaw,
308 Thompson Avenue,
Excelsior Springs, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "In your opinion who is entitled to the One Dollar mentioned in Sec. 11791 of the Revised Statutes of Missouri (Fees of Sheriffs and other Officers) for committing any person to Jail. Our Circuit Clerk says it is a fee belonging to the Sheriff for any prisoner placed in the County Jail regardless who may bring him in. I contend that if I give a commitment to the Constable or other Officer to commit a person to Jail to await Trial or serve a sentence that Officer commits him and the Jailor receives him. If I am wrong and I give a commitment to the Sheriff or his deputy what fee if any is he entitled to. The Clerk says there are no fee provided for the Sheriff in such work. If that be the case and the Sheriff brings a Robber or other desperate criminal I must turn him over to the Constable to take to Jail regardless as to whether he is a competent person or not or the Sheriff must make the trip for nothing. Please read foot notes under Sec. 11756."

In the case of People v. Kulan, 3 Mich. 42, 49, the term "commitment" is said to mean the process by which a person is confined under the order of a court at any time before or after final sentence.

In the case of Commonwealth v. Barker, 133 Mass. 399, 400, it is stated that a commitment is a warrant or order by a court or magistrate directing a ministerial officer to take a person to prison.

In the case of Duthmann v. People, 67 N. E. 821, 822, 203 Ill. 260, it is stated that a commitment has in law a well defined meaning and signifies the act of sending an accused or convicted person to prison.

In the case of State v. Clark, 70 S. W. 489, 492, 170 Mo. 67, in which case is cited the case of Thomas v. St. Louis County, 61 Mo. 547, the court in construing the words "committing any person to jail" as used in the statute relating to the fee bill of a sheriff, says that they relate to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions.

Section 3426, R. S. Mo. 1929, provides as follows:

> "If the defendant shall fail or refuse to enter into recognizance, the justice shall commit him to the common jail of the county, or to the calaboose or other prison of the city where the trial is pending, there to remain until the day fixed for the trial of the charge alleged against him."

Section 3443 prescribes the form of the commitment, stating that it may be directed to the sheriff or any constable.

Section 3446 provides:

> "All proceedings upon the trial of misdemeanors before justices of the peace shall be governed by the practice in criminal cases in courts

> of record, so far as the same may be applicable, and in respect to which no provision is made by statute."

The above sections refer to proceedings before justices of the peace in misdemeanors.

The sections pertaining to the authority of justices of the peace as to commitments in felony cases are now referred to.

Section 3474 authorizes the justice of the peace to commit a person at his preliminary; likewise does Section 3476, which states as follows:

> "When such person fails to recognize, he may be committed to prison by an order under the hand of the magistrate, stating concisely that he is committed for further examination on a future day, to be named in the order, and on the day appointed he may be brought before the magistrate, by his verbal order to the officer who made the commitment, or by his order in writing to a different person."

Sections 3487 and 3488 prescribe certain authority and duties given to and laid on justices of the peace as to committing.

Thus it will be seen under what circumstances justices of the peace may issue commitments, and they may be directed by him to either the sheriff or the constable.

Section 11777, relating to fees of constables, among other things, provides that he shall be entitled to $1.00 "for taking a criminal to jail."

Section 11791, relating to fees of sheriffs, county marshals and other officers, provides that they shall be allowed fees for their services in criminal cases, among other things, "For committing any person to jail, $1.00."

Section 11777 is the specific statute defining constable fees, while Section 11791 is a general statute defining the fees of sheriffs, county marshals and other officers.

It would appear that the specific statute defining the constable's fees must govern as to his fees and that he does not come within the class of "other officers" as used in Section 11791.

No officer is entitled to compensation for services which he performs in his official capacity unless the statute clearly authorizes the payment thereof.

In the case of King v. Riverland Levee District, 279 S. W. 195, l. c. 196, the court says:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. * * * * * Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking vs. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

In construing statutes relating to the payment of fees, they are given strict construction.

It will be noted that the statute defining constable's fees says that the constable is entitled to a fee for "taking a criminal to jail." The law does not stamp a man as a criminal until after he has on his voluntary plea or after trial and judgment been adjudged guilty of a crime. It would appear from this that the constable is only entitled to the fee of $1.00 for committing a person after he has been adjudged guilty. On the other hand, the sheriff is entitled to the fee "for committing any person to jail."

Our view is that committing a person to jail is the physical deliverance of the defendant from the court room where the justice presides to the jailer, and the authority to so deliver the prisoner is the paper that is issued by the justice directing the officer to so deliver the prisoner to the jailer.

CONCLUSION

It is our opinion that if the commitment issued by the justice of the peace is directed to the sheriff and the sheriff executes the same, the sheriff is entitled to the $1.00 fee as provided for by the above quoted statutes. If the commitment is issued by the justice of the peace and directed to the constable, and the defendant is a "criminal" within the meaning of the law, and the constable executes the commitment by delivering the defendant to the jailer, then the constable is entitled to the $1.00 fee provided for by the above Section 11777 for so doing, and under no other circumstances.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

County Seat, Removal of

Petition to move County Seat and petition to increase tax to build new court house must be separate petitions.

FILED
84

January 2nd, 1935.

Mr. William Short,
County Treasurer,
Huntsville, Missouri.

Dear Sir:-

We have your letter of November 26, 1934 in which is contained a request for an opinion as follows:

> "We are figuring on moving the County Seat to Moberly and building a new Court House there as this one in Huntsville is falling down by degrees and I would like to know what procedure to take in this matter. Do we have to get a petition to the County Court to move the County Seat and then another one to the County Court to build a court house and separate elections on both, or can we get a petition to and the required number on it to call an election to build a court house in Moberly and that would automatically move the County Seat. If we have to have separate petitions for each how many signers would we have to have to present it to the court to call an election and how many would we have to have to carry either or both of them at the polls.
>
> "Hoping this is not asking too much of you and I do not cause you too much trouble looking this up but this has to be did sooner or later to be safe to work in, and I was asked by several interested in it to write you for the information.
>
> "Hoping to hear from you soon with the information desired by the taxpayers of this County for the safety of the public in general that come in and out of the court house day in and day out."

Article 4 of Chapter 85, sections 12043-12104 incl., Revised Statutes of Missouri, 1929, sets forth the law and procedure with reference to the removal of a county seat and the construction of a new court house.

Section 12073 et seq., Revised Statutes of Missouri, 1929, provides that one fourth of the voters in a county may petition the county court for an order submitting the proposition of removal to

the voters at the next general election. For adoption of the proposition, under section 12075 of the Statutes, and also under section 2, article 9 of the Constitution of Missouri, two thirds of the qualified voters of the county, voting on the proposition, must vote in favor thereof.

With regard to the petition for the erection of a new court house, we presume you refer to a petition for an order submitting to an election the question of increased taxation for the purpose of erecting a court house.

Sections 12093 to 12103, Revised Statutes of Missouri, 1929, seem to cover increase of taxation for the erection of public buildings generally. Section 12104, Revised Statutes of Missouri, 1929, however, expressly applies to the erection of a court house, hence we refer you to the latter section.

By section 12104 mentioned above it is provided that the county court of its own motion may, or, upon petition signed by not less than one hundred resident taxpayers, shall order that an election be held within forty-five days thereafter to determine whether or not the rate of taxation shall be increased for the purpose of erecting a court house. Certain conditions and the form of ballot are then set out. Two thirds of the qualified voters voting at such election are necessary for adoption.

From the above it will be seen that the procedures for removal of the county seat and for the erection of a court house are markedly different. For instance, the removal proposition must be submitted at a general election; not so in the case of the other proposition. In addition, where removal is sought one-fourth of all the voters in a county must sign the petition; while in the other situation the county court may of its own motion order the election, or if it will not act, only one hundred resident taxpayers must sign the petition which will require action.

It seems fairly obvious, therefore, that the legislative intent was to keep the two procedures distinct and separate. With the foregoing in mind we are of the opinion that both procedures must be separately followed.

Very truly yours,

CMHJr:LC

CHAS. M. HOWELL, Jr.
Assistant Attorney General

APPROVED:

Attorney General

COUNTY BUDGET LAW: Road District Fund and County Purpose Fund may be used for Class 5 and need not be kept separate from other funds, and if anticipated funds in Class 5 exceed 1/5 of anticipated revenue, the excess may be placed in Class 6.

January 3, 1935.

FILED
84

Hon. F.D. Sheible,
Treasurer of Jefferson County,
Hillsboro, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of December 5, 1934, said request being in the following terms:

> "As the Treasurer of Jefferson County, Missouri, will you kindly favor me with an opinion as to whether or not it is legal for county treasurers to transfer a County Road District Fund to the general purpose fund of the county?
>
> Formerly we had county revenue, county road and bridge, road district, special road district funds, etc., but with the ushering in of the Budget Law, the two first mentioned funds were consolidated into one fund known as the County Purpose Fund. Lately I have been advised that the Court desires to consolidate the Road District Fund with the County Purpose Fund. Your opinion as to the legality of latter mentioned transfer would therefore be very deeply appreciated."

The above letter was supplemented by a letter from you dated December 21, 1934, containing the following information:

> "What we call our 'County Purpose Fund' is the budget portion of the county money or that portion under the Budget Law available for use in the various classifications, namely, 1 to 5. To give you an

idea of the county's financial possibilities from a tax collection standpoint, will say that we are levying as follows: County Revenue, 30 cents per $100; Road & Bridge, 25 cents per $100; Road District 20 cents per $100. The County Revenue and the Road and Bridge have already been consolidated and yield a combined rate of 55 cents per $100. The County Court has recently ordered the further consolidation of the Road District Fund with the two former; this results in a total budget levy of 75 cents per $100.

I do not know under what law authority the levy of 20 cents per $100 for Road District Fund was authorized, but I do know that for years the county has been maintaining a levy for this account. We formerly had some 79 road districts and the levy was run against taxpayers of said districts and spent in the several districts in the exact proportion as the amount collected for the district. The money being dispensed as a rule through the County Treasurer to road overseers appointed to supervise road work in the various districts. Some time ago the county began the maintenance method of caring for roads and at that time the road overseers were eliminated, but the road district fund and levy therefor remained, and the county as a rule hired men to work in each district every year, and these as a rule worked out most all monies collected for the district.

The money derived from the road tax goes into the 'Road District Fund.'"

The County Budget Act of 1933 changed the financial structure of the various counties of the State, it being the intention of the Legislature to budget the various funds for the purpose of economy and efficiency. Section 9874, R.S. Mo. 1929 is expressly repealed. The classes created by the Legislature are somewhat similar to the classes under Section 9874, but under the new law each succeeding class has a priority of the lien on the county funds of the other classes, which was not the situation under the old section 9874.

Sec. 1, Laws of Mo. 1933, p. 340 contains the sentence, "whenever the term revenue is used in this act it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by this act regardless

of the source from which derived." We construe this provision of the Act to mean that all of the funds of whatever kind and nature are to be classified and expended according to Sec. 2 of the Act, which contains the classes, except as where expressly provided in the classes themselves that certain revenue is exempt.

Class 3, Sec. 2, Laws of Mo. 1933, p. 341 is as follows:

> "The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

This class refers only to the repair and replacement of bridges, there being no provision made for roads, nor do any of the other classes refer to roads specifically.

Sec. 1 of the Budget Act also contains this sentence: "The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved." It therefore becomes the duty of the county court to sacredly preserve the priority of the various classes in the order mentioned and unless certain obligations are specific, or exempt from certain classes, it is necessary that the fund for that purpose be placed in Class 5 or 6.

Sec. 22, Laws of Mo. 1933, p. 351 provides as follows: "All laws or parts of laws and expressly sections 9874, 9985 and 9986 in so far as they conflict are hereby repealed.". Having construed the new County Budget Law as taking over the entire financial structure of the county, we are forced to the conclusion that all sections relating to road funds of the county are in conflict with, at least partially, this Act, and the funds derived from the revenue for road purposes should be disbursed according to the terms of the new County Budget Act.

As stated before, it is the duty of the county court to sacredly preserve the priorities as enumerated in the various classes. If the county court shall carry out this duty and successfully take care of all obligations in the succeeding classes, then any surplus funds in any given class may be used, if there be a deficiency, in any succeeding class, and we accordingly hold that it is not necessary to make any formal transfer. Having

reached the conclusion that the funds mentioned in your letter may be used if necessary to preserve priorities, and if such priorities have been sacredly preserved according to the classes, then the question arises as to where the surplus funds may be used.

Sec. 2, Class 5, Laws of Mo. 1933, p. 342 is as follows:

> "The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

Sec. 5, Laws of Mo. 1933, p. 344 contains the following regarding Class 5 hereinbefore quoted:

> "Contingent and emergency expense, not to exceed one-fifth of the total estimated revenue to be received. Purposes for which the court proposes the funds in this class shall be used shall be shown."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the funds mentioned in your letter may be used or allocated to Class 5 and need not be kept separate from the other county funds. If the anticipated funds of Class 5 exceed one-fifth of the anticipated revenue, it is the opinion of this department that the excess may be placed in Class 6, wherein we note the following words: "After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose."

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

Attorney General

OWN.AH

DEPUTY CIRCUIT CLERK: Statutes do not require a deputy to give bond; however, circuit clerk may, if he desires, exact a reasonable bond.

2-4

January 26, 1935.

FILED
84

Hon. John E. Short,
Circuit Clerk,
Ray County,
Richmond, Missouri.

Dear Sir:

This department is in receipt of your letter of some time ago wherein you request an opinion concerning the following:

> "I having asked my deputies to furnish bond at $1,000 each, would like a decision from your office on this matter."

Section 11812, Laws of Missouri, 1933, p. 371 contains the following provisions relating to deputies:

> "Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the county court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant, which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be

> filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

Section 11666, R.S. Mo. 1929 relates to the giving of a bond by the circuit clerk, and is as follows:

> "Every clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Missouri, with good and sufficient securities, who shall be residents of the county for which the clerk is appointed or elected, in any sum not less than five thousand dollars, the amount to be fixed and the bond to be approved by the court of which he is clerk, or by a majority of the judges of such court, in vacation. The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hand by virtue of his office, and that he, his executors or administrators, will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office."

Neither of the above sections contain any provision relative to the giving of bond by a deputy circuit clerk; we therefore conclude that it is not necessary for a deputy to give bond for his official acts in the circuit clerk's office. It is a well recognized principle of law that you, as circuit clerk, would be liable on your bond for the acts of the deputy. We assume that you had this in mind when you conceived the idea of having your deputy execute a bond--that the same is for your own protection. Some states require a deputy to give bond, but as above stated, the State of Missouri does not.

We call your attention to a decision in the State of Indiana, where such a law exists,for the purpose of shedding light on whether or not it is legal for you to exact a bond from your

deputy. In that case, Southern Surety Co. v. Kinney, 74 Ind. App. l.c. 216-217, the Court said:

> "Thus far we have considered Sec. 9478 Burns 1914, supra, as being merely permissive rather than mandatory, but the language used does not necessarily require that it be so construed. Said section provides that a county treasurer 'may appoint one or more deputies and may take from them bond and surety.' It is well settled that in the construction of statutes the word 'may' will be construed synonymous with 'shall' where public interests and rights are concerned, and where the public or third persons have a claim de jure that the power should be exercised. Nave v. Nave (1855), 7 Ind. 122; Bansemer v. Mace (1862), 18 Ind. 27, 81 Am. Dec. 344; City of Madison v. Smith (1882), 83 Ind. 502; Zorn v. Warren, etc. Paving Co. (1908), 42 Ind. App. 213, 84 N.E. 509. The statute provides that the deputies of county treasurers 'shall take the oath of their principals and may perform all the duties of such principals.' Secs. 9158, 5159, supra. We know as a matter of common knowledge that such deputies, as a rule, receive and disburse public funds, and in some instances, as appears in the case at bar, have practically the entire control of the office. The funds thus entrusted to such officials are not the private funds of their superiors, but public funds, in which every taxpayer has an interest. The public is therefore concerned as to its safety, and has a right to demand that the officer primarily charged with the duty of receiving and disbursing such funds shall take every precaution to prevent its loss or impairment which the law provides. It is not a sufficient answer to say that the law makes the treasurer and his sureties responsible for the official acts of his deputies. That is merely one provision made for the safety of public funds entrusted to them, and may as a rule suffice for such purpose, but it is entirely within the realm of possibility that,

> where a deputy treasurer becomes a defaulter, his principal and sureties might all prove to be insolvent. The public, having a direct interest in the funds, has a right to demand not only that one precaution provided by statute be taken for their safety, but that every precaution so provided be taken."

Your precise question is answered in 22 R.C.L., page 587 in the following language:

> "A public officer who handles public funds may or may not, as he pleases, take security from the deputies for the faithful discharge of their duties in regard to such moneys. Every bond demanded of and taken from a deputy for the faithful discharge of his duties is an official bond, and is subject to the same rules as other official bonds. Where the principal officer has himself given a bond, those aggrieved by the acts of his deputies within the scope of their authority may recover on such bond. For example it has been held that where a deputy sheriff kills a person under the mistaken belief that he is a felon for whose arrest the deputy has a warrant, and that the killing is necessary to prevent his escape, the sheriff is liable on his bond. But the sureties of the deputy are not amenable beyond default of such deputy in his official duties."

CONCLUSION

The statutes do not require a deputy to give bond to his principal and we are not able to locate any decision in this state regarding the matter; however, we are of the opinion that you may, if you so desire, exact of your deputy a reasonable

bond for the faithful performance of his duties and the accounting of all funds in his hands as deputy circuit clerk.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

COUNTY COURT: Sec. 11812, R.S. Mo. 1929 confers on County Court complete control of appointment, compensation, and tenure of office of deputies and assistants to clerks of the circuit court.

4-18

April 18, 1935.

FILED 84

Hon. Clarence L. Shotwell,
Missouri Senate,
Jefferson City, Missouri.

Dear Senator Shotwell:

This department is in receipt of your letter of April 2 asking for an opinion as to the following state of facts:

> "The County Court of St. Louis County have been urging me to have perfected and passed Senate Bill No. 116, which gives the County Court the right to limit the number of employees of the various county officers and also fix their compensation. I have told them that I thought they had that authority as far as the office of the Circuit Clerk was concerned under the provisions of Section 11812, R.S. Mo. 1929, as amended by the Acts of 1933, page 371. However, they claim that they are advised by their attorney or counselor that they have no such authority. Personally, I do not agree with the opinion they have received, but in order to get straight on the matter I would be glad if you would advise me at your earliest convenience as to the construction you place on the authority given them under said Section 11812."

Laws of Missouri, 1933, page 371 provides:

Sec. 11812, Laws of Mo. 1933, page 371 provides:

> "Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the county court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office. The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

The general rule with respect to the authority conferred by reason of the power of removal granted to some officer or body is stated in 22 R.C.L., Sec. 84, page 433:

> "Wherever under a constitutional or statutory provision the appointment is required to be made with the approval of some officer or body, such appointment must be approved before the person is legally entitled to the office."

In the case of Schulte v. City of Jefferson, 273 S.W. page 170, the Court said:

> "(1) It is well settled - 'Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc. p. 1372; Meachem's Public Office and Officers, Secs. 114, 124; 22 R.C.L. p. 433, Sec. 84."

CONCLUSION

Under Sec. 11812, supra, a clerk of the Circuit Court is entitled to appoint deputies and assistants, but may only do so with the approval of the County Court and may only appoint such deputies and assistants as "such courts shall deem necessary for the prompt and proper discharge of the duties of his office." The County Court is given the power to fix the compensation of the deputies and assistants and may at any time "modify or rescind its order permitting any appointment to be made and may reduce the compensation theretofore fixed by it."

It would be difficult to conceive of language that could more strongly assert the intention of the Legislature that the County Court should have the complete control of the appointment, compensation and tenure of office of deputies and assistants to the clerk of the Circuit Court, and such is our conclusion with respect to the construction to be placed on Section 11812, supra.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

BARBER SHOPS) Under the provisions of House Bill
and) No. 32, cities may regulate the
BEAUTY SHOPS) hours of closing of barber shops
) alone or vice versa.

9-26

September 26, 1935

FILED
85

Mr. J. H. Skaggs
Treasurer State Barber Board
405, 100 North Broadway Building
St. Louis, Missouri

Dear Sir:

This will acknowledge your letter of recent date requesting an opinion, which reads as follows:

> "In the last session of the legislature there was a Bill passed known as House Bill No. 32, giving power and authority for incorporated Cities and towns in the State, to pass an ordinance setting closing hours for barber shops and beauty parlors.
>
> Now as the two occupations are so closely connected, doing practically the same type of work, namely cutting and dressing the hair Etc, and in view of the fact that there are many barbers who carry both, a barbers license and a beauty operators license, and who operate both a barber shop and a beauty parlor in the same quarters, and could be a barber up until a certain time and a beauty operator after that time. In view of these facts and also in view of the fact that House Bill No. 32 is a twin bill, stating barber shops and beauty shops, I would appreciate an opinion as to whether or not an ordinance would be legal

if it only mentioned barber shops and left out beauty shops.

This question however arises in my mind, for instance a closing hour of seven o'clock is set for barber shops, and no mention is made of beauty shops, as prescribed in House Bill No. 32. Now the hour of seven o'clock arrives, a certain barber shop closes his door, then comes a lady and her children to this barber shop for a hair cut, the barber tells her that he is required by law to close his shop at seven o'clock and that he cannot serve her, then she goes across the street to a beauty shop and all get their hair cut by licensed beauty operators, while House Bill No. 32 states closing hours for barber shops and beauty shops.

Please give me an opinion on this at your very earliest possible convenience, as there is about to be a bill introduced in the Board of Aldermen of St. Louis leaving out beauty shops, and I fear that the legality of the ordinance will kick back at us, as the beauty operators took an active part in helping to get House Bill No. 32 through the legislature, and all the better class of beauty shops are as anxious for the provisions of this bill, as is the barbers.

Thanking you for a quick reply to this request."

Your attention is directed to Section 7289, R. S. Mo. 1929, relating to cities and towns under special charter, and said section reads as follows:

"Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating

> subjects, matters and things upon which there is a general law of the State, unless otherwise prescribed or authorized by some special provision of its charger, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

Under the provisions of the above section of the statute, it is too plain to admit of controversy that cities must pass laws in conformity with State laws.

House Bill No. 32 which was signed by Governor Park on April 16, 1935, and which is now the law of this state respecting the instant matter, reads as follows:

> "Section 1. The legislative bodies of all incorporated cities, towns and villages are hereby empowered to pass, alter, amend and repeal ordinances to regulate the hours of closing of barber shops and beauty shops."

We direct your further attention to Section 23 of Article IX of the Constitution of Missouri respecting the charter of the City of St. Louis, Missouri, which provides as follows:

> " 'Such charter and amendments shall always be in harmony with and subject to the Constitution and laws of Missouri,' etc., " subject to certain exceptions mentioned therein.

In the case of Ex parte Tarling 241 S. W. l. c. 932, the Court had before it for consideration an ordinance of the City of St. Louis, Missouri, and in passing upon the particular ordinance in question had the following to say:

"This court, in construing the ordinances of St. Louis, and other cities in the state, has uniformly followed the constitutional and statutory mandates * * * *. * * * * * we have uniformly held that municipal ordinances must be in harmony with the provisions of our Constitution and the Legislature enactments of our state. * * * * * * *"

CONCLUSION

It is the opinion of this department that if a city were to pass an ordinance respecting barber shops alone, it would not be in conflict with the State law. You will note that the City is empowered to pass such ordinances respecting barber and beauty shops but it is not obligatory that they do so.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

RCS:LC

COUNTY BUDGET ACT: County Court may transfer surplus in any one of the five classes to some other class in need of same at the close of fiscal year
COUNTY COURT: It is duty of county court under Sec. 12162, R.S. 1929 to take whatever action it deems proper in regard to audit made by State Auditor of county offices.
CIRCUIT CLERK: Additional salary due Circuit Clerk, as shown by audit, for 1932-33-34 can only be paid from income of those years, from back taxes collected for those years, or from surplus remaining at close of fiscal year.

November 22, 1935.

11-22

FILED
85

Honorable H.J. Simmons,
Prosecuting Attorney,
Vernon County,
Nevada, Missouri.

Dear Sir:

This department is in receipt of your recent letter requesting an opinion as to the following:

I

> "This county will have a surplus of funds in Classes 1 and 4 at the end of the year and a shortage in Class 3. This county owes outstanding, protested warrants of prior years. Section 12167 and section 12168 provide that any balance at the close of the year may be used by any fund which may be in need of said balance.
>
> "Will you kindly advise whether under the sections 12167 and 12168 the surplus in classes 1 and 4 may be transferred to Class 3 or any other class which is in need of funds at the end of the year or whether the balance in those classes should be transferred to Class 6 to apply on outstanding, protested warrants of prior years."

The County Budget Act, Section 2 (Laws of Mo. 1933, page 341) divides proposed expenditures of the county for the fiscal year into 6 different classes, 5 of which are definite in their terms, and each class has priority over each succeeding class, and such priority must be sacredly preserved.

Sections 12167 and 12168, R.S. Mo. 1929, relating to the transfer of funds after the purposes for which they were

appropriated have been satisfied, have been on our statute books for a number of years, and we know of no reason why they cannot be applied to the County Budget Act. The County Budget Act did not repeal in its entirety the old financial structure which has long existed in our counties and enact new laws in lieu thereof. The only sections which are expressly repealed are Sections 9874, 9985 and 9986, R.S. Mo. 1929, and those sections only insofar as they conflict.

We can discern no conflict in the County Budget Act and Sections 12167 and 12168, R.S. Mo. 1929; therefore, we are of the opinion that if a balance remain in Classes 1 and 4 and the priorities of payment have been preserved, such surplus may be transferred to Class 3 if there be a shortage in said class, or such surplus may be transferred to any other class which may be in need of same, with the exception of Class 6.

We are further of the opinion that no surplus should be transferred to Class 6 until all of the five prior classes, which might be in need of such funds, have been taken care of.

II

> "The report filed by the State Auditor in this county in compliance with sections 11478 and 11479 of the Session Acts of 1933 shows an excess fee retention by the County Clerk of $2349.29; excess salary of the Prosecuting Attorney for the term of 1931-1932 to be $541.72; excess salary retention of the County Superintendent of Schools from March 13, 1934 to December 31, 1934 is $120.84; and salary due the Circuit Clerk of Vernon County to be $1458.38.
>
> "The County Court has asked that I get an opinion from you as to what steps they should take in collecting the excess Attorney and County Superintendent of Schools and whether it is mandatory under the Budget Act for the County Court to take any action in the matter."

Under Section 12162, R.S. Mo. 1929 the county court is authorized to enforce the collection of money due the county in settling claims, the pertinent part of which is as follows:

> "The county court shall have power to audit, adjust and settle all

> accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; to enforce the collection of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; to issue all necessary process to secure the attendance of any person, whether party or witness, whom they deem it necessary to examine in the investigation of any accounts; * * * * "

Therefore, if the county court believes that any officer of the county owes the county certain sums of money, it is its duty to turn the matter over to the Prosecuting Attorney and direct that, after investigation by said Prosecuting Attorney, suit be instituted and prosecuted to final judgment, and if the county court so desires, it may employ other attorneys. State v. Fulks, 296 Mo. 634. There is no action required under the County Budget Act.

III

> "Also advise whether the $1458.38 that is due the Circuit Clerk can legally be paid out of Class 4 of the budget for the year of 1935 when the amount due him is for the years 1932-33-34."

It is the opinion of this department that the excess salary ($1458.38) due the Circuit Clerk cannot legally be paid out of the funds in Class 4 for the year 1935. This department recently rendered an opinion to Honorable Percy W. Gullic, Prosecuting Attorney of Oregon County bearing on this question, copy of which is enclosed herewith, which we believe properly answers your third question.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

OWN:AW

Prisoners Board in County Jail

County Court cannot order different amounts to be spent for board of misdemeanor and felony prisoners.

FILED 86

January 3, 1935.

Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:-

We have your letter of December 3, 1934, in which is contained a request for an opinion as follows:

"I am in receipt of Certified Copy of County Court Order of Greene County, Missouri, as follows:

'It is ordered by the Court that the Sheriff be and is hereby allowed during the year 1934, compensation, as follows:

For each prisoner confined in said jail for misdemeanor, the sum of 50¢ per day;

For each prisoner confined in said jail for felony, the sum of 75¢ per day;

It is further ordered that the Clerk of this Court furnish the Clerk of the Circuit Court of Green County with a certified copy of this order.'

This Court Order is made in compliance with Section 11794, R. S. Mo. 1929 which authorizes the County Court to fix the board bill of prisoners during the November term. As this order is written it forces the state to pay 75¢ a day for the board of prisoners, where the County will only be required to pay 50¢ per day, as all felony cases are chargeable to the state. This seems to be a discrimination between the state and the county.

I will appreciate an opinion from your office as to the authority of the County Court of Greene County in making such an order."

Section 11794, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 11794. Allowance to sheriffs and marshals for board for prisoners. Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

Section 11795, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 11795. Duty of county courts at November term in each year to fix such allowances.--It shall be the duty of the county courts of each county in this state at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of January next thereafter, and it shall be the duty of the clerk of the county court to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court for the use of the said clerk and the judge and prosecuting attorney in making and certifying fee bills."

Neither of the sections above quoted, nor any section of the Statutes that we have been able to locate, provides for any differentiation, as to payment of board, between prisoners confined for a felony and those confined for a misdemeanor. On the contary, the word "prisoner" is used generally and must be taken to mean anyone confined, without regard to the offense committed.

The provision for the allowance by the county court, within the limit set, of so much for each prisoner for each day, is obviously intended by the legislature as a mere measure of the amount to be allowed. The offense in question can have nothing to do with the cost of board, hence the prisoners must all be treated equally with reference to such matters.

The order referred to in your letter is, in our opinion, based on no statutory authority, and should not be allowed

to stand.

Very truly yours,

CHAS. M. HOWELL, Jr.
Assistant Attorney General

CMHJr:LC

APPROVED:

_____
Attorney General.

SHERIFFS - Fees for attending court.

1-14

January 8, 1935.

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

Your request of December 19, 1934 for an opinion is as follows:

> "Section 1870, R. S. Mo. 1929 provides certain duties affecting the office of Sheriff.
>
> "I would like an opinion as to whether a Sheriff is entitled to $3.00 a day for waiting upon the County Court and the Probate Court when he actually does not perform the duties as such."

It appears from the statute, Section 1870, R. S. Mo. 1929, that:

> "The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; ## "

We construe the above statute to be mandatory upon the sheriff; it is, however, silent as to any deputy. Section 1871, R. S. Mo. 1929 makes it the duty of the county court to:

> " ** audit and adjust the accounts of the officer attending it, made pursuant to this chapter, and certify the same for payment."

Construing the two above statutes together, it is plain, (1) that it is the mandatory duty of the sheriff to attend each court held in his county, and, (2) that the account of the sheriff shall only be paid for such days as he actually attends court. The rate of pay for such service is fixed by Section 11789, R. S. Mo. 1929 and is in the following language:

> "For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day ..... $3.00"

Construing the above three statutes together, it is plain that it is the duty of the sheriff to attend court, and the rate of pay is for actual attendance upon such court, and it is the duty of the county court to audit and pay such accounts only for the officer attending court. In the event that the sheriff is unable to attend court, a deputy may attend in his place. The number of deputies in attendance upon the court under the above statute should be fixed by the court being attended.

It is, therefore, the opinion of this office that it is the duty of the sheriff to attend each term of court held in his county and for such attendance he is entitled to the statutory fee of $3.00. If he fails to attend court, he is not entitled to such pay, since the statutory fee allowance is based upon the actual attendance, and the power of the county court to audit and pay such claims is limited to pay for actual attendance of such court.

Yours very truly.

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

OFFICIAL BONDS: Attorneys at Law accepted as sureties on official bond does not invalidate, yet such should not be accepted as the statute is purely directory.

January 15, 1935.

FILED 16

Mr. Akey R. Smith
Recorder of Deeds
Clinton County
Plattsburg, Missouri

Dear Sir:

This is to acknowledge your letter of January 8, 1935, as follows:

> "Upon furnishing Official Bond for the discharge of his duties as Circuit Clerk of this County, John W. Porter gave as sureties R. H. Musser and Pross T. Cross, two attorneys at law, together with Earl S. Gibson, a merchant of this City. Under Section No. 2847 of Revised Statutes of Missouri, 1929, should this Bond have been approved? I might add that it was approved by Hon. R. B. Bridgeman, Judge of this 5th Judicial District, he contending that there was a decision of the Supreme Count modifying this Statute."

Section 2847, R. S. Mo. 1929, provides:

> "No sheriff, collector, constable, county treasurer, attorney at law, clerk of any court of record, judge or justice of any court of record, shall be taken as surety in any official bond that may be given by any officer in this state."

The above statute has been held to be directory only and not mandatory by the Supreme Court of Missouri in State

ex rel. Howell County v. Findley, 101 Mo. 368, l. c. 372, as follows:

> "The judges of the county court, it is true, ought not to have accepted one of their number as a surety on the official bond of the collector, as the statute forbids them from so doing, but statutes of this sort are regarded as directory merely, and as not designed to avoid the bonds where the statute has been disregarded."

The St. Louis Court of Appeals in Smith v. Young, 177 Mo. App. 482, l. c. 487, said the following:

> "The first charge is that, as administrator of the father's estate, respondent failed to give a proper bond as required by the statute, in that the sureties thereon were attorneys at law. This point is purely technical and not well taken, since in any event the bond is not invalidated but remains in full force and effect."

It is our opinion that while the two attorneys should not have been accepted as sureties, yet, their acceptance as sureties does not invalidate the bond.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

COUNTY BUDGET LAW: Revenue of 1934 cannot be used for payment of interest on warrants issued prior thereto; if surplus remains after all obligations have been taken care of, or if revenue is derived from delinquent taxes, the same may be applied on interest of protested warrants.

2-4

January 29, 1935.

FILED

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

Some time ago you requested of this department an opinion based on the following facts:

> "Under the County Budget Law passed by the last session of the legislature, it is provided that the County Court shall classify all money into six classes.
>
> Where a county has outstanding protested warrants, can any part of the revenue for 1934 be used to pay interest on protested warrants issued prior to 1934, before the current expenses of 1934 have been taken care of?"

At the outset we are confronted with the question of whether or not the revenue of one year may be used to pay obligations of a preceding year. In other words, can the revenue of 1934 be used by a county to pay the interest on protested warrants issued in 1933 or prior to 1934?

In the case of State ex rel. v. Allison, 155 Mo., l.c. 329, the Court said:

> "And the respondent is correct in the second proposition advanced in its brief, viz: the revenue provided for any one fiscal year must be first applied to the payment of the

> ordinary and usual expenses incurred in conducting the necessary business of the county for that year. It was so expressly decided by this court in Andrew Co. ex rel. v. Schell, 135 Mo.31. Therefore as to $22,000 of the $32,000 of outstanding county warrants, they afforded no reason for the nonpayment of the relator's warrants and with reference to the remaining $10,000 of those warrants they also were no answer to the relator's demand, if the relator is right in his contention that the fiscal year for the county began May 1, 1895, but if the fiscal year for the county began January 1,1895, then the relator's warrants must wait on the payment of those issued, presented and registered before May 1 of that year. The sole question then is when does the fiscal year for the county begin? That question has already since the judgment of the circuit court in this case, been answered by this court in two decisions. Wilson v. Knox County, 132 Mo. 387, and State ex rel. v. Appleby, 136 Mo. 408. But respondent asks us to review the subject again, and we will not refuse to do so in the light of the earnest argument in that behalf."

Again, in the case of Kansas City, Fort Scott & Memphis Railroad Company v. Thornton, 152 Mo. 570, it was the opinion of the court that the revenues for any one year must be applied to the payment of the current expenses of the county for that year, and only the surplus after these have been paid can be used to pay the warrants issued in some other year.

In the case of Trask v. Livingston County, 210 Mo. 582, the court, in substance, said:

> "The Constitution in declaring that 'no county shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year', and the statutes in forbidding the doing of

anything 'towards building the bridge after the letting thereof, until an appropriation for the same shall first be made by the county court', mean that the county becomes indebted for the bridge when the contract therefor is made, and that the appropriation to pay for the same must be made out of the revenue for that year and do not mean that the bridge can be paid for by an appropriation out of the revenue for the next year, even though the bridge is finished the next year. The date of the county's indebtedness, under the Bridge Act, if valid at all, is the year in which the contract is made, and not the next year when the bridge is completed and accepted and warrants issued to pay for it."

CONCLUSION

In view of the foregoing decisions, it is the opinion of this department that the revenue of 1934 cannot be used to pay interest on warrants issued prior thereto, but if any surplus remains after all obligations have been taken care of, or if revenue is derived from delinquent taxes, the same may be applied on the interest of the protested warrants in question.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

GAMBLING - "Ball Machines"

February 4, 1935

2-8

FILED
86

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

We have your request of January 16, 1935 for an opinion upon the following:

> "There is in operation in Newton County, certain devices known as 'ball machines', which are constructed in the form of a glass covered table with numbered holes bored in said table and pins placed upright in various places around the holes.
>
> "On one side of the table is constructed a canal or trough in which the balls are placed and from which they are shot by means of a plunger operated by a spring. The balls are shot from this canal and by means of a track are spun around the table and allowed to, by the force of gravity on the sloping table, strike the pins and sometimes drop into the holes.
>
> "There is a degree of skill necessary to the successful operation of these devices, in that by the pulling of the plunger back to a particular distance, the balls can be made to

> drop into whatever hole the placer sees fit to shoot it, unless prevented by some of the pins which are upright on the board.
>
> "These balls, when dropped into the holes set up and electric contact, which operate a machine on the under part of the table and from the machine comes nickles in some cases and slugs in others, in various numbers according to the hole in which the balls drop.
>
> "These machines with which you may perhaps be familiar are constructed in as many and various forms as the inventive genius of man will allow, but all are played for the purpose of gain.
>
> "Do they, in your opinion, violate Section 4287, R. S. Mo. 1929?"

From your letter, it is apparent that this machine is a device, designed for gambling, and comes within the statute, Section 4287, R. S. Mo. 1929, defining criminal offenses as follows:

> "Every person who shall set up or keep any table or gaming device * stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property * * shall, on conviction, be adjudged guilty of a felony, * * "

The essential elements of a lottery are consideration, chance and prize. - State v. Emerson, 1 S. W.

#3 - Honorable Wayne V. Slankard

(2d) 109 (1927). The "ball machines" contain all these elements, and for convenience are set out as follows:

(1) Prize - the payoff of one dollar more or less.

(2) Chance - Depending upon the marble coming to rest in some particular niche or hole. If it lands in one hole you win; if it lands in others, you lose.

(3) Consideration - The placing of a nickle in the machine and pushing of a lever.

It is, therefore, the opinion of this office that the "ball machines" are gambling devices prohibited by the laws of the State of Missouri.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

INHERITANCE TAX: Taxation of remainder interest should be at the highest possible rate.

2-20

February 12, 1935.

FILED 86

Mr. Harry Sloan, Appraiser,
Post Office Building,
Clayton, Missouri.

In the Matter of the Appraisal of the Estate of Edwin T. Nugent, deceased.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

> "****For your information, the widow is 57 years old, the married daughter is 30 and the single daughter 21 years of age.
>
> Under the terms of the Will, it is provided that the widow receives 5/7 of the income of the trust estate for life, each daughter 1/7 for life, upon the death of the mother, 1/2 of the said 5/7 shall go to each daughter for life, with remainder to their children, and if no children, then to the surviving daughter for life. It provides that the life estates of the daughters shall pass under this will, unless the daughters provide differently by their wills.
>
> The married daughter has two children, the contention of the executor is that for the purposes of inheritance tax it should be assumed that the daughter, now single, will have one child to inherit and that neither of the daughters will make a will diverting the remainder.
>
> The language of Section 597 R.S. 1929 reading in part as follows, provides: 'A tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of

this article.'

The executor and appraiser differ on the law and I therefore ask instructions from your department."

Olga M. Nugent Conroy, daughter of the deceased, has three children. Edwine C. Nugent, the other daughter of the deceased, is 21 years old, unmarried, and has no children. The precise question involved is as to the taxation of the remainder interest of the trust in which Edwine C. Nugent has or will have a life interest. The paragraph of the will in question provides as follows:

"My daughters shall each have the right to provide by will for the distribution upon their respective deaths of one-half of the trust estate, provided they leave children surviving them, such wills to take effect after the death of my wife. In the absence of a will and in the event of a daughter dying leaving children surviving her, one-half of the trust estate shall go to such children to be held in trust under the terms and conditions hereinafter provided. In the absence of such children surviving a daughter, upon the death of one daughter the other shall receive the entire income during her life, and upon the death of the surviving daughter the children of such surviving daughter shall receive the trust estate IN TRUST under the terms and conditions hereinafter provided, unless such surviving daughter shall leave a will otherwise providing, in which event the trust estate shall go as provided by such will."

Section 597, R.S. Mo. 1929 provides in part as follows:

"****When the property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate, which,

> on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred: Provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article. Such return of overpayment shall be made in the manner provided by section 584 of this article, upon the order of the court having jurisdiction. ***"
>
> (Emphasis ours)

It is entirely possible that Edwine C. Nugent may predecease Olga M. Nugent Conroy, in which event the remainder interest of the trust in which Edwine C. Nugent has a life interest would pass to Mrs. Conroy. Mrs. Conroy, having three children, could then, under the terms of the will, dispose of this remainder interest, together with the remainder interest of the trust in which she (Mrs. Conroy) has a life interest, to a stranger in blood or to a body politic, association, institution or corporation. These remainder interests, under Section 572, R.S. Mo. 1929, would then be taxable at 5% on the first $20,000 and 10% on the next $20,000. On the other hand, if it were to be assumed that Edwine C. Nugent would marry and have children, the result would be the same, for both daughters could then by will dispose of the remainder interest to a stranger in blood or to a body politic, association, institution or corporation.

The precise statute involved here has been before the Supreme Court of Missouri in the case of State Treasurer v. Trust Company, 293 Mo. 545. The facts in that case are not dissimilar to those involved in the case here under discussion. In that case the testator, by his will, created a trust estate for the benefit of his daughter for life and provided that if his daughter should predecease his wife, the property was to go to his wife absolutely; however, if his wife should predecease his daughter, the trust fund was to go (1) to the daughter's children or their descendants, if any such there were; (2) if no children or their descendants, then the daughter, by will duly executed, could

name the person or persons to take; and (3) if the daughter had no children or their descendants and failed by will to nominate or appoint a person or persons to whom the estate should go, then, and in that event the trust should go to such persons as would be entitled to receive the same from her under the laws of descent and distribution then in effect in this state. Judge Graves, in holding that the inheritance tax payable upon the transfer of the remainder of the trust estate, after the daughter's life estate, was the highest rate fixed by Sub-division 5 of Section 3 of said Act (now Sub-division 5, Section 572, R.S. Mo. 1929) said:

> "This was on the theory that under her power of appointment by the will, the daughter might and probably would name and appoint either a stranger to the blood or some 'body politic, association, institution or corporation'. The value of the remainder was found to be $24,365. Of this sum $20,000 was fixed at 5% and $4,365 (after deduction $100 exemption) was taxed at 10%, making the total tax of $1,426.50 complained of in this appeal.
>
> I do not understand that it is urged that the value of the remainder was not properly and rightfully determined nor that the rates fixed are not the proper ones under the statute. ****
>
> From it all it appears that (to say the least) the Probate Court followed the statute in fixing the rate and in fixing the time of payment. Appellant's second contention must be ruled against then."

A leading case from New York on this subject is the case of Matter of Zborowski, 213 N.Y. 109, wherein the court said:

> "The different statutes hereinbefore referred to contain evidence of a constant effort of the Legislature to enlarge the class of transfers immediately taxable upon the death of the transferror. The question of the Legislature's power in that regard was set at rest by the decision of this court in Matter of Vanderbilt (supra). In one aspect it may be unjust to the life tenant to tax at once the transfer, both of the life estate and

> of the remainder though contingent, and it may seem unwise for the State to collect taxes which it may have to refund with interest, but those considerations are solely for the Legislature, who are to judge whether they are more than offset by the greater certainty which the State thus has of receiving the tax ultimately its due under the statute. However unwise or unjust it may seem in a particular case like this for the State to collect the tax at the highest rate when in all probability the remainder will vest in a class taxable at the lowest rate, it is the duty of this court to give effect to the statute as it is written."

In the case of State Treasurer v. Trust Company, supra, Judge Graves cited the Zborowski case and said:

> "****And it will be noticed that the decision was made after the State of New York had amended its law so as to read practically as our Section 25 of the Act of 1917 reads."

In the case of The People v. Starring, 274 Illinois 289, the testatrix left her estate in trust for a period of twenty years with directions to pay the income to her brother and her sisters for that period with provisions that if all shall die before the termination of the trust period, then all the income should be paid to a certain nephew of the testatrix. The Court said:

> "The county court did not err in imposing the tax at the highest rate which, on the happening of the contingencies provided for by the will, would be possible under the provisions of the Inheritance Tax Act. A nephew is entitled to less exemptions and is taxed at a higher rate than a brother or sister. Under the provisions of this will the brother and sisters of the testatrix did not receive an amount equal to their exemptions and therefore their estates were liable to no tax. To impose the highest rate possible it was necessary to assume that the contingencies mentioned, namely, the deaths of the brother and sisters of the testatrix, would

> happen, and that Edwin Newlander, a nephew, would receive seven-ninths of the income from the trust for the remainder of the twenty years."

In consideration of this problem it must be remembered that the Legislature of the State of Missouri, in enacting Section 597, supra, used the word "possible". Thus it is that the tax must be assessed at the highest possible rate and not the highest probable rate. This distinction is clearly brought out in a recent case by the Supreme Court of Washington in the case of In Re Eaton's Estate: (170 Wash. l.c. 283, 284, 285)

> "We refrain from discussing the authorities cited, as no other state has a statute like ours. The statutes of New York and three other states provide for taxation of the trust estate at the highest rate possible.
>
> * * *
>
> Twelve years later, our legislature amended the 1917 act. The present (1929) statute requires the payment of the tax, immediately upon the transfer of the property, at the highest rate probable; that is, the word 'possible' was changed to 'probable' and the court was vested with the power to adjust the tax if same 'appear to be excessive'.
>
> * * *
>
> 'Possible' is defined as 'capable of being done'. 49 C.J. 1118. The definition of the word 'probable' in Gallamore v. Olympia, supra, appears at page 419 of vol. 50 C.J., and in distinguishing the word 'possible' the author says:
>
> > 'Things or results which are only possible cannot be spoken of as either "probable" or "natural" for the latter are those things or events which are likely to happen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference.'
> > 50 C.J. 420.

> The word 'probable' implies a far different meaning than the word 'possible'. Had our legislature intended to follow the New York law, it would have used the word 'possible'"

CONCLUSION

In view of the foregoing, it is the opinion of this department that the remainder interests of the trusts in which Olga M. Nugent Conroy and Edwine C. Nugent have or will have life interests should be taxed under sub-section 5 of Section 572, R.S. Mo. 1929 so that said remainder interests will be taxed at 5% on the first $20,000 and 10% on the next $20,000.

Our conclusion is based upon Sec. 597, R.S. Mo. 1929 and we do not consider the purpose of this statute obscure, which is to put at once into the Treasury of the State the largest sum which in any contingency the remaindermen may have to pay. The remaindermen do not suffer, for when the estate takes effect in possession there will be a refund of any excess.

If preferred, the persons, institutions, associations or corporations beneficially interested in the property chargeable with this tax may elect not to pay the same until they shall come into actual possession or enjoyment of such property, and may give bond payable to the State of Missouri in a penal sum of three times the sum or amount of taxes due, as provided in Section 577, R.S. Mo. 1929.

If the conclusion we have reached in this matter appear to be unjust, we can but refer to the case of Matter of Parker, 226 N.Y. 260, decided by Judge Cardozo, now Associate Justice of the Supreme Court of the United States, when he was a member of the Court of Appeals of New York. Judge Cardozo, in passing upon a question similar to that here under discussion, said:

> "This construction of the statute maintains the consistency of the law and its singleness of purpose. The State has secured itself against all contingencies, remote as well as probable. That is the dominant scheme which it is our duty to preserve. In the case before us the contingency is in all likelihood remote, and so the mind rebels a little against the tying up of money. But in other cases it may be less remote, and the need of protection greater. Whether in improbable contingencies the risk justifies the burden, it is not for us to say.

That is a question for the Legislature. Our duty is done when we enforce the law as it is written."

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

TAXATION AND REVENUE: (Collectors can only retain a commission
(on the amount of money actually collected
COUNTY COLLECTORS : (regardless of the face value of the tax bi

February 12, 1935.

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge your letter dated February 8, 1935, as follows:

> "In making an audit of the Collector's office of Stoddard County, I find that it has been the practice for the County Court to issue wholesale orders compromising taxes. For instance, a man has taxes charged against his farm in the amount of $1,000, the County Court will compromise that tax for $100 and it has been the custom of the collectors to charge a commission on the original amount of the taxes instead of a commission on the amount of money actually collected.
>
> I would like an opinion from your office as to whether the collectors can legally retain the commission which he has charged on the face value of the tax bill."

We assume that the collectors are retaining commissions on compromised back taxes.

In 1933 the Legislature made many changes concerning taxation and revenue. Laws of Missouri, 1933, page 454,

Section 9935, in part provides as follows:

> "The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:"

We invite your attention to the fact that back taxes are excepted in the above section.

Laws of Missouri, 1933, page 429, Section 9969, provides for the fees to the collector for services rendered in collecting back taxes; and provides as follows:

> "Fees shall be allowed for services rendered under the provisions of this article, as follows: To the collector, except in such cities, two per cent on all sums collected; in such cities, two percent on all sums collected-- such per cent to be taxed as cost and collected from the party redeeming. To the county collector, for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

We invite your attention to the wording of the statute, namely, "To the collector * * * two per cent on all sums collected."

In 1883 the St. Louis Court of Appeals in the case of State ex rel. Kemper v. Smith, 13 Mo. App. 421, l. c. 423, said:

> "By another provision of the same statute, the fees allowed the collector

> are fixed at 'four per cent on all sums collected.' Rev. Stats., sect. 6842.
>
> It is thus perceived that the attorneys of the collector are not entitled to any fees in proceedings under this statute except such as may accrue as commissions upon 'taxes actually collected and paid into the treasury.' It is also perceived that the law in direct terms prohibits them from receiving any fee or compensation for services except such as may accrue by way of commissions upon taxes actually collected and paid into the public revenue. It is also perceived that the collector is not entitled to any fees in proceedings under this statute, except a per centum on 'sums collected.'
>
> There is no doubt that the words 'sums collected,' as used in section 6842, mean revenue collected."

In Gordon v. Lafayette County, 74 Mo. 426, the Supreme Court of Missouri said (page 428):

> "The compensation of the collector is fixed by law at a certain per cent on moneys collected by him. None is allowed for ineffectual efforts to collect the revenue. Not a cent of the money on which he claimed commission in this case, was collected by him, or under any proceeding or suit commenced by him. If there is any law for paying him, as was done by the county court, expenses for guarding or taking care of property levied upon by him for taxes, it has escaped our attention. That he levied upon property of the railroad company gives him no right to compensation. That arises only on collections actually made by him. Nor does it give any

> strength to his case in a legal point of view, that the replevin and damage suits of the railroad company against him, were compromised by him with the consent, or by the advice of the county court. This by no means rendered the county liable to him for commissions on the taxes collected by the county after the termination of his office, and under proceedings commenced after his term of office had expired."

In State ex rel. Davidson v. St. Louis-San Francisco Railway Company, 66 S. W.(2d) 149, l. c. 150, the Supreme Court said:

> "The word 'commissions' is without technical meaning. As used in this section it means a compensation of two per cent payable from the tax collected. Of course, the Legislature did not charge the two per cent against the taxpayer if the tax was paid before it became delinquent."

See, also:
State ex rel. Crutcher v. Koeln, 61 S. W. (2d) 750;
State ex rel. McKittrick v. Bair, 63 S. W. (2d) 64.

From the foregoing, it is our opinion that the collectors can only retain a commission on the amount of money actually collected, regardless of the face value of the tax bill.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

INCOME TAX: Compensation paid officers and employees under the Federal Emergency Relief Act of 1933 subject to taxation in Missouri.

March 7, 1935

FILED 16

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, wherein you inquire whether or not compensation paid to officers of the State Emergency Relief Administration, under the Federal Emergency Relief Act of 1933, is subject to the Missouri State Income Tax and also whether the salaries of the employees of the State Emergency Relief Administration are subject to such tax.

It is the universal rule that every instrumentality, lawfully employed by the United States to execute its constitutional laws and exercise its lawful governmental authority, is necessarily exempt from state taxation or interference.

United States v. Bean 253 Fed. 1.

However this may be, it stands without cavil that the state may tax its own instrumentalities, just as the Federal Government taxes its own officers and instrumentalities, through the very income tax laws here considered.

In order to solve the question here before us it is necessary to determine the exact status of the funds granted by the Federal Relief Emergency Administration for relief purposes in Missouri. This status is best explained in our opinion by a letter from Mr. Corrington Gill, Assistant Administrator in the Federal

Emergency Relief Administration at Washington, which letter is as follows:

> "Mr. Forrest Smith, Auditor
> Jefferson City, Missouri
>
> Dear Mr. Smith:
>
> Mr. Hopkins has asked me to reply to your letter of December 20 concerning the status of funds granted by the Federal Emergency Relief Administration for relief purposes in Missouri.
>
> * * * * * In point of fact, under the provisions of the Federal Emergency Relief Act of 1933, the funds made available through this Administration are grants to the state and upon being granted become state money subject only to the regulations and other conditions under which funds are made available from month to month."

Section 5 of the Federal Emergency Relief Act of 1933 provides as follows:

> "Any State desiring to obtain funds under this Act shall through its Governor make application therefor from time to time to the Administrator. Each application so made shall present in the manner requested by the Administrator information showing (1) the amounts necessary to meet relief needs in the State during the period covered by such application and the amounts available from public or private sources within the State, its political subdivisions, and private agencies, to meet the relief needs of the State, (2) the provision made to assure adequate administrative supervision, (3) the provision made for suitable standards of relief, and (4) the

> purposes for which the funds requested will be used."

In view of this letter and the provisions of the Federal Emergency Relief Act of 1933 there can be no doubt that the funds granted to the State of Missouri, by the Federal Government under this Act, become, when granted, state money. This is further shown by the fact that as these funds are needed from time to time a letter over the Governor's signature is forwarded to the Comptroller of the Federal Reserve Bank in St. Louis, requesting a part or all of these funds; checks are issued in the name of the Governor and made payable to him and he in turn endorses the checks to the State Relief Administrator who deposits them to the account of the Missouri Relief and Reconstruction Commission.

It may be urged that the compensation to the officers and employees of the State Emergency Relief Administration is exempt from the income tax laws of the State, by reason of the fact that the State Emergency Relief Administration is, in effect, an agent of the United States Government. We hold this theory to be untenable and as authority for our position respectfully refer your attention to the case of People v. Lynch (Court of Appeals of New York) 173 N. E. 571. In that case the United States Shipping Board entered into an agreement with a corporation, whereby said corporation was appointed as agent to handle claims against the Board. The Shipping Board agreed to pay a fixed fee plus expenses for the services rendered by the agent. Then Chief Justice Cardozo, now Associate Justice of the Supreme Court of the United States, in holding that the compensation paid the officer of the agent corporation was not exempt from the income tax laws of the State of New York, said:

> "The relator makes the point that, if the form of a dividend be rejected, the compensation is to be viewed as salary paid by the Shipping Board, an agency of the federal government, and so exempt upon that ground. We think the claimed exemption must be held to be unreal. The relator was not employed by the Board.

> He was employed by the agency, an independent corporation, which the Board carefully interposed between itself and the human agents by whom the work was to be done. * * * * * * * * * * * * * * *
>
> For one and all, the employer was the corporation, created for the very purpose of supplying an insulating medium that would break the line of contact between the agents and the government. The fee contributed by the government was, when received by the corporation, a fund available for salaries and for the expenses of the business generally. It did not turn the officers and managers in the service of the corporation into officers and managers in the service of the government. "

CONCLUSION

In view of the foregoing, it is the opinion of this department that the compensation paid to officers and employees of the State Emergency Relief Administration, under the Federal Emergency Relief Act of 1933, is subject to the income tax law of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

JWH:LC

SHERIFF - State not liable for commitment fees and mileage.

3-22

March 21st, 1935

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Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We have your request of December 12, 1934 for an opinion as follows:

> "This office requests an opinion from the office of the Attorney General of Missouri as to the fee that can be charged by a sheriff in the following instance:
>
> "Can a sheriff charge mileage on a commitment issued by a justice of the peace committing a defendant to jail for failure to give a recognizance after a preliminary hearing is had on a felony charge binding said defendant over to await the action of the Circuit Court wherein in executing said commitment said sheriff transports prisoner to jail within the county from place of preliminary hearing where the jail is more than five miles from the place of the preliminary. This office requests an opinion as to whether a commitment issued by a justice of the peace, as above stated, is of the same meaning as a writ or warrant as used in the statutes."

In answer to your inquiry, we refer you to the portion of Section 11791, R. S. Mo. 1929 which, in part, provides as follows:

> "Sheriffs, * shall be allowed fees for their services in criminal cases * as follows:
>
> * * * * * * * * *
>
> For committing any person to jail...$1.00"

We find that the act of "committing any person to jail" means a judicial act. In Thomas v. County of St. Louis (1876), 61 Mo. 547, l.c. 548, the court said:

> "The words 'committing any person to jail,' relate to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions."

The above quotation is set out with approval in State v. Abel (1902), 170 Mo. 59, l.c. 76. The original purpose of issuing a "commitment" is found in State v. Shirley (1910), 233 Mo. 335, l.c. 342:

> "The reason for requiring the issuing of a commitment arose from the fact that the defendant was to pass out of the custody of the constable, and it was necessary for the keeper of the county jail to be legally informed that the defendant was under arrest upon a charge of violating a criminal law, so that the said jailer would have full evidence of his right to imprison the defendant and be prepared to justify his custody, if called upon by writ of habeas corpus. The law contemplates that the commitment should be delivered to the jailer."

It therefore appears that a "commitment" is one of the writs which a sheriff is required to execute, and for which mileage is provided under the provisions of Section 11792, R. S. Mo. 1929. In an opinion heretofore written by this office under date of August 13, 1934 by Mr. Charles M. Howell, Jr. to Mr. George D. Brownfield, Prosecuting Attorney of Cooper County, Missouri, it was held that the fee of the sheriff for serving a commitment from a justice court located more than five miles from the county jail was the above fee of $1,00, plus ten cents per mile. However, under Section 11791, we find this provision:

> " * all costs, incident to the issuing and serving of writs of * fieri facias, * shall in no case be paid by the state, but such costs * shall be paid by the defendant and his sureties, * "

It therefore appears that by this special statute these costs have been charged against the defendant. It may be urged that such costs are chargeable to the State under the provisions of Section 3828, R. S. Mo. 1929, which provides:

> "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment * if the defendant is acquitted, the costs shall be paid by the state; * "

The costs covered by Section 3828 are those which have not previously been specifically charged against either party. State ex rel. v. Gordon (1931), 254 Mo. 471, l.c. 475. State v. Brigham, 63 Mo. 258. Statutes which specifically tax costs against either party to the litigant have been construed as controlling, such as a continuance granted under Section 3653, provided that

the continuance shall be at the costs of the party seeking it, and costs therein charged against the defendant are not payable by the State within the meaning of Section 3828, R. S. Mo. 1929. State ex rel. v. Holladay, 67 Mo. 299. It must be remembered that the sheriff is a public officer and is not entitled to any fees except those specifically provided for by statute. State ex rel. v. Brown, 146 Mo. 401. In State ex rel Buder v. Hackmann(1924), 305 Mo. 342, l.c. 351, this general rule is stated in the following terse language of the Supreme Court:

> "Before the State can be held liable for the payment of a fee or expense incurred in its behalf, the person or officer claiming such fee or expense must be able to point out the law authorizing such payment. * "

State ex rel. v. Wilder, 197 Mo. 27. Rendition of services by public officer is deemed gratuitous unless compensation is provided by statute. King v. Riverland Levee Dist., 279 S. W. 195.

The term "fieri facias" means a judicial writ. 25 C. J. p. 1121. A "commitment" is a writ of fieri facias.

It is, therefore, the opinion of this office that the sheriff's fees for serving a commitment from a justice court located more than five miles from the county jail is $1.00 plus mileage at the rate of ten cents per mile, but that such costs are specifically chargeable against the defendant, and in no event is the State liable for the payment of the same.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

COSTS: **INFORMATION CHARGES CRIME UNDER SECTION 4151 R. S. MO. 1929, ** STATE NOT LIABLE FOR COSTS IN THE CASE CHARGED UNDER SECTION 4151, R. S. MO. 1929.**

March 23, 1935.

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Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date requesting an opinion from this department which reads as follows:

> "This office is in receipt of a fee bill from the Circuit Court of Douglas County, Missouri, in the amount of $625.70 and this office requests an opinion of the Attorney General of Missouri as to whether the State of Missouri is liable for the costs in this case.
>
> "An information was filed in the Circuit Court of Douglas County, Missouri, on September 12th, 1934, charging the defendants with the crime of stealing timber. Apparently this information is brought under Section 4151 R. S. Mo. 1929 and said information filed on said date and furnished by the Circuit Clerk of Douglas County is in words and figures as follows, to-wit:
>
> **INFORMATION IN THE CIRCUIT COURT.**
>
> State of Missouri, County of Douglas SS.
>
> "The State of Missouri, vs. Tom Baney, John Burchett, Ed Roberts, Earl Woods, Burl Baney. — In the Circuit Court of Douglas County, Missouri,
>
> At the September Term, 1934.

John M. Bragg, Prosecuting Attorney within and for the County of Douglas, in the State of Missouri, informs the Court upon his oath, that Tom Baney, John Burchett, Ed Roberts, Earl Woods and Burl Baney, on the ____ day of May, 1933 in said County of Douglas, did then and there unlawfullyand feloniously enter upon certain lands belonging to Minnie B. McKinney, to-wit, the south one-half of Section 26, and Section 27, and Section thirty-four all in Township 27, Range 11, Douglas County, Missouri, and did then and there on the aforesaid day, unlawfully and feloniously commence cutting down and distroying certain oak trees and pine trees standing and growing on said lands and at divers times and on divers days between that day and the _____ day of September 1933 did unlawfully and feloniously continue to enter upon said lands and cut down and distroy the Oak trees and Pine trees then and there standing and growing upon said lands aforesaid, and that seventy five oak trees and twenty five pine trees, standing and growing on said lands of the value of $200.00, the property of Minnie B. Minney, then and there u-unlawfully and feloniously did cut down, distroy and carry away; Against the peace and dignity of the State.

JOHN M. BRAGG
Prosecuting Attorney.

_____, Prosecuting Attorney, makes oath and says that the facts stated in the foregoing information are true according to his best information and belief.

Subscribed and sworn to before me this 12th day of September, A. D. 1934.

Noel Sutherland, Circuit Clerk
by W. I. Barker, Deputy Circuit Clerk.

" On September 19th, 1934, defendant Ed Roberts was tried by a jury in said court and a verdict of 'Not Guilty' was returned by the jury. It is stated by the Circuit Clerk of Douglas County that the court only instructed the jury on a minimum sentence of two years in the State Penitentiary and did not instruct

the jury that if they found the defendant guilty they could assess a punishment in the county jail not less than six months or by fine not less than $300.00. On the 14th day of January, 1935, the Prosecuting Attorney of Douglas County entered a nolle prosequi as to the other defendants and the case was dismissed and the Circuit Clerk of Douglas County thereupon certified the fee bill to this office for payment.

"It is apparent that this information was filed under Section 4151 R. S. Mo. 1929 and not under Section 4076 R. S. Mo. 1929, and therefore we request an opinion as to whether the State of Missouri or the County of Douglas is liable for the costs in this case in view of the fact that the instruction by the Court to the jury on the punishment was for minimum sentence of two years in the State Penitentiary."

I.

INFORMATION SUBMITTED CHARGES CRIME UNDER SECTION 4151, R. S. Mo. 1929.

Section 4151, R. S. Mo. 1929, reads as follows:

> "Any person who shall unlawfully enter upon any lands belonging to this state, saline, seminary, school or swamp lands belonging to any county, or lands belonging to any corporation, person or persons, and shall cut down or destroy, or cause to be cut down or destroyed, any tree or trees standing or growing thereon of the value of thirty dollars, or any person who shall induce, assist, aid or abet any other person so to do, shall be deemed guilty of a felony, and shall, upon conviction, be punished by imprisonment in the state penitentiary for a period of not less than two years, or by imprisonment in the county jail not less than six months, or by fine not less than three hundred dollars."

The information in question clearly follows the language of the above section and plainly charges the defendants with a violation of the provisions thereof. That the Prosecuting Attorney must have intended to charge the defendants under the provisions of Section 4151, supra, is evidenced by the fact that he followed the direction of Section 4155, R. S. Mo. 1929, in drawing the information, which section applies to informations drawn under Section 4151 but not to those drawn under Section 4076, R. S. Mo. 1929, and it is therefore the opinion of this office that the information charges the defendants with a crime under Section 4151, supra.

II.

STATE NOT LIABLE FOR COSTS OF A CASE CHARGED UNDER SECTION 4151, R. S. MO. 1929.

The punishment prescribed by Section 4151, supra, upon a conviction of the offense charged in the information is by imprisonment in the State penitentiary for a period of not less than two years or by imprisonment in the county jail for a period of not less than six months or by fine of not less than three hundered dollars.

Section 3828, R. S. Mo. 1929, provides:

> "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

In the case of State ex rel. Tudor v. The Platte County Court, 40 Mo. App. 503, loc. cit. 506, the Court said:

> "The controversy is whether the state or county is liable for relator's costs and the case depends upon a construction of the criminal costs statute; and in passing on the question we shall consider the case as though the defendant had been ac-

quitted. The nolle prosequi amounted to an acquittal in the sense of the statute.

"In all capital cases in which the defendant is convicted, and all cases in which the defendant may be sentenced to the penitentiary, and he in either case be unable to pay the costs, the state shall pay them, except such as he incurs. Revised Statutes, 1879, section 2093. So, if the defendant be acquitted in a capital case or in a case where the punishment is solely in the penitentiary the state shall pay the costs. Section 2095. 'And in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them, or it shall be otherwise provided by law.' Section 2095. In this case the punishment may be either imprisonment in the penitentiary or by fine and imprisonment in the county jail (section 1259), and it is therefore not a case 'in which imprisonment in the penitentiary is the sole punishment for the offense' which, by the terms of section 2095, is the prerequisite to the state's liability where the defendant is acquitted. The state, therefore, is not liable for relator's costs."

The fact that the Court failed to instruct the jury that if they found the defendant guilty they could assess his punishment by imprisonment in the county jail not less than six months or by fine of not less than three hundred dollars would not make the case one in which the imprisonment in the penitentiary was the sole punishment for the offense. But such failure was mere error on the part of the trial judge which would have entitled the defendant to a new trial if he had been convicted. State v. Hurt, 285 S. W. 796.

In view of the above, it is the opinion of this department that the State of Missouri is not liable for the costs in the case where the defendant is acquitted of a

crime under the provisions of Section 4151, supra, although the judge failed to instruct the jury that the defendant could be punished other than by imprisonment in the penitentiary, and that the county in which the information was filed would be liable for said costs except when the prosecuting attorney shall be adjudged to pay them or it is otherwise provided by law.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/JLH:afj

COUNTY COLLECTOR: Terms of collector's bond is guide as to whether collector, who remains in office due to successor's failure to qualify as to giving of bond, shall be required to give a new bond.

March 29, 1935.

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Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

This department is in receipt of your letter of March 22 wherein you request an opinion regarding four questions, as follows:

> "We now have seventeen counties in Missouri where the collector has failed, refused or been unable to give a bond as provided in Section 9885, R.S. Mo. 1929. I have received several inquiries relative to the procedure to follow in such cases. I would like an opinion from your office as to the following questions:
>
> 1. How long does a collector have in which to qualify by giving a bond as provided in Sec. 9887?
>
> 2. Whose duty is it to declare the office of collector vacant where the collector has neglected or failed to file his bond?
>
> 3. Can the collector continue to hold office until the collector-elect qualifies by giving his bond?
>
> 4. If so, is the collector required to give a new bond as his old bond expires on March 4 of this year?"

I - II - III.

On February 1, 1935 this department rendered an opinion to Hon. J.C. McKeehan, Collector of Adair County, Missouri, which contains the answer to your first three questions. A copy of said opinion is herewith enclosed. The answer to your fourth question will be rendered under a separate heading.

IV.

County collectors remaining in office due to their successors being unable to qualify must give new bond.

The statute which sets forth the form of the collector's bond is Sec. 9885, R.S. Mo. 1929. This section was repealed by the Legislature in 1933, Laws of Mo. 1933, page 464,and a new section, to be known as Section 9885, enacted in lieu thereof. As the question at hand deals with bonds executed prior to the 1933 session of the Legislature, we shall deal solely with Sec. 9885, R.S. Mo. 1929 and disregard the new section. Section 9885,R. S. Mo. 1929 is as follows:

> "Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any two months of the year preceding his election or appointment, plus ten per cent. of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, 1909, thereafter, and that he will in all things faithfully perform all the duties of the office

> of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties."

Assuming that the language contained in Section 9885 is contained in all the bonds of the seventeen collectors mentioned in your letter, and that the same is identical with the terms of the statute, we shall deal in our opinion mainly with the meaning of the phrase "for the four years next ensuing the first day of March, 1909".

As a matter of fact, we have examined the form of bond which the collectors actually executed, and they all appear to be identical, containing the following language:

> "NOW, THEREFORE, if the said _____ faithfully and punctually collects and pays over all state, county and other revenue for the four years next ensuing the first day of March, 19__, and in all things faithfully performs all the duties of his said office of collector according to law, then this bond to be void; otherwise to remain in full force and effect."

One of the most pointed decisions relating to the element of time or duration in a surety bond is that of Fisse v. Einstein, 5 Mo. App., l.c. 86-87, wherein the Court said:

> "The liability of a surety is said to be strictissimu juris; that is, the obligation of surety must not be extended to any other subject, to any other person,or to any other period of time than is expressed or necessarily included in it. This is what is meant by strict construction of a contract of suretyship; non extendatur de re ad rem, de persona ad personam, de tempore ad tempus. The contract, however, is subject to the common-sense rules of interpretation which govern any commercial instrument. No surety is to be bound beyond

> the extent of the engagement which shall appear, from the expression of the security and the nature of the transaction, to have been in his contemplation at the time of entering into it. But to this extent the surety is bound. The intent or latitude of the contract of suretyship is to be ascertained by a fair and liberal construction of the instrument, in furtherance of the intention of the parties, and then the case must be brought strictly within the terms of the guaranty, and the liability of the surety cannot be extended by implication. But one giving a guaranty shall be bound to the full extent of what appears to hafe been his engagement; and for this purpose, it is said, the words of the guaranty are to be taken as strongly against him as the words will admit. **** the strict construction of the obligation of a surety applies to its non-extension to subjects, persons, or periods of time not necessarily or expressly included in it; otherwise, it is subject to the ordinary rules of construction. Thus, a bond with sureties, by guardians of infants, conditioned that both the guardians shall faithfully execute the trust, one of them dying, it was held that the surety was liable for the acts of the survivor. The People v. Byron, 3 Johns. Cas. 53; Douglass v. Reynolds, 7 Pet. 122; 12 Wheat. 515; 12 East. 227; Noyes v. Nichols, 28 Vt. 173; Fisher v. Cutter, 20 Mo. 209; 3 Kent's Comm. 124; Fell's Guar. & Surety, 191; Burge, 40."

On the question of extending the terms of a surety beyond his contract, we quote the case of Fisher v. Cutter, 20 Mo. 206. The Court said (l.c. 209-210):

"I admit that contracts of guaranty, like all commercial contracts, have received a liberal interpretation in furtherance of the intention of the parties; but then they should never be extended beyond the obvious import of the terms in their reasonable interpretation. Justice Story said, in the case of Miller v. Stewart, 9 Wheat. 702: 'Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication, beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound and no further. Courts of equity, as well as courts of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness.' In Lawrence v. McCalmont et al., 2 How. Rep. 449, the same judge says: 'The words of such guaranty contracts should receive a fair and reasonable interpretation, and should not be forced out of their natural meaning.'

Applying these rules to the case before us, and we cannot hesitate to say, that Cutter's guaranty here has a direct relation to the contract between Dana and Butler, as it was then made--***** It was a guaranty against loss upon the contract as then made and not upon any future contract which Butler might make with Fisher & Fellows. Fisher & Fellows got their pay for this change of the terms. They pay the drafts, and wait ninety days longer. Now Cutter was to guaranty against losson the sale, that is, loss on the sale at ninety days' credit, as then made, which is equivalent to guaranteeing against loss on the drafts which Dana had drawn at ninety days on Fisher & Fellows. Surely his contract cannot be extended to a guaranty

> against any loss which Fisher & Fellows and Butler might cause by their after arrangements, in holding over the lard and extending the time of the drafts, by renewing them for ninety days."

The two above quoted decisions are among the earliest decisions relating to our question, and the rules contained therein have been sustained by the courts without exception.

In the early history of our state sureties for hire or compensation were practically unknown, and the voluntary or gratuitous surety was a favorite of the law, but as compensated sureties and surety companies came into existence, the rule relating to such hired sureties was reverted and hired sureties were not treated as favorites. This subject was discussed in the case of City of St. Joseph ex rel. v. Stone Co., 224 Mo. App., l.c. 897, in the following language:

> "Relator cites many cases holding that the statutory provisions are to be read into bonds taken under the statute. (Fogarty v. Davis, 265 S.W. 879, 880; Zellars v. Surety Co., 210 Mo. 86, 92; State ex rel. v. Rubber Mfg. Co., 149 Mo. 181, 212; Henry Co. v. Salmon, 201 Mo. 138, 162, 163; Board of Education v. Fid. & Guaranty Co., 155 Mo. App. 109, 115). There is nothing in these cases holding that a court can interpret plain language of a bond when there is no need for interpretation. In other words these cases do not hold that the courts may construe a bond to mean differently than expressly provided in the bond actually taken. As is well said in Pingrey on Suretyship and Guaranty, p. 170:
>
> The measure of liability of sureties is fixed by the terms of the instrument they sign, and such undertaking cannot be enlarged or varied by judicial construction. Their undertaking will be construed as the words used are ordinarily understood.

> Whether the surety is a compensated one or not, the rule applicable to the construction of bonds is that, for the purpose of ascertaining the meaning of the language used therein, and thus in determining the extent of the guaranty, the same rules of construction are to be applied as are applied in other instruments. (Kansas City to Use v. Youmans, 213 Mo. 151, 166, 167; Jobes v. Miller, 201 Mo. App. 45, 47). Of course if it be a fact that the surety herein is a compensated surety the general rule applies which is, if there is any ambiguity in a written contract it will be construed most strongly against the person using the language giving rise to such ambiguity. (Union State Bank v. American Surety Co., 23 S.W. (2d) 1038, 1044; State to Use v. Cochrane, 264 Mo. 581) However, there is no ambiguity in this bond. It provides in no uncertain terms that it covers persons 'who have contracts directly with the principal for .... material.' As relator had no contract directly with Hackett, the contractor, the furnishing of material by it was not covered by the terms of the bond in question."

It will be noted in the above decision that regardless of whether a surety is a favorite or not, the courts will not hold a surety beyond what is expressly provided in his bond actually taken.

Coming nearer to the point at hand, the decision in the case of North St. Louis B. & L. Ass'n. v. Obert, 169 Mo. 507 deals with the different phases and the different expressions in official surety bonds as to time, and the distinctions therein, in the following language: (l.c. 513-515)

> "In support of its proposition that the surety on the bond for the faithful performance of the official duties of the principal is not liable for defalcations occurring

after the expiration of the prescribed term of office, the learned counsel for appellant cite a long list of adjudicated cases and text-writers, and a reference to their brief will show all the authorities on that point that could be desired. The proposition in its general terms is conceded by the learned counsel for respondent, but they contend in the first place that it is qualified in this, that if it appears that it was the intention of the parties to the contract that the bond was to cover the acts of the officer not only during the period of the first prescribed term, but also during the period of his actual continuance in office, whether by holding over or re-election, the bond will cover such acts according to such intention, and, secondly, that the evidence in this case does not show any prescribed term of office and that the only limitation as to period of liability is to be found in the character of the contract with appellant, which contemplates an annual renewal of the bond upon the payment of an annual premium, whereby the bond runs for a period of one year from the date of its delivery. In Lionberger v. Krieger, 88 Mo. 160, the sureties on the bond of the cashier of a national bank, whose term of office was prescribed as one year, but who was reelected yearly and continued in office for nine years, were held liable for his misdeeds during the whole period. In that case, however, the bond on its face expressly provided that it was to cover the acts of the cashier, not only during the first year, but also during all the time he might be continued in office. That case is authority for the proposition that sureties on such a bond may be liable for the conduct of the principal beyond the period of his first term if that is the contract. There is nothing so peculiar in the nature of

such a bond as to necessarily limit its operation to the acts of the principal during his first term. The extent to which we approve the proposition contended for by appellant is, that if the term of office is prescribed and the bond is conditioned without express limitation as to period, for the faithful performance of the principal's duties, and nothing else appears to give it a wider effect, it will be construed as intended to cover acts occurring only within the prescribed term. We thus, by construction, read into the bond a limitation as to period. But if it appears from all the circumstances that the intention of the parties to the contract was that the bond, being unrestricted by its own terms, should cover the acts of the principal during his continuance in the office, whether by reelection or holding over, we cannot give it the restricted construction. Of course, if the bond in express terms should limit its operation, we could not, from evidence beyond its face, enlarge its face, enlarge its effect, any more than we could, by the application of the principle contended for by appellant, restrict in its effect a bond like that in the case of Lionberger v. Krieger, above mentioned. When it is 'so nominated in the bond' there is no room for construction, but it is not so nominated in the bond now under consideration, and if we give this bond the restricted meaning appellant contends for, we must do so because we are satisfied from all the evidence in the case that that was the intention of the parties. When it becomes a matter of construction it is the duty of the court to put itself in an attitude to view the contract from the same standpoint that it was seen by the parties when they entered into it. (Westervelt v. Mohrenstecher, 76 Fed. 118).

The question is again discussed in the case of Citizens Trust Vo. v. Tindle, 199 S.W., l.c. 1029, as follows:

> "This reasoning is based upon the general rules of construction applicable alike to all obligations. When, however, the rights of sureties are involved, the doctrine of strictissimi juris may properly be invoked in construing the contract--this, of course, when it is otherwise clear, plain, and its meaning unmistakable. State ex rel. v. Smith, 173 Mo. loc. cit. 407, 73 S.W. 211. It is elementary, and does not admit of question, that the reason underlying the application of this limitation to the general rule of construction is that sureties are the favorites of the law. In Blair v. Insurance Co., 10 Mo. loc. cit. 566, 47 Am. Dec. 129, this court first gave judicial recognition to this doctrine. This classification of sureties cannot be better defined than in the words of Sherwood, J., speaking for this court in Nofsinger v. Hartnett, 84 Mo. loc. cit. 552, where he says in effect, citing numerous cases, that: It is a well-settled rule, both at law and in equity, that a surety is not to be held beyond the precise terms of his contract, and except in cases of accident, mistake, or fraud, a court of equity will never lend its aid to fix a surety beyond what he is fairly bound to at law. This rule is founded on the most cogent and salutary principles of public policy and justice. In the complicated transactions of civil life, the aid of one friend to another, in the character of surety or bail, becomes requisite at every step. Without these constant acts of mutual kindness and assistance, the course of business and commerce would be prodigiously impeded and disturbed. It becomes then excessively important to have the rule established that the surety is never to be implicated beyond his specific engagement. Calculating upon the extent of that engagement, and having no interest or concern in the subject-matter for which he is surety,

> he is not to be supposed to bestow his attention to the transaction, and is only to be prepared to meet the contingency, when it shall arise, in the time and mode prescribed by his contract. The creditor has no right to increase his risk without his consent, and cannot therefore vary the original contract, for that might vary the risk."

There should be no strained construction in order to release or hold sureties. This question is discussed in the case of Fire Insurance Co. v. Nevils, et al, 217 Mo., l.c. 642, as follows:

> "This seems to us to be a fair and reasonable construction of the terms of the bond. While it is true, as contended by respondents, that voluntary sureties are the favorites of the law and have the right to stand on the strict letter of the obligation they sign as has often been held by the courts of this state, for which see Pemiscot County Bank v. Tindle, 272 Mo. 681, 695, 199 S.W. 1025, et seq.; Saginaw Medicine Co. v. Dykes, et al, 210 Mo. app. 399, 405-6, 238 S.W. 556, and many other cases that might be cited, yet the same cases, and many others, also hold that the contract of a voluntary surety is to be construed by the same rules as all other contracts and the language used is to be given its ordinary meaning with a view to carry out the intention of the parties as expressed in the instrument executed by them. 'There should be no strained construction in order to release or hold the sureties.' (Beers v. Wolf, 116 Mo. 179, 184, 22 S.W. 620; Mo. Kan. Tex. Ry Co. v. American Surety Co., 291 Mo. 92, 122, 236 S.W. 657; Evans v. U.S. Fidelity & Guarantee Co., 195 Mo. App. 438, 443, 192 S.W. 112)."

In the case of Trust Co. v. Tindle, 272 Mo. 681, the Court, after reviewing the rules of construction and interpretation, concluded the decision with the following language:

> "This bond speaks for itself. Thus speaking the liability of the sureties thereon is limited to its exact words. If these will not render them liable, nothing can. There is no equity against sureties and courts will not so construe a bond as to create a liability at variance with its letter. Such a construction would be necessary to fix the liability of the sureties here, under the allegations of this petition. We therefore hold that it does not state a cause of action, from which it follows that the judgment of the trial court should be affirmed. It is so ordered."

In the case of School Dist. No. 18 v. McClure, 224 S.W. 831, l.c. 832, Judge Ragland discusses the question as to whether or not the rules of construction are different in common law bonds and statutory bonds. He said:

> "It is suggested by appellant that the bond sued upon herein is a common-law bond, and that the strictissimi juris rule of construction applies. The character of the bond (as to whether statutory or common law) has nothing to do with this rule of comstruction. This court has deviated from the rule of strictissimi juris in suits upon bonds, but the deviation from such rule was not based upon the kind or character of the bond involved. The rule has been relaxed or ignored in those cases where the surety is one engaged in the business of making bonds for hire, or a stipulated stipend. The old-time accommodation surety has the benefit of the rule, whilst the hireling has not. The rule that sureties are the favorites of the law has no application to the surety who is engaged in the business of

> making bonds and contracts of suretyship for the cash to be realized from the business. Such contracts of suretyship are to be construed as ordinary contracts, and under the rules applicable to ordinary contracts. The intention of the parties is the vital issue. State v. Chicago Bonding & Surety Co., 215 S.W. loc. cit. 25; Lackland v. Renshaw, 256 Mo., loc. cit. 140, 150, 151, 165 S.W. 314.
>
> This intention is to be gathered from the four corners of the instrument, as you would gather the intention of the parties in other contracts. In other words, we use the ordinary rules of construction to determine the meaning of the contract and the breaches thereof. 5 Cyc. 753.
>
> Appellants speak of extending the obligation of the bond by mere implication. The rule is to get the intent of the parties under the usual rules of construction, and this rule we shall apply in the construction of this bond."

The common sense viewpoint of the matter was assumed by the court in the case of Moore, Admr. v. Title Guaranty & Trust Co., 151 Mo. App., l.c. 260:

> "While the strictissimi juris rule of construing the contract of a surety should be, and to some extent, has been relaxed in the judicial inspection of bonds executed by surety companies for hire, the express limits placed by such contracts on the obligation of the surety must be respected, else courts will be making contracts for persons which they did not make nor intend to make for themselves. The judgment is affirmed. All concur."

Relating to the intention of the parties, we wish to quote from the case of Erath & Flynn v. Allen & Son, 55 Mo. App., l.c. 113, as follows:

> "The plain meaning of the statute of Nebrasks, already quoted, is that the commissions shall, in cases where mechanics and laborers have no lien to secure the payment of their wages, take from the person to whom the contract is awarded a bond with at least two good and sufficient sureties, conditioned for the payment of the wages of all laborers and mechanics for labor performed in erecting the building or performing the contract. The bond in question is not broader or more comprehensive in its scope than the statute provided it should be. The liability of the sureties depends upon the construction of the language of the statute authorizing the bond. The bond, it is seen, is one of indemnity provided by the statute for the benefit of laborers and mechanics. If the plaintiffs are persons falling within either or both of these statutory designations, then they are entitled to the benefit of the indemnity.
>
> The obligations of sureties, it has long ago been decided in this state, are to be strictly construed, and their liabilities are not to be extended by implications. Blair v. Ins. Co., 10 Mo. 566; Harrisonville v. Porter, 76 Mo. 358. The statute under consideration, as against the sureties on the bond sued upon, must be strictly construed."

CONCLUSION

The terms of the bond are the sole guide in answer to your question. If the bonds in question are in the form as set forth in the beginning of this opinion, containing the phrase "for the four years next ensuing the first day of March, 19__", as contained in the statute, and contain no

other words qualifying such terms, the foregoing authorities indicate the appellate courts would relieve the sureties of liability for acts after the 1st day of March, 1935, and to protect the interest of the State and governmental subdivisions, new bonds should be required of the collectors holding over.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

TAXATION) Commission of County Collector cannot
) under any circumstances exceed per centage
COUNTY COLLECTOR.) of taxes actually paid.

4-13

April 5, 1935.

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Acknowledgment is herewith made of your request dated March 28, 1935, for an opinion of this office reading as follows:

> "On February 12, 1935 you furnished this office an opinion as to the amount of commission a collector could legally retain on compromise back taxes.
>
> In an effort to get around your opinion, the Collector of Stoddard County has prepared a form which he is now using and a copy of which I am enclosing in this letter. This form as you will note attempts to bind the taxpayer to the extent that he agrees to pay the collector his commission on the full amount of taxes collected. It is my opinion that the taxpayer can not sign any agreement fixing the amount of commission that a collector can legally retain for his services, as the commission is fixed by the statutes and not by an individual.
>
> I would like an opinion from your office as to whether this agreement which I am enclosing will in any way effect your opinion given me on February 12, 1935."

The form which you attached to your request reads as follows:

"In Re: Tax Receipt No._____ Dated_____

AGREEMENT OF TAX PAYER ON
COMPROMISE OF TAXES.

In consideration of the benefits moving to me by reason of a compromise order made by the County Court of Stoddard County, Missouri, authorizing the payment of certain delinquent taxes on a reduced valuation on certain real estate, and which I subsequently paid to the ex-officio collector of said County as is shown by tax receipts numbered_____ and dated_____, 193_____, and issued to me by said Collector, I, the undersigned tax payer, or his legal representative, do hereby agree and state as follows:

First: That said reduction was made at my request and on my application.

Second: That I was advised at the time of the making of said compromise order that said compromise order did not apply to the state taxes levied and assessed against said lands and that said state taxes would have to be paid in full.

Third: That I was advised at the time of said compromise, and I fully understood that the Collector's commission, Clerk's costs, andall other legal costs and charges, including costs incident to tax suits filed against said lands and all of which had theretofore accrued against said land by reason of its delinquency, would have to be paid in full onthe original valuation of said lands.

Fourth: That with full knowledge of all the above facts I paid the taxes on said lands, on the compromise basis as fixed by the County Court, and intended to and did pay as set out in the above numbered tax receipts, the Collector's commission, Clerk's costs, attorney fees, and all other costs and charges incident thereto on the

basis of the original valuation of said lands, and that I did further intend to and did thereby forever prevent and estop myself, my heirs, executors, administrators and assigns, or anyone for me or in my or their behalf from claiming or demanding the return of my part of the sums so paid by me as shown by said numbered tax receipts.

In testimony whereof I have hereunto set my hand this _____day of _____, 193____.

_____

Witness:_____."

Your inquiry deals particularly with the third and fourth paragraphs of the "agreement" and we therefore do not pass upon the first and second clauses.

I.

"AGREEMENT" VOID AS LACKING CONSIDERATION.

While not passing upon the validity or construction of Section 9946, page 424, Laws of Missouri 1933, we shall assume that the County Court acted lawfully and legally. Authority for acts must be found either in Section 9946, page 424, Laws of Missouri 1933, Section 9950, page 427, Laws of Missouri 1933, or Section 9808, R. S. Mo. 1929. Each of these sections authorize the county court to perform specific acts to insure that an owner of property pays no

more than his fair and equitable share of taxes. Two of these sections are hereinafter quoted and authorize the County Court to affirmatively act in the correction of error and the compromise of taxes.

Section 9946, page 424, Laws of Missouri, 1933, reads as follows:

> "In all cases where any assessor or assessors, the county court, or assessment board,****** shall have assessed and levied taxes,* * *on any real estate, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interests and penalties thereon,***** the county court of any county shall have the full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, or of description, or ownership, double assessment, omission from the assessment list or books, or otherwise, and to make such valuations, assessment and levy conform in all respects to the facts and requirements of the law.*******

Section 9950, page 427, Laws of Missouri, 1933, reads as follows:

> "Whenever it shall appear to any county court,* * *that any tract of land or town lot contained in said 'Back tax book' or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon,* * *or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the said court* * * *to

> compromise said taxes with the owner of said tract or lot, and upon payment to the collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state,* * * *"

It is generally recognized that County Courts are not the general agents of the County but only have such powers as are expressly granted to them by statute. Kin vs. Marion County, 249 S. W. 418. The action of the County Court authorized by the foregoing sections is based, first as to Section 9946, upon the existence of an error which may appear in the assessment and levy of taxes, and second in respect to Section 9950 upon the fact that the property is not worth the taxes levied and assessed against it. If either of these two facts exist the County Court is authorized by these Sections to make an order in the one instance correcting the errors, or in the other instance, compromising the taxes. It is the existence of these facts which authorize the County Court to act in the premises. These two Sections do not provide for any understanding or agreement with the taxpayer as to the granting of the order or the payment of any additional charges or fees of any kind or character. No promise can be exacted from the taxpayer relative to any such payments. If the facts exist, the taxpayer is entitled to the relief as a matter of right and cannot be required to promise or agree to any of the matters or things called for in the "agreement" of taxpayer on compromise of taxes". It appears that the "agreement" is based upon some purported "consideration", "moving to me by reason of a compromise order made by the County Court". Such consideration is wholly and totally fictitious, does not exist in law and cannot be the basis of any such agreement or understanding.

CONCLUSION.

It is therefore the opinion of this office that there is no consideration whatsoever for the agreements contained in "agreement of taxpayer on compromise of taxes."

II.

AGREEMENT VOID AS AGAINST PUBLIC POLICY.

County Collector's commissions are prescribed by Section 9935, page 454, Laws of Missouri 1933, and 9969, page 429, Laws of Missouri, 1933. Section 9935 states:

> "The collector* * *shall receive full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:
>
> I. * * * *a commission of ten per cent on the amount collected.
>
> II* * * * a commission of ten per cent on the first five thousand dollars collected and six per cent on whatever amount may be collected over five thousand dollars.
>
> XIV.* * * all fees, commissions and other compensations heretofore charged, received or allowed by or to any such collector as

> compensation for services whether under or by virtue of state law or not are hereby abolished; and such collector and all his deputies and employees are hereby forbidden under penalty of forfeiture of office to collect, charge or receive directly or indirectly any fees or commissions in the nature of compensation or other compensation other than those allowed and authorized by this section."

Section 9969 allows the collector on delinquent taxes:

> "* * *two per cent on all sums collected, * * *"

Attorney fees may only be charged and collected by reason of suits instituted prior to the effective date of Senate Bill 94 and are provided for in Section 9952 R. S. Mo. 1929. This section provides that the attorney shall receive

> "as fees, such sum not to exceed ten per centum of the amount of taxes actually collected and paid into the treasury."

The Collector's fees and attorney fees are therefore only permitted to be computed on the amount of money actually collected. No justification or authorization is to be found for any further additional charges. In fact, Subdivision 14 of Section 9945 heretofore referred to declares a forfeiture of office on the part of any collector who shall receive any fees as compensation in excess of such amount. These provisions were passed on at an early date by the Courts of this State. In the case of State ex rel. Kemper vs. Smith, 13 Mo. Appeals 421, the Court, referring to the Attorney fees allowable under a section practically identical with Section 9952 R. S. Mo. 1929, stated, l. c. 423:

> "It is thus perceived that the attorneys of the collector are not entitled to any fees in proceedings under this statute except such as may accrue as commissions upon 'taxes actually collected and paid into the treasury.' It is also perceived that the law in direct terms prohibits

> them from receiving any fee or compensation for services except such as may accrue by way of commissions upon taxes actually collected and paid into the public revenue. It is also perceived that the collector is not entitled to any fees in proceedings under this statute, except a per centum on 'sums collected.'"

Similar holdings may be found respecting the collectors commissions. There is another section equally applicable to this situation. Section 3948 R. S. Mo. 1929 provides:

> "Every officer who shall, by color of his office, unlawfully and willfully exact or demand or receive any fee or reward to execute or do his duty, or for any official act done or to be done, that is not due, or more than is due, or before it is due, shall upon conviction be adjudged guilty of a misdemeanor."

The law specifically states that the fees are to be computed on the amount which is actually collected and not upon some fictitious amount which might at some time or other have been entered on the tax book. It is unlawful for the Collector to receive any fee for any official act done for more than is due, and no provision of law can be found authorizing the collecting or receiving of the fees and charges attempted to be collected under the guise of an "agreement."

Nor can it bemaintained that the agreement of the taxpayer can in any way effect the law as provided by the foregoing sections. It has long been established in this State that the County Court does not allow the fees of the County Collector but that the law itself allows such fees and is the rule by which all compensation must be measured. In the case of Hethcock vs. Crawford County, 200 Mo. 170, 175, it is stated:

> "The County Court does not allow his (collector's) commission; it has no lot or part in that; the law allows them on settlements and statements made by him--the Court being merely the representative or fiscal agent of the County, charged with the duty to see to it that the public is protected."

So, in the instant case, the law allows the fees to the Collector and to the delinquent tax attorney and the contract of the parties can have no bearing upon the fees which the law allows. Section 3948 R. S. Mo. 1929 supra, has recently been before the Appellate Courts of this State in the case of Bennett vs. Gerk, Chief of Police, 61 S. W. (2d) 241. In this case the Court had for consideration the issue as to whether or not deputy sheriff might receive a portion or all of a reward offered for the arrest of criminals. The Court held that to permit public officials to participate in such rewards would be contrary to public policy in this state. In reaching this conclusion the Court quoted with approval from the case of Hatch vs. Mann, 15 Wend. (N.Y.) 49-50, (61 S. W. (2d) 246.):

> " 'That a public officer, whose fees are prescribed by law, may maintain an action to recover an additional sum promised him by a party for doing his official duty, is a monstrous proposition, fraught with every kind of mischief. The pretence that it is for extra services would cover any conceivable corruption or extortion. What are extra services in the performance of a defined official duty? The Supreme Court seems to define them as being 'extraordinary efforts, beyond what an officer is strictly bound to make.' But 'Nil agit exemplum, litem quod lite resolvit.'--What are the 'extraordinary efforts' which an officer can make to discharge his official duty, which he is not strictly bound to make? When he takes upon himself the office, he solemnly swears to discharge the duties of it 'according to the best of his ability.' Has he then an extraordinary ability beyond his best ability, for the exertion of which he may legally demand extra pay? If it be so in regard to a constable, it is equally so in regard to every other officer, judicial or ministerial. They all take the same oath, and all are embraced together in the same prohibition. The language of 2 R. S. 650, Sec. 5, is 'No judge, justice, sheriff, or other officer whatsoever, or other person to whom any fees or compensation shall be allowed by law for any service, shall take or receive any other or greater fee, or reward for such

service, but such as is or shall be allowed by the laws of this state.'

'If a constable, for making 'extraordinary efforts' to perform an ordinary official act, may not only receive, but may also collect by law a compensation beyond what the statute allows for the act, any other officer may do the same; and sheriffs, legislators and judges might and soon would put their 'extraordinary efforts' in the market, to be had by the highest bidder. This is a sickening and revolting view of the subject, I admit, but it is one forced on my mind by the case. It carries back my thoughts to scenes which I trust are never to be witnessed in this country, when chancellors and judges made a business transaction of receiving gratuities from parties for expediting, i. e., making 'extraordinary efforts' to dispose of their suits. These gratuities were not deemed bribes for perverting justice, but merely compensations for 'extraordinary efforts' to administer it 'beyond what an officer was strictly bound to make.' The great Lord Bacon by the workings of whose mighty mind

'Darkness fled,
'Light shone, and order from disorder sprung'--

secured his eternal epitaph, of 'wisest, brightest, meanest of mankind;' not by contaminating his fingers with bribes to do injustice, for it is recorded of his judicial decisions that never one of them was reversed or even the fairness of it questioned--but by receiving gratuities for making 'extraordinary efforts' to discharge his official duty. It was because he had an itching palm and sold his offices for gold, that he was impeached, fined, imprisoned, degraded and disgraced, and that genius which like a meridian sun should have illumined a world,

> for this reasonable practice of taking extra pay for 'extraordinary efforts', was shorn of its beams, and will forever 'in dim eclipse, disastrous twilight shed.'
>
> 'I have scarcely patients to look for authorities to support a principle which of itself is paramount to all authority.'"

There can be no valid distinction drawn between these two classes of public servants. The law on the subject in this state is clear and conclusive. The "agreement" is void as against the policy of the law of the State of Missouri.

CONCLUSION.

It is therefore the opinion of this office that the "agreement of taxpayer on compromise of taxes", is void as contrary to public policy of this state, and that the officials receiving or retaining fees in excess of the respective percentages of the taxes actually paid, by virtue of the agreement or otherwise, are subject to the penalties prescribed by Section 3948 R. S. Mo. 1929 and Section 8935, page 454, Laws of Missouri 1933.

Respectfully submitted,

HARRY G. WALTNER, JR.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM

PROBATE JUDGE: Probate Judge is entitled to deduct amount of salary he has paid a probate clerk who holds over after the expiration of the term for which he was appointed.

April 8, 1935.

4-13

FILED
16

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office which reads as follows:

> "In 1929 Mr. Uhrig was appointed Probate Judge of Carroll County. Under Section 2049, R. S. Mo. 1929 he qualified and appointed a clerk which said clerk qualified and gave bond as provided for in Section 2049, for the term ending December 31, 1930.
>
> "In November 1930 Mr. Uhrig was elected Probate Judge and entered upon his term for which he was elected, on January 1, 1931. The same clerk has remained in this office during the term for which Mr. Uhrig was elected from 1931 to December 31, 1935, but the clerk has never given a bond and there is no entry of record in Carroll County showing that the Probate Judge has appointed this individual to act as clerk in his office.
>
> "In the auditing of the Probate Judge's office, should the Probate Judge be charged with the amount of salary he has paid the clerk during the years 1931 to 1934 inclusive, as there is no official record showing either the appointment or the qualification of this

individual to act as such clerk."

Section 2049, R. S. Mo. 1929, provides that the judge of probate be required to act ex officio as his own clerk and give bond in like amount with like conditions as is required of clerks filling said office by appointment provided that a probate judge may, by an order of record appoint a clerk who shall be paid by said judge and hold his office at the pleasure of the judge. Said section reads in part as follows:

> "The judge of probate is required to act ex officio as his own clerk, and give bond in like amount, with like conditions and penalties, to be approved by the judges of the county court, filed and recorded, the same as is required of clerks filling said office by appointment: Provided, that any judge of probate may, by an entry of record in said court, appoint a separate clerk, who shall be paid by said judge and shall hold his office at the pleasure of the judge. Said clerk shall take the oath required of other clerks of court in this state, and, before entering upon the duties of his office, shall enter into a bond of the state of Missouri, with two or more good and sufficient sureties, to be approved by the judge, in the sum of one thousand dollars, conditioned that he will faithfully discharge all the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county where such clerk of probate is to serve, upon which bond, when breach thereof is made, suit may be brought as upon other penal bonds. Said clerk, when so appointed and qualified, may discharge all the duties of clerk, and shall have power and authority to do and perform all acts and duties in vacation which the judge of said court is or may be authorized to perform in vacation, subject to the confirmation or rejection of said court at the next regular term held thereafter. ****."

It is plain from the above section that the probate judge may act ex officio as his own clerk or he may appoint a separate clerk. If he elects to act as his own clerk, he is required to give a bond in like amount with like conditions and penalties, the same as is required of clerks filling same office by appointment. In view of the fact that the clerk, who was appointed and qualified during Mr. Uhrig's first term, held over and performed the duties of the office of probate clerk and since you do not state that the probate judge gave bond and acted as his own clerk, we assume, for the purpose of this opinion, that the probate judge did not qualify or act as his own clerk.

Section 11782, R. S. Mo. 1929, provides what fees a Probate Judge is allowed for his services and provides what fees he is allowed to retain after deducting all reasonable and necessary expenses for clerk hire. Said section reads in part as follows:

> "****Provided further, that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of office, and irrespective of the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate from all sources and for all duties by virtue of the office, except the $1,200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, then it shall be the duty of such probate judge to pay such excess less ten per cent. thereof, within thirty days after the expiration of such year, into the treasury of the county in which such probate judge holds office, for the benefit of the school fund of such county; ****."

There can be no doubt that a probate clerk is a public officer and the clerk of the probate court is not a mere employee of the judge. In Young v. Boardman, 97 Mo. loc. cit.189, the Court said:

> "**** The charge is that he was clerk of the judge and not of the court; but it is stated that he was appointed by the judge of the court in pursuance of section 1179, Revised Statutes, 1879. That section makes it the duty of the judge of the probate court to act ex officio as his own clerk, 'provided that any judge of probate may, by an entry of record in said court, appoint a separate clerk, who shall be paid by said judge and shall hold his office at the pleasure of the judge.' The clerk thus appointed is required to give bond before entering upon the duties of 'his office,' conditioned to discharge the 'duties of his office.' And when so appointed and qualified,

> 'may discharge all the duties of clerk and shall have power to do and perform all acts and duties in vacation which the judge of said court is or may be authorized to perform in vacation,' etc. Thmughout the law relating to the administrationof estates of deceased persons and the probate of wills, various duties are assigned to probate clerks. When the judge appoints a clerk, these duties devolve upon the clerk thus appointed. There can be no doubt but he is the clerk of the court and an officer of the court, and not in any sense the clerk of the judge."

Section 5, Article XIV. of the Constitution of Missouri provides:

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of regignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

You state that the Probate Judge was appointed to his office in 1929 and appointed a clerk who qualified and gave bond for the term ending December 31, 1930. Under the terms of the statute, a probate clerk does not hold his office for any definite term but only at the pleasure of the probate judge. In this case it would make no difference as the clerk did serve at the pleasure of the judge until December 31, 1930, and his term of office, in either event, would be from the date of appointment until December 31, 193 0. Under Section 5 of Article XIV. of the Constitution of Missouri, an officer holds his office during his official term and until his successor shall be appointed and qualified. If no clerk is appointed at the expiration of the Clerk's term, he would hold over by virtue of his original appointment until a successor is appointed and qualified, and the period he holds over is asmmuch a part of the term of his office as that which precedes the date at which the new appointment should be made.

In the case of State v. McGraw, 87 Mo. loc. cit. 160-161, the Court said:

> "Where an officer, especially a public officer, thus holds his office for a period and until his successor is appointed and qualified, a failure to appoint a successor at the end of the defined period, does not work a vacancy. State ex rel. v. Lusk, 18 Mo. 333. The incumbent holds until the successor is elected or appointed and qualified, and it is then, and not until then, that his term expires. State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Ranson, 73 Mo. 94; Bank v. Hunt, 73 Mo. 597. For his acts during the time he thus holds over, without any new appointment, he and his sureties are liable on his official bond, given at the date of the qualification. Long v. Seay, 72 Mo. 648; State ex rel. v. Kurtzeborn, 78 Mo. 99. It is true the law by which the relator was appointed fixed the term of office at four years and contemplates that at the expiration of that time a new appointment will be made, but the same law also contemplates that the appointing power may not be promptly exercised, and to prevent a vacancy the incumbent is made to hold over until such appointment is made. This is a contingency contemplated by the law, and enters into every such appointment, and the time he holds over the designated period is as much a part of the term of his office as that which precedes the date at which the new appointment should be made. *****

In the case of State v. Brown, 274 S. W. loc. cit. 967, the Court said:

> "The law is well settled that, where a public officer is elected or appointed to hold office for a denite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel. Lusk,

18 Mo. 333; State ex rel. Stevenson v. Smith, 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel. v. Ranson, 73 Mo. 78."

In view of the above, it is the opinion of this office that the office of probate clerk does not become vacant at the expiration of the term for which the clerk was appointed, but that the clerk in office holds over by virtue of his original appointment until a successor is appointed or elected and qualifies and that period for which said clerk holds over is as much a part of his term of office as the period preceding the time at which the new appointment should be made; that the clerk while holding over is a de jure officer and is entitled to compensation for performing the services of his office.

We therefore hold that a probate judge is entitled to deduct from the amount of fees he is allowed to retain as compensation for his services the salary he has paid a clerk of the probate court, for the time said clerk has held over by virtue of his original appointment.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

MISSOURI ATHLETIC COMMISSION: Sec. 12999, R.S. 1929 in using words "gross receipts" means receipts from all sources in connection with any boxing, sparring or wrestling exhibition.

April 9, 1935.

FILED
86

Athletic Commission of Missouri,
3132 Troost Avenue,
Kansas City, Missouri.

Attention: Mr. Garrett L. Smalley

Gentlemen:

This department is in receipt of your request for an opinion as to the following state of facts:

> "We are writing you for a written opinion in regard to the money we are collecting from concessions being operated in the majority of wrestling and boxing shows throughout the State of Missouri.
>
> We have successfully collected this fee ever since the Commission was organized in 1927, with one exception, and that is in one of the auditoriums in St. Louis. In Section 2 of the laws governing boxing and wrestling, it states that,
>
> > 'The Commission is to collect five per cent of the gross receipts of every boxing, sparring or wrestling exhibition held, such funds to be accounted for by the said Athletic Commission of the State of Missouri.'
>
> What we want to know is, whether the word 'gross' is to be construed to cover all moneys taken in from everything connected with the show or simply from the date. * * * * "

Section 12999, R.S. Mo. 1929 provides in part as follows:

> "* * * Third, to collect fees for such license of ten dollars ($10.00) for every license issued, and to collect five per cent. of the gross receipts of every boxing, sparring or wrestling exhibition held, such funds to be accounted for by the said athletic commission of the State of Missouri, and deposited monthly in the state treasury, and by the state treasurer set apart into a fund to be known as the athletic commission fund."

Statutes and ordinances imposing licenses and business taxes are generally to be construed liberally in favor of the citizens and strictly against the government. "The rule, however, does not compel an adherence to the mere letter of the law or to strict grammatical construction so as to defeat the plain legislative intent." Porter v. State, 58 Ala. 66.

Volume 37 Corpus Juris, page 249 states the general rule,

> "Liability for a license fee or tax, and the nature and extent of such liability, depend upon the terms of the statute or ordinance by which the fee or tax is imposed."

By the plain terms of the statute, the Commission is to collect 5% of the gross receipts of every boxing, sparring or wrestling exhibition. Nothing is said in the statute limiting the source from which said gross receipts should be estimated. The receipts obtained from concessions, etc. are collected by reason of their being connected with the boxing, sparring or wrestling exhibition in conjunction with which they are established.

CONCLUSION

In view of the foregoing, it is the opinion of this department that it was the intention of the Legislature that the

words "gross receipts", as used in Section 12999, R.S. Mo. 1929 should be taken to include the receipts from all sources obtained in connection or in conjunction with any boxing, sparring or wrestling exhibition.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

MUNICIPAL LIGHT BONDS: Laclede Electric Light Bonds.

4-26

April 20, 1935.

FILED
86

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge receipt of your letter of April 12, 1935, a copy of which is attached to this opinion.

We note in your letter that Judge Sevier on October 15, 1934, in the case of E. B. Allen v. Forrest Smith, State Auditor, in the Circuit Court of Cole County, Missouri, granted a temporary writ of injunction restraining the State Auditor from registering the electric light bonds of the City of Laclede voted at an election held on May 3, 1932. On February 5, 1935, while said temporary writ of injunction was in full force and effect, a petition for a writ of prohibition was filed in the Supreme Court of the State of Missouri, entitled State of Missouri at the relation and to the use of Forrest Smith, State Auditor, v. Nike Sevier, Judge of the Circuit Court of Cole County, Missouri, and E. B. Allen, to prohibit Judge Sevier from proceeding further with the case of E. B. Allen v. Forrest Smith, State Auditor, and a writ of prohibition was granted by the Supreme Court on February 5, 1935. The alternative writ of prohibition issued by the Supreme Court commanded Sevier, Judge, to take no further action in the first described cause until the further order of the Supreme Court.

We have read the petition in the case of E. B. Allen v. Forrest Smith, State Auditor, filed in the Circuit Court of Cole County, Missouri, in which case the plaintiff raised many questions as to why the bonds mentioned in said petition were illegally issued and should not be registered.

Recently, bonds in the sum of $12,000.00 issued by the City of Laclede, based on the election of May 3, 1932, and described in your letter, were presented by representatives of that City for the purpose of registration. The question about which you inquire is whether or not these new bonds should now be registered by you in view of the restraining order heretofore issued by Judge Sevier on October 15, 1934, and what effect, if any, the writ of prohibition issued by the Supreme Court has upon said temporary writ of injunction issued aforesaid.

The prohibition case is set for hearing before the Supreme Court, Division No. 2, at the May Term, to-wit, May 17, 1935; the pleadings having been made up on the petition of relator and demurrer of the respondent. The alternative writ which has been served in the case operates as a prohibition until the further order of this court and preserves the existing status of the proceedings. The writ of prohibition in this case does not set aside previous orders made by the lower court but only prohibits the lower court from proceeding further in the case.

It is our opinion that the bonds recently presented to you for registration cannot be registered by you so long as the temporary writ of injunction issued by Judge Sevier is in force and effect, and it is our further opinion that the alternative writ of prohibition issued by the Supreme Court does not have the effect of dissolving the temporary writ.

We deem it unnecessary to pass on the question of the liability of the State Auditor on his official bond for the reason that the question now involved is -- What should he do under the present status of the legal proceedings?

We, therefore, are of the opinion that the bonds in question should not now be registered by you.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG
Enc.

INCOME TAX: Com[illegible]tion of counsel for Trustee in Bankruptcy not exempt.

57

May 2, 1935.

FILED
86

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

This department is in receipt of your letter of April 30 requesting an opinion as to the following state of facts:

> "I herewith submit a copy of a petition which was filed in this office by W.C. Scarritt, et al., wherein they request that certain attorney fees outlined in the attached petition be deducted from their gross income as reported on their State Income Tax Returns for the calendar year 1934, said amounts having been included in their respective State Income Tax Returns for said year. The basis for this request is clearly set out in the attached petition."

W.C. Scarritt, Elliott H. Jones, Edward S. North and A.D. Scarritt, hereinafter called the petitioners, in 1933 were appointed by the Federal Bankruptcy Court, sitting at Kansas City, as counsel for Herbert V. Jones, Trustee in Bankruptcy of the Fox Rocky Mountain Theatre Co. and the Fox Midland Theatre Company. During the year 1934 $17,500 was paid to the aforesaid petitioners as compensation for their services performed on behalf of said trustee. It is now sought by this petition that the aforesaid sum of $17,500 be deducted from the returns of said petitioners as and for their income tax for the calendar year 1934.

Section 10117, R.S. Mo. 1929 provides in part as follows:

> "Income shall include gains, profits, and earnings derived from salaries, wages or compensation for personal services of whatever kind and in whatever form paid; and from professions, vocations, businesses, trade, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or the use of any interest in real or personal property; ***"

As authority for the proposition that Federal income is not subject to the income tax of the State of Missouri, the petitioners cite the case of State ex rel. Thompson v. Truman, 319 Mo. 423, wherein it was held by the Supreme Court of Missouri that the compensation allowed a receiver appointed by a Federal Court was not subject to income taxation by the State of Missouri for the reason that a receiver is an instrumentality of the Federal Court whether he be considered an officer of the Federal Government or not. In the course of its opinion, the Court said (l.c. 431):

> "It is plain under these rulings and definitions by Federal courts that whether an officer appointed by such court is technically an officer of the Federal Government or not, he discharges a duty necessary in the exercise by the government of its sovereign functions. The court, as a department of government, appoints a receiver as a necessary agency in the administration of the court functions. The emoluments of his office are fixed by the court as the proper compensation for the service which he renders. For the State to tax it would be to reduce that compensation, and to that extent would be an interference with the operation of the Federal court."

To our mind, however, there is a distinction between a receiver or trustee and counsel appointed to aid such receiver or trustee. An attorney employed as counsel for a trustee or

receiver is employed by reason of his professional ability and for the reason that said trustee or receiver, in the course of his duties, may have need of professional advice in order that questions of law may be properly investigated and the authorities fully presented; however, said attorney acts, not as an arm of the Court (as does the receiver or trustee), but merely as an aid to said receiver or trustee, much in the same manner as might an expert accountant. While a trustee or receiver is absolutely indispensable to the court in the administration of the receivership or bankruptcy proceedings, it is not always necessary that counsel be appointed, and it is only where the necessity clearly rises that the court should provide for the employment of counsel by receiver or trustee. The fees for counsel employed by receiver or trustee are regarded as a part of the receivership expenses and are allowed, not to the attorney, but to the receiver as a proper expenditure made by him. Joost v. Bennet, 56 P. l.c. 44.

Similarly, in the case of Stuart v. Boulware, 133 U.S. l.c. 81, the Court said:

> "On the other hand it is argued, and in this we concur, that if it were proper for the receiver to employ counsel, the allowance of reasonable counsel fees is to the receiver and not directly to the counsel, and that such fees would constitute only one of the items in the receiver's account; that the counsel had no cause of action, but the allowance was in legal effect to the receiver to enable him to make compensation for professional services."

It may be seen from these citations that the allowance is not made to attorneys for their services as an arm of the government or of the court, but is made for the purpose of allowing the receiver or trustee to make compensation for professional services rendered in the same manner as would professional services have been rendered to any other client.

High, in his work on "Receivers", 4th Ed., at page 954, says:

> "Receivers are entitled in the settlement of their accounts, to payments made on account of legal services and counsel fees. And such fees, when paid by the receiver in good faith in collecting moneys

> to which he is entitled, the disbursements being necessary and beneficial to the parties ultimately entitled to the fund, should be paid from such fund in the settlement of the receiver's accounts. The allowance of counsel fees is regarded as being made to the receiver as an item in his account, and not directly to counsel, the allowance being made in his accounts in order that he may make compensation for such services."

While the distinction we have heretofore set out between the nature of employment and compensation incident thereto between a receiver or trustee and counsel for said receiver or trustee would seem to settle the question now here before us, nevertheless, consideration must be had to the proposition that an agency may be of such character or so intimately connected with the exercise of a power, or the performance of a duty, by one government that any taxation by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power. Necessarily, the same prohibitions apply to an attempt by the Federal government to tax an agency of the State government as apply to efforts by the State government to tax instrumentalities of our Federal government.

Perhaps the leading case on this question is the case of Metcalf & Eddy v. Mitchell, 269 U.S. 514. The question considered in that case was the liability to income tax of amounts received by consulting engineers as compensation for their services under contract with various states, municipalities, water or sewage districts created by state statute. The court held that since the engineers held no official positions - were free to accept other employment, and did not show that their duties were defined or prescribed by statute, they were not officers or employees of the state within the meaning of the statutory exemption, and that there was no constitutional prohibition against taxing them. In the course of the opinion the court said (l.c. 522, 524-525):

> "Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing

> power of the other.
> * * * *
> It is on this principle that, as we have seen, any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function, (Gillespie v. Oklahoma, supra,) is prohibited. But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way."

In the case of Blair v. Byers, 35 F. (2d) 326 it was held that a lawyer practicing his profession while employed as a counsel for municipal water works trustees was not a city officer or employee within the statute exempting compensation from Federal income taxes. The Court said: (l.c. 328)

> "Nowhere in the record is it revealed to what extent, if at all, his services were subject to the control of the board of trustees. Furthermore, we are of opinion that an attorney who is engaged in this manner, who has not contracted to give to such a client his entire and exclusive services, does not thereby become an officer or employee in the sense of this statute. It is our judgment that

> Mr. Byers did not become such an employee of this political subdivision of the state of Iowa, and that the compensation which he received for services was therefore not exempt from income taxes."

And in the case of Elam v. Commissioner of Internal Revenue, 45 F. (2d) 337, the Circuit Court of Appeals held that attorneys for state court receivers are not 'officers or employees of state or political subdivision' within income tax exemption of the Federal Revenue Act. The Court said (l.c. 338):

> "Attorneys fees. That attorneys representing state court receivers are not officers of a 'state or political subdivision thereof' is definitely settled by the decision of Metcalf & Eddy v. Mitchell, 269 U.S. 514, 520, 46 S. Ct. 172, 70 L. Ed. 384."

CONCLUSION

While it may be difficult with respect to the problem of taxation by the state, to draw the line between agencies receiving compensation incidental to employment directly or indirectly from the Federal government, nevertheless, that difficulty is hardly an argument against making the distinction. As Mr. Justice Holmes has said: "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law." Irvin v. Gavit, 268 U.S. 161.

Nevertheless, it seems clear in the instant case that the exemption here sought for by petitioners as to the compensation received by them as counsel for a trustee in bankruptcy should not be allowed, and this for the following reasons: (1) The allowance of counsel fees is to be regarded as being made to the receiver as an item in his account and not directly to counsel, the allowance being made in his accounts in order that he may make compensation for such services; (2) the effect of the income tax in the instant case does not impair in any substantial manner the ability of petitioners to discharge their obligations to the trustee in bankruptcy or to the Federal government; (3) the tax is not imposed upon an agency of government in any technical sense and the tax itself cannot be deemed to be an interference with government or the impairment of the

efficiency of its agencies in any substantial way. Metcalf & Eddy v. Mitchell, supra.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

APPROPRIATIONS: Director of Medical Licensure -- No appropriation having been made, cannot be ascertained at this time out of which of the two funds his salary may be paid.

5-9

May 6, 1935.

FILED
86

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

We wish to acknowledge your letter of recent date wherein you state as follows:

> "The appropriation of the State Board of Health is divided into two classes: the Board of Health Fund consisting of certain fees earned by the department, and the State Department of Health Fund which consists of the appropriation from the state revenue.
>
> I would like an opinion from your department on the following question:
>
> > From which of these two funds should the salary of the Director of Medical Licensure be paid?"

In an opinion rendered by this Department under date of November 20, 1934, addressed to the President of the State Board of Health, a copy of which we are enclosing, we ruled as follows:

> "By virtue of the foregoing statutes authorizing the establishment of such divisions as the Board may deem necessary from time to time, the division

of medical licensure has been established and under the provision of Section 9112 heretofore referred to it is specifically provided that the State Board should have general supervision over the subject matter of registration of practitioners of medicine and surgery.

It is therefore inescapable that the State Board would have authority to employ a director of medical licensure and to establish the amount of compensation he is to receive as well as to prescribe the other rules and conditions under which he is to be employed."

We direct your attention to the following appearing in the Constitution of Missouri:

Article IV, Section 20, provides as follows:

"The General Assembly elected in the year one thousand eight hundred and seventy-six shall meet on the first Wednesday after the first day of January, one thousand eight hundred and seventy-seven; and thereafter the General Assembly shall meet in regular session once only in every two years; and such meeting shall be on the first Wednesday after the first day of January next after the elections of the members thereof."

Article X, Section 19, provides as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued

> therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

The Supreme Court in the case of State ex rel. Missouri State Board, etc. v. Holladay, State Auditor, 64 Mo. 526, l. c. 528, said:

> "And commenting on the same section, Mr. Mudd said: 'Now, the object of the committee was to restore to the general revenue the balances of the appropriations not applied at the end of every two years, so that each session of the General Assembly should make appropriations for the term during which they were elected, and not leave those appropriations open to be drawn upon at any time, which have been made by preceding General Assemblies. It was to close up the books at least once every two years, and then if any appropriation be made, let it be made by the General Assembly then in session.'"

Regular appropriations for the support of the state government are made biennially, or every two years. All moneys remaining at the end of the two years go back into the general revenue. As appropriations for the support of the state government for the years 1933-34 have expired by law,

it will be seen that such are no longer of any force and effect. Therefore, reccurse must be had to the appropriation for 1935-36. At this date the Legislature has not appropriated any moneys either to the State Board of Health Fund or to the Department of Health Fund. Consequently, we cannot say out of which of the two funds the Director of Medical Licensure shall be paid. However, we invite your attention to a perfected bill now before the 58th General Assembly, namely, House Bill No. ~~358~~ 536, page 18, which provides in part as follows:

"STATE BOARD OF HEALTH-
DEPARTMENT OF HEALTH-

SECTION 22. There is hereby appropriated out of the state treasury, chargeable to the State revenue fund, the sum of Two Hundred Fifty Two Thousand dollars ($252,000) to be expended for the following purposes, in the amounts hereinafter stated:

A. Personal Service:

Health Commissioner's Office:

The salary of the secretary, state health commissioner, secretary to the state health commissioner, director of licensure, supply clerk, multigraph operator and janitor."

If the above appropriation Act is enacted and approved as above written, it would be our opinion that the salary to be paid to the Director of Medical Licensure would be paid out of the above fund.

approved June 10th 1935

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

JLH/MW/EG

COUNTY COLLECTORS-STATE AUDITOR: The State Auditor's power to audit, adjust and settle with County Collectors carries with it the right to discreetly credit County Collectors with outlawed taxes where his refusal to so credit would be arbitrary under all the facts.

May 8, 1935. 11-6

FILED 86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

Your request for an opinion dated April 10, 1935 is as follows:

"Section 9961, Laws of Missouri, Extra Session, 1933-34 relating to delinquent and back taxes reads as follows:

"Sec. 9961. Limitation of action.-- No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, provided that proceedings for the sale of lands and lots on which taxes are delinquent for the year 1928 may be commenced at any time prior to December 31, 1934. Provided further, that in suits or actions to collect delinquent drainage and/or levee assessments on real estate such suits or actions shall be commenced within five years after de-

> linquency, otherwise no suit or action therefor shall be commenced, had or maintained.'
>
> "In checking the annual settlements of the various collectors, we find that some of them have taken as a credit item, 1928 and 1929 real estate taxes as outlawed.
>
> "We would appreciate an opinion from your office advising us as to whether or not the collectors should be allowed credit for 1928 and 1929 delinquent real estate on their annual settlements as an outlawed tax, and if this would not be a credit that would be allowable, how should we proceed to issue a Quietus to one of these collectors that had taken credit for the 1928 and 1929 delinquent real estate as above set out.
>
> "It is our understanding that the above land was not advertised or offered for sale in the fall of 1934."

The Session Acts of 1933-1934 at page 154, quoted in your request, provide for a statute of limitations upon the time in which the County Collector can bring an action enforcing the State's tax lien against real estate. Said law, by its very terms indicates that 1928 and 1929 delinquent State tax liens which were not foreclosed upon prior to December 31, 1934, ceased to be a tax lien against the land.

The State Auditor is an executive officer charged under the Constitution with performing those duties which the Legislature prescribes. Article V, Section 1, Missouri Constitution provides:

> "The executive department shall consist of a Governor, Lieutenant-Governor, Secretary of State, State Auditor, State Treasurer, Attorney-General and Superintendent of Pub-Schools, all of whom, except the Lieutenant-Governor, shall reside at the seat of government during

> their term of office, and keep the public records, books and papers there, and shall perform such duties as may be prescribed by law."

Auditing, settling and adjusting of County Collector's accounts by the State Auditor is provided for by Statutes. Section 11404, R. S. Mo. 1929, reads in part as follows:

> "He shall:* * * *fourth, audit, settle and adjust the accounts of the collectors of the revenue, and other holders of public money who are required by law to pay the same into the treasury;* * * *."

Again in Section 11407 R. S. Mo. 1929, the Legislature followed in the wake of Section 11404, supra, and again provided for the auditing, settling and adjusting of County Collector's accounts by the State Auditor. Said section reads as follows:

> "All officers and others bound by law to pay money directly into the state treasury shall exhibit their accounts and vouchers to the State Auditor on or before the thirty-first day of December, to be audited, adjusted and settled, except the collectors of the revenue, who shall, immediately after their settlement w with the county court on the first Monday in March in each year, exhibit their accounts and vouchers to the State Auditor to be audited, adjusted and settled; and the State Auditor shall proceed, without unnecessary delay, to audit, adjust and settle the same, and report to the treasurer the balance found due."

In the case of State ex rel. Gehner v. Thompson, 293 S. W. 391; 316 Mo. 1169, l. c. 1185, the Supreme Court said:

> "It appears to us, from the precise language of the statute and the duties and obligations imposed upon respondent thereby, that respondent's acts and decisions thereunder, in the allowance or disallowance of claims made against the State, necessarily, and as a general rule, involve the exercise of discretion upon his part and invest him with quasi-judicial functions and duties. That being true, this court cannot control or direct respondent's action, or quasi-judicial discretion, unless it be clearly shown that respondent is acting arbitrarily and without legal reason, or unless it clearly appear that respondent has abused his discretion. For us to control or direct respondent's quasi-judicial discretion (absent an arbitrary and clearly unlawful, or unjustifiable, action on his part) would mean for this court to impose our own judgment and discretion for that imposed upon respondent by the legislative department of this State, the assumption and arrogation of which power on our part would be to render abortive and ineffectual the statute prescribing the powers and duties of the State Auditor."

The above case holds that the State Auditor, and he alone, is charged with auditing, settling and adjusting accounts. Said case even goes so far as to say that the State Auditor's quasi-judicial discretion (absent an arbitrary and clearly unlawful, or unjustifiable, action on his part) cannot be controlled by the courts.

Section 11408 R. S. Mo. 1929, provides the statutory liability of a County Collector who shall fail to pay the amounts which the State Auditor finds due the State and reads:

> "If any of the persons mentioned in the preceding section shall fail to

> pay the amounts so found due into the treasury within thirty days after the settlement above required, the delinquent shall forfeit to the state the amount of the commission allowed him by law, and also two and a half per cent. a month on the amount wrongfully withheld, to be computed from the time the same ought to have been paid until actual payment; and the auditor shall charge such delinquent accordingly."

Section 11409 provides how the State Auditor shall proceed against those collectors which he finds delinquent and reads:

> "The auditor shall, immediately after such delinquency shall occur, issue a warrant of distress against such delinquent and his sureties, directed to the sheriff of the proper county, or if he shall be disqualified to act, then to the sheriff of some adjoining county, who is authorized and required to execute the same, and who, together with his sureties, shall be liable on his official bond in the same manner and to the same extent as if the writ were to be executed in his own county, stating therein the amount due and the penalties and forfeitures thereon accrued; and upon any failure by the auditor to issue the distress warrant herein provided for within thirty days, he and his sureties shall become liable on his official bond for all losses which the state may sustain through such failures."

Section 11415 provides that unsettled accounts of County Collectors be reported to the General Assembly and reads:

> "The auditor shall report to the general assembly, during the first week of each regular session, a list of all

collectors of the revenue and other holders of public money whose accounts have remained unsettled for the space of six months after they ought to have been settled, according to law, and the reason therefor, if known."

CONCLUSION.

Your request resolves itself to the problem as to the duty of the State Auditor who is charged by the statutes to audit, settle and adjust the accounts of County Collectors in allowing credit to collectors for 1928-29 real estate taxes which they have returned on their annual settlement as being outlawed. From the foregoing citations the auditor cannot exercise arbitrary, unlawful or unreasonable discretion. So long as the Auditor acts reasonably, justifiably and lawfully he may not be controlled by the Courts. In determining the legal problem presented by the request, we are not concerned with the policy which the State Auditor adopts. Such policy is for his own determination. Our only concern is to present what the auditor can do, under the law, in adjusting the annual settlement filed by the county collector. What he ought to do in the exercise of his quasi-judicial discretion is for the State Auditor to determine.

We are of the opinion that the State Auditor of Missouri, under the provisions of Sections 11404 and 11407, supra, is charged with the mandatory duty of auditing, adjusting and settling County Collectors' accounts. The word "shall" as used in these sections is used in its positive sense, making it the State Auditor's duty, under the Constitution and Statutes pursuant thereto, to audit, settle and adjust these accounts. The statutory terms, "audit, settle and adjust," as used in these Statutes, are not narrow terms. These terms are given no statutory definition and so their common meaning is to be applied when deciding the power of the State Auditor in performing his duty. These words, we believe, are conjunctive in the power which they give the State Auditor, not modifying each other. It is not only the

State Auditor's mandatory duty to audit the Collectors' accounts, but he also has a mandatory duty to settle and adjust these accounts. Taken together these three words give to the State Auditor wide latitude in the quasi-judicial discretion he is empowered to use when passing upon the annual settlement of the County Collector. The powers to audit, adjust and settle is the power to give credit where credit is due.

The mandatory duty of the office to "audit, settle and adjust" the accounts of county collectors even though the State Auditor has wide latitude in the exercise of his power does not empower the State Auditor to exercise arbitrary authority and refuse to allow a lawful and just credit. In making these annual settlements with county collectors the State Auditor should make reasonable effort to discover all the pertinent facts relative to the efficiency of the county collector in the collection of the revenue and after taking the facts within his knowledge and which have come to his attention, he must use sound discretion in allowing credits under his power to "audit, adjust and settle." The County Collector's right to a credit depends on the facts in each particular case. Any sound discretionary credit allowance is properly made by the Auditor.

We call your attention to the opinion of this office written by Honorable Gilbert Lamb, addressed to you on July 27, 1933, in which we said:

> "If such examination develops a situation that warrants you, in your judgment, in making an examination of additional books or records kept by any of the county officers named in the above section, then we think you would have a right to and should extend your examination and audit to such an extent as the facts developed by you would justify,"

Finally we are of the opinion that the provisions of Section 11408, supra, providing liability for delinquent County Collectors, Section 11409, supra, providing

that the Auditor issue distress warrant against delinquent County Collectors, and Section 11415, supra, providing for the State Auditor's report to the General Assembly on all County Collector's accounts not legally settled, by their very terms become operative and refer only to delinquencies found by the Auditor in auditing, adjusting and settling the accounts. Where, after the affirmative mandatory action of the State Auditor, acting in a quasi-judicial capacity, he finds a delinquency it is his duty to proceed against the delinquent under the provisions of law herein set out relating to delinquent County Collectors.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

COLLECTOR: BONDSMEN: 1. Sureties on a Collector's bond are not liable beyond the liability of their principal.

2. Collectors and sureties are relieved if funds are lost by failure of a legal depository even though the bond contains the phrase 'collect and pay over.'

5-13

May 10, 1935

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This Department acknowledges receipt of your letter addressed to General McKittrick, wherein you request an opinion regarding the following question,

> "We are advised that an opinion has recently been issued by your Department which holds that the depository liability upon a County Collector's funds is not a liability of the Collector's bondsmen.
>
> Under this interpretation, we would like to know if the security given to the County by a County depository will apply to the Collector's account when the County depository has been designated by the County Court as the Collector's depository?
>
> We would further like to know what stipulation should be made in a Collector's bond which is furnished in accordance with the opinion which removes the depository liability from the Collector's bond that will cover the statutory requirement which calls upon the Collector to collect and pay over. Wherein there is further statutory provision that the only

payments the Collector may make out of the Collector's account is the pay over that completes his monthly distribution of collection.

Due to the fact that the time allotted to the Collectors to qualify is so short, we would appreciate an early opinion on these questions."

You state in the first paragraph of your letter that you have been informed that this department has recently rendered an opinion, wherein it was held that, 'the depository liability upon a County Collector's funds is not a liability of the Collector's bondsmen."

We assume that you refer to an opinion rendered by this department on February 13,1935, to Hon. P. C. Breit, Prosecuting Attorney, Savannah, Missouri, (copy of which opinion is herewith inclosed) wherein it was held that if the county court selects a county depository in accordance with the provisions of the new section relating to the bond of a collector, the county collector would be relieved of liability by reason of the failure of such designated depository, but there was no disposition of the question as to whether or not the collector's bondsmen would be liable. We shall therefore proceed to answer that question.

I.

THE SURETIES ON A COLLECTOR'S BOND ARE NOT BOUND BEYOND THE LIABILITY OF THE PRINCIPAL

Having held in the opinion to the Prosecuting Attorney of Andrew County that the collector was relieved of liability in the event of the failure of the depository, provided the depository was selected in accordance with Section 9885, page 463, Laws of Missouri 1933, which is as follows:

> "Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St.Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any two months of the year preceding his election or appointment, plus ten per cent. of said amount; Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, 1909, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties."

We consider the question as to whether or not the bondsmen may be liable.

The case of Stix Dry Goods Co. v. Bonding & Surety Co. 273 Mo. l. c. 390, wherein the court said,

> "We think it sufficiently appeared from the pleadings and proof of plaintiff that no such delivery or even offer of delivery was ever made by plaintiff. This may be deduced from the pleadings and from the facts that the letters of plaintiff to defendants advised the latter that it

had 'exercised its (our) option to require the payment of $8000 in advance of the delivery and laying any carpets,' as pursuant to the terms of the contract of sale, it was authorized to do. Plaintiff insists that it may upon such a state of the evidence recover the full penalty of the bond sued on, without showing delivery of the goods, or any offer to deliver them, without showing that the goods were made up or laid, and without showing any actual damage accruing to it from defendant Ottawa Realty Company's breach of the conditions of the contract. The assignments of error of defendants, each specifically, and in effect collectively, deny most strenuously the right of recovery of the full penalty of the bond upon these facts. Within the above respective contentions lies the only question presented upon this appeal.

We premise that it is among the conceded law of the case (a) that since the bond in suit referred to the contract, and the contract in turn referred to the bond, this bond is to be construed in the light of the terms of the contract (Forst v. Leonard, 112 Ala. 298; Sewing Maching Co. v. Winchel, 107 Ind. 260; Jordan v. Kavannaugh, 63 Iowa, 152), and (b) that the liability of the surety upon the bond here can in no event exceed that of the principal therein, (Stevens v. Partridge, 109 Ill.App.486; Barrie v. Seidel, 30 Mo.App. 559). So much being conceded, is plaintiff entitled to recover the full penalty of the bond? We think not."

CONCLUSION

We are, therefore, of the opinion that in the event the collector is not liable on his official bond,

for acts or misappropriations, the bondsmen are not liable. A surety cannot be held liable beyond the liability of his principal.

II

THE COLLECTOR'S BOND CONTAINING THE CLAUSE "THAT HE WILL FAITHFULLY COLLECT AND PAY OVER ALL STATE, COUNTY AND OTHER REVENUE," CANNOT BE BOUND TO PAY FUNDS, WHICH, ACCORDING TO LAW HE WOULD BE RELIEVED FROM PAYING.

Section 9885, quoted under the first question, while repealing the old section 9885, is in many respects similar, in that the first part and the first proviso are identical. If the collector qualifies by giving bond and no action is taken by the county court as contained in the next proviso, then, and in that event, the old form of bond and its liability remains identically as in the past. But if the county court, as contained in the next provision, which appears to be a discretionary matter with the county court, exercises its power, and the county being less than 75,000 population "may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184." The question then arises whether or not the bond containing the clause "that he will faithfully and punctually collect and pay over all state, county and other revenue" would render the county collector and his sureties liable in the event of the failure of the depository, and further, whether or not the terms of the bond should be changed.

The statute containing the provisions permitting the county court to select a depository, Section 9885 quoted supra, states that the same may be done at the May term. The present year of 1935 is the year in which the collector is required to qualify for four years on March 1, hence we assume that all of the collectors qualified by giving the old form of bond. We herewith quote from

decisions which have bearing on the point involved. In the Case of State v. Simmons 284 Mo. l. c. 671, the court said:

> "It has been held that a recognizance is not vitiated by reason of its containing more than the statute prescribes because 'the stipulation in the bond not required by a statute may be rejected as surplusage and the bond still be regarded as a statutory bond.' (Woods v. State, 10 Mo. l. c. 700.) Likewise, when a bond 'falls short of the statutory enumeration in such manner as to be more favorable to the party executing it,' such party cannot complain because it contains enough to make him liable for the penalties prescribed. (Flint ex rel. Lumpkin v. Young, 70 Mo. 221, l. c. 226.) Those cases imply that a statutory forfeiture cannot be adjudged for failure to comply with a condition which the statute does not recognize."

In the decision, State to the use v. Cochrane 264 Mo. l. c. 593, the court, in discussing the bond which broadens its obligation, said:

> "The vital question in this case is whether or not the bond in suit is a valid and enforcible obligation under the principles of the common law. It was executed by appellant for a price paid or promised. The Surety Company desired a premium, and to gain that, executed the bond in suit. It had no relationship to the business conducted by the Cochrane Grain Company and no connection with its occupation other than for an agreed consideration to indemnify the public against the breach of certain duties imposed upon its principal by law.
>
> It entered into that contract without any other coercion than a motive of profit. The italicized conditions of the contract as

set out in the statement disclosed an agreement on the part of the signers in substance that the principal will not only comply with the statutory regulations specified in the Act of 1907, but will also comply with the law of Missouri applicable to the calling of a public warehouseman. If no statute had ever been enacted regulating that business, the common-law obligations would still subsist. Hence, if we should concede for the argument only, that all statutory provisions on the subject are at an end, still the duty was imposed upon the principal by the nature of his business and his receipt for the goods, to surrender the property upon proper demand, or to show a valid reason for refusal. The fact that the bond in question embodied conditions to comply with the statutory regulations does not prevent the enforcement of other obligations expressed, which, though not prescribed by statute, were the common law duties attached to the business of public warehousemen.

It is a settled principle of law in this State that a voluntary bond not opposed to public policy and resting on a sufficient consideration is enforcible or binding as a common-law obligation. (Barnes v. Webster, 16 Mo. 258; State ex rel Jean v. Horn, 94 Mo.162; Henoch v. Chaney, 61 Mo. 129; LaCrosse Lbr.Co. v. Schwartz, 163 Mo. App.659; State ex rel. McKown v. Williams, 77 Mo. 463, 467; State to use v. Finke, 66 Mo. App. 238; State ex rel. v. O'Gorman, 75 Mo. l. c. 378.)

In view of the specific provisions in the bond in question which broadened its obligation, so as to cover any failure

on the part of the principal to comply with the laws of Missouri, we see no escape from the application of the rule laid down in the above cases."

Likewise, in the case of Newton v. Cox 76 Mo. l. c. 353, the court, in discussing statutory bonds, said:

"It is conceded, and there can be no question, that if the bond in suit is a statutory bond, the court had jurisdiction. R. S. Secs.235, 236, 252. But two questions are presented by this record for consideration, both arising on the plea to the jurisdiction: 1st, Is the bond a statutory bond? 2nd, Was it necessary to allege in the sci. fa. that demand was made upon the executor to satisfy judgment before the issuance of the execution against him?

The condition of the bond prescribed by the statute is that the executor shall: 'Faithfully administer said estate, account for, pay and deliver all money and property of said estate, and perform all other things touching said administration required by law, or the order or decree of any court having jurisdiction.' The condition of the bond pursued the statute, except that the words, 'or the order or decree of any court having jurisdiction,' are omitted, and the words, 'touching such executorship,' are substituted for the words, 'touching said administration.'

In the State to the use of Cameron v. Berry, 12 Mo. 377, it was held that: 'Where the bond merely fell short of the statutory enumeration, in such a manner as to be more favorable to the party executing it, he could not be permitted to complain if,

after it had answered all his purposes, he was held liable to its penalties.' In Hoshaw v. Gullett, 53 Mo. 208, a forthcoming bond in an attachment suit, executed by defendant and his sureties, but not in exact, though substantial conformity, with the requirement of the statute, was held a good statutory bond. See also Flint v. Young, 70 Mo. 222."

CONCLUSION

As stated in the beginning, the new Section 9885 embodies the old section in its entirety, and by adding the two additional provisos lessens the amount of the bond of the collector and relieves, according to the opinion rendered by this department to Mr. Breit and written by Assistant Attorney General Hewitt, the collector of liability in the event of the failure of a legally selected depository, and the first question that the bondsmen would also be released from liability, if a depository is legally selected. We are of the opinion that the phrase "that he will faithfully and punctually collect and pay over all state and county money," does not in anywise injure the state and county nor in anywise place an undue burden or hardship on the collector and his sureties, and that it is not necessary to make any change in the wording of the bond. By the terms of the bond the collector is required to faithfully perform his duties and to pay over and deliver all moneys, which, by law or legally, he is required to do. A collector could only be required to collect and pay over only the money which, by law, he would be required to collect and pay over regardless of the terms of the bond. If, therefore, a depository is selected and the same becomes defunct or fails, according to the Breit opinion the collector and his bondsmen are relieved and no action could be brought against the collector and his bondsmen for the money lost in the legal depository, for the reason

he would not be required, as a matter of law, to collect and pay over that amount.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

SHERIFF--COSTS--TRAVELING EXPENSES: State is liable to Sher... and guard for traveling expenses of themselves and prisoners when delivering boys convicted of a felony and committed to the Missouri Training School for Boys.

May 27, 1935.

FILED
16

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri:

Dear Sir:

We acknowledge your request for an opinion dated May 18, 1935, which reads as follows:

> "This office, upon a receipt issued to Joe Anderson, Sheriff of Scott County, Missouri, by H. G. Gray, Superintendent of the Missouri Training School for Boys at Boonville, Missouri, for the delivery of certain boys to that institution for confinement, requested said sheriff to furnish this office with a certified copy of the information, together with a certified copy of the judgment in the above cases to determine the liability of the costs for the transportation of said boys to said institution. I am enclosing the certified copy of the information, together with the certified copy of the judgment in the cases and desire an opinion from your office as to whether or not the State of Missouri is liable for the costs of said transportation or whether said transportation is a proper charge against Scott County."

We also acknowledge the exhibits referred to in your request, which we are returning with our opinion.

Section 8357 R. S. Mo. 1929, provides when the State shall pay the costs of delivery of prisoners to the Missouri Training School for Boys and reads:

> "In all cases of conviction of felony, wherein the punishment is commitment to the reformatory, the cost of the

proceedings and of the delivery of such person to the reformatory shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the county in which the conviction is had. The sheriff, marshal or other person charged with the delivery of any person to the reformatory shall be allowed the necessary traveling expenses of himself and such person, and a per diem of two dollars for the time actually occupied in taking such person to said reformatory and in returning therefrom, to be paid by the state or county, as the case may be."

CONCLUSION.

The attached certified copies of informations, judgments, and sentences show that Warren Rowlet was found guilty of a felony, the crime of burglary and larceny, that he was sentenced to two years in the State Penitentiary, from April 27, 1935, which sentence was commuted to imprisonment to the Missouri Training School for Boys at Boonville, Missouri.

The attached certified copies of informations, judgments, and sentences show that Truman Gregory and Charles Betts were found guilty of a felony, grand larceny, and that they were sentenced separately to three years in the Penitentiary, which sentence was commuted to three years in the Missouri Training School for Boys.

We are of the opinion that under the provisions of Section 8357, supra, the State of Missouri is liable to Joe Anderson, the Sheriff of Scott County, and guard Glen Lumpkins, for their necessary traveling expenses and the expenses of their three prisoners, and that the sheriff and guard are entitled to a per diem of two dollars for the time actually occupied in taking the boys to the reformatory and returning therefrom.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

ROY McKITTRICK
Attorney General.

OCCUPATION TAX: Deductibility of (1) sales of electric energy to municipally owned power and water plants; (2) sales of electrical energy to buildingowners to be remetered to tenants; (3) sales of electrical energy to companies for propelling street cars; (4) sales of electrical energy from transmission lines; (5) sales of electrical energy in other states by a Mo. company; (6)Rental receipts from property used in operations; (7) Sales of material and supplies to Employees Mutual Benefit Associations.

May 31, 1935.

FILED

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of May 22 wherein you request an opinion involving seven questions pertaining to the taxability or non-taxability of certain sales of tangible personal property and the rendering, furnishing or selling for a valuable consideration certain substances, things and services. We shall answer your questions in their numerical order.

I

Sales of electric energy to municipally owned plants for power purposes, i.e., sales to municipal water companies for use in pumping water, etc.

The section of the Occupation Tax Law dealing with electricity is sub-section (b) of Section 2A. Same relates to the privilege of engaging in the business of rendering services, furnishing and selling the substances and things therein stated, i.e., "Sales of electricity or electrical current, water, sewer service, gas (natural or artificial) to domestic,commercial or industrial consumers."

We must determine whether or not sales of electricity to municipally owned plants for power purposes is to be classified as domestic, commercial or industrial. A domestic consumer is defined as "One who consumes electricity or electrical current for household or domestic purposes." In the case of Maasdam v. Blokland, 261 P. 66, a commercial consumer is defined as "one who uses electricity or electrical current for trade or commercial purposes. In the case of Railroad v. Fulgham, 91 Ala. 555, industrial consumer is defined as "one who uses electricity or

electrical current for manufacturing,power and light purposes."

It is the opinion of this department that when a municipally owned plant buys or receives electrical energy to be used by the city for power purposes in pumping water, it constitutes a sale for commercial purposes. It would, therefore, involve "Sales * * * to domestic, commercial or industrial consumers," and the amount of such energy should be computed in the gross receipts of companies who furnish such power to municipalities.

II

Sales of electric energy to building owners which is remetered by said building owner to the individual tenants in said building. The utilities hold that such sales are sales for the purpose of resale. However, we believe that in the stipulation of the K.C. Power and Light Company case, they agreed to pay on such sales, but the other companies have not yet done so, and have continued to deny liability.

This question involves the element of resale as may apply to Section 2A, which will be more fully discussed under Question IV. Referring to the definition of "commercial, domestic and industrial consumers" as contained in Question I, we are of the opinion that the amount of electrical energy distributed to owners of buildings is not a legal deduction. The owner of a building is not engaged in the electrical business--he merely divides the electricity among the various tenants of the building, or meters the same to them in order that each tenant may be compelled to pay for the actual amount of electrical energy consumed. The owner of the building does not receive the profit from the sale of electricity to his tenants and the company that sells such energy to building owners should include such sales in its gross receipts.

III

Sales of electric energy by the electric company for use in propelling street cars

Under Section 2A of the Act, the tax is imposed on the gross receipts from "sales of electricity or electrical

current, water * * * to domestic, commercial or industrial consumers". If the use of electricity by a street railway company is to be included within the terms of the Act, the company using such electricity must be deemed a commercial consumer.

In the case of Conecuh County v. Simmons, 95 So. 488, it was said of "trucks" as follows:

> "Trucks used by a lumber manufacturer for hauling logs, timber, lumber and commissary provisions as well as provisions used by the owner's family, were used for 'commercial purposes' within the meaning of Gen. Acts, 1915, p. 573, and therefore subject to a privilege or license tax assessed by the county commissioners."

If the street railway is owned by a corporation that is engaged in carrying passengers from place to place, and organized for gain and profit, the same as any private corporation, we would deem it to be of the same character as a railroad company carrying passengers. The distinction between a street railway and a railroad carrying freight and passengers is made in the case of Hartzell v. Alton, Granite & St. Louis Traction Co., 183 Ill. App. 641, wherein it was said:

> "Commercial railroads embrace railroads for all freight and passenger traffic between one town and another or between one place and another. They are usually not constructed upon streets and highways, except for short distances. Street railways embrace all such railroads as are operated upon public streets for the purpose of conveying ordinary passengers, with hand baggage, from one place to another on the street, but the character is determined by the character of traffic or service, and not by the location."

This question is now on appeal to the Supreme Court of Missouri from the Circuit Court of Jackson County, and as yet no decision has been rendered.

We are of the opinion that electrical energy used by street railways for propelling street cars constitutes commercial consumption of electricity, and the receipts by the electric company for the same should be included in the return

to the State Auditor. It is in no wise a legal deduction.

IV.

Sales of electric energy from transmission lines, i.e., the company in question generates the electric energy, conveys same by transmission line to a given point where it is metered to another company and the latter company then resells same to the ultimate user or consumer.

This question involves the element of resale as it might apply to Section 2A of the Act. "Sale at retail", as defined in the Act, means "any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration." We must bear in mind that the Act is in reality in two parts, (1) the tax to be computed on the gross receipts derived from sales of tangible personal property, and (2) for the privilege of rendering services, furnishing and selling the things as set forth under the subdivisions of Section 2A. We consider the words "furnishing or selling", as used in Section 2A of the Act as being synonymous in their meaning.

In the case of admission tickets, electricity, sewer service, gas, telephone service, telegraph messages, newspaper advertising, laundry, railroad fares and billboard service, no tangible property passes from the vendor to the vendee; the person merely pays for the service received, or pays a stipulated amount for having the things enumerated furnished by persons engaged in the business. It would be highly impractical and highly improbable to conceive of the resale of telephone service or of messages sent by telegraph companies. The question of reselling electricity, gas, water, sewer service, etc. is not contemplated by the Act, nor does the Act, under Section 2, provide for the exemption in any wise of the resale of those things, as it does in the case of tangible personal property.

In 60 Corpus Juris, 1213, "tangible property" is defined as follows:

> "That which may be felt or touched. It must necessarily be corporeal, but it may be real or personal. As used in a revenue act, the term has been defined by the statute as meaning

> 'stocks, bonds, notes, and other evidences of indebtedness, bills and accounts receivable, lease-holds, and other property other than tangible property.'"

We think it was the intention of the Legislature to impose a tax for the privilege of any person engaging in rendering services, furnishing or selling substances and things, regardless of the fact that such person may be furnishing the substances and things in wholesale quantities or to groups and individuals, and each person who furnishes or sells the same electricity, gas, etc. is subject to the tax. We are therefore of the opinion that no legal deduction can be made by persons subject to the tax under subsection (b), for electricity, water, sewer service, gas or the other things mentioned in the subsections, by reason of the fact that they are resold before reaching the ultimate user or consumer.

Having disposed of the question of resale in so far as the terms of the Act may apply, we shall next discuss whether or not taxing a resale of the above mentioned substances and things would constitute double taxation. To constitute double taxation it is necessary that one person contribute twice to the same burden. As was said in the case of Harvey Coal Company v. Coke Co., 53 S. E. l.c, 941,

> "By 'double taxation' is understood the requirement that one person, or any one subject to taxation, shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once; but where the same property represents distinct values belonging to different persons, the fact that each is taxed on the value which the property represents in his hands does not constitute 'double taxation.'"

Also, in the case of Cook v. City of Burlington, 13 N.W., l.c. 114, it was said:

> "'Double taxation', within the policy of the law which prohibits double taxation, means the taxing of the same piece of property twice to the same person, or taxing the same piece of property once to one

> person and again to another; but the imposing of a tax on the shares of a corporation in the hands of its stockholders, and also on the property of a corporation, will not constitute such double taxation."

In order to constitute double taxation, the tax must be imposed upon the same property at the same time. In the case of State v. Ingalls, 135 P., l.c. 1180, the Court said:

> "'Double taxation', in the objectionable and prohibited sense exists only where the same property is taxed twice when it ought to be taxed but once, and to consider such double taxation,the second tax must be imposed upon the same property by the same state or government during the same taxing period."

The above quoted cases refer to double taxation with reference to ppoperty. In the instant question the tax is upon the privilege of a person engaging in the business of selling tangible personal property or rendering services; hence, the only essential is that each person must be exercising a separate and distinct privilege. We therefore hold that the taxing of such sales would not constitute double taxation, and the same will apply to all of the other subsections as enumerated under Section 2A. However, under subsection (b) (sales of electricity or electrical current, water, sewer service, and gas) the Legislature has seen fit to limit the taxing of the gross receipts to "domestic, commercial or industrial consumers."

We shall next discuss that portion of your question, - "the company in question generates the electric energy, conveys same by transmission line to a given point where it is metered to another company and the latter company then resells same to the ultimate user or consumer", from the viewpoint of determining whether or not such sales may be classed as services to domestic, commercial or industrial consumers.

The various "persons" through which the electrical energy passes before reaching the ultimate consumer cannot be classed as domestic, commercial or industrial consumers according to the definitions of those terms. They are in the nature of brokers or middle men. It cannot be said that when they relay or sell the electrical current from person to person, that those persons consume the current; therefore, such sales are deductible, not because they constitute resales, but for the reason that the

electrical energy is not used or consumed domestically, commercially or industrially.

In our opinion relating to this question we have treated the resale of electrical energy, gas, water, etc. as separate and distinct from the other subsections under Sec. 2A, as the section relating to those services qualifies the users or consumers, while the other sections do not so qualify them; hence, we repeat that there is no legal deduction for the resale of things in Section 2A, and the exception made in the case of electrical energy, gas, water, etc. is not made on the grounds of resale, but because the Legislature qualified or limited the user or consumer.

V.

Sales of electric energy in other states by a Missouri company where the electric energy is generated in Missouri, conveyed by transmission line to a point in some other state and there sold to another company or sold by the Missouri company to the ultimate user or consumer.

This question involves the interstate commerce feature. Section 3 of the Retail Occupation Tax Act is as follows:

> "There are hereby specifically exempted from the provisions of this act and from the computation of the tax levied, assessed or payable under this act, such portion of the gross receipts as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such portion of the gross receipts as is derived from sales of tangible personal property, services, substances and things which the State of Missouri is prohibited from taxing or further taxing under the Constitution of this state."

In the case of Texoma Natural Gas Co. v. Railroad Commission of Texas, 59 F. (2d) 750, the question of companies engaging exclusively in producing, selling and transporting gas from one state to another was discussed. The Court said (l.c. 753):

> "The plaintiffs are engaged exclusively in producing, selling, and transporting gas from the State of Texas for delivery to purchasers in other states, under contracts made prior to the enactment of the statute. These are the essential elements of interstate commerce. Producers Transportation Co. v. California Railroad Commission, 251 U.S. 228. * * * *"

The general principle of law relating to interstate commerce is found in the opinion in the case of Dahnke-Walker Co. v. Bondurant, 257 U. S., l.c. 290-291:

> "The commerce clause of the Constitution, Art. I, Sec. 8, Cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446-447; American Steel & Wire Co. v. Speed, 192 U.S. 500, 519. On the same principle, where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation. American Express Co. v. Iowa, 196 U.S. 133, 143. This has been recognized in many decisions construing the commerce clause. Thus it was said in Welton v. Missouri, 91 U.S. 275, 280: 'Commerce is a term

> of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities.' In Kidd v. Pearson, 128 U.S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In United States v. E.C. Knight Co., 156 U.S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last."

The question of transmitting water, gas, electricity, etc. from one state to another and there sold to another company or sold by a Missouri company to the ultimate consumer is discussed in the case of Missouri v. Kansas Gas Co., 265 U.S. 298, l.c. 306, as follows:

> "The business of the Supply Company, with an exception not important here, is wholly interstate. The sales and deliveries are in large quantities not for consumption but for resale to consumers. There is no relation of agency between the Supply Company and the distributing companies, or other relation except that of seller and buyer, Public

> Utilities Comm. v. Landon, 249 U.S. 236, 244-245; and the interest of the former in the commodity ends with its delivery to the latter, to which title and control thereupon pass absolutely. The question is, therefore, presented in its simplest form; and if the claim of state power be upheld, it is difficult to see how it could be denied in any case of interstate transportation and sale of gas. Both federal courts denied the power. The state court conceded that the business was interstate and subject to federal control, but rested its decision the other way upon the fact that Congress had not acted in the matter and that, in the absence of such action, it was within the regulating power of the State. The question is controlled by familiar principles. Transportation of gas from one State to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce. In Public Utilities Comm. v. Landon, supra, at p. 245, this Court said: 'That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the State.' See Pennsylvania v. West Virginia, 262 U.S. 553, 596, and cases there cited."

It will be noted by the above decision that there is no distinction as to the interstate commerce feature when pipe lines sell to the ultimate consumer or when they sell to a distributing company.

The right to tax an occupation, or the privilege of doing business, is decided in the case of Ozark Pipe Line Co. v. Monier, 266 U.S., l.c. 561, as follows:

> "The tax is one upon the privilege or right to do business (State ex rel.Marquette Hotel Invest. Co. v. State Tax Commission, 282 Mo. 213, 234, 221 S.W. 721); and if appellant is engaged only in interstate commerce, it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form, -- whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. Leloup v. Mobile, 127 U.S. 640, 648, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Kansas City, Ft. S. & M. R. Co. v. Botkin, 240 U.S. 227, 231, 60 L. ed. 617, 618, 36 Sup. Ct. Rep. 261, and cases cited. Plainly, the operation of appellant's pipe line is interstate commerce, and beyond the power of state taxation. Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265, 272, 66 L. ed. 227, 231, 42 Sup. Ct. Rep. 101; United Fuel Gas Co. v. Hallanan, 257 U.S.277, 66 L. ed. 234, 42 Sup. Ct. Rep. 105. But the contention in justification of the tax is that appellant is also engaged in doing local business, the basis of such contention being the facts concerning its ownership and use of property other than the pipe line, and its various acts and activities within the state hereinbefore recited; and, further, that the purpose for which it is incorporated, as declared in its articles, comprehend other activities than that of transporting petroleum; namely, the acquisition and operatinn of telegraph and telephone lines, dealing in and transporting merchandise, etc."

In the case of Crew Levick Co. v. Pennsylvania, 245 U.S. l.c. 297, certain taxes were held to be legal even though it applied to interstate commerce transactions (in the instant case it applies to a tax on gross receipts) and the Court said:

> "These taxes were held valid, because unlike a gross receipt tax, they do not

> withhold for the use of a state a part of every dollar received in such transactions."

It is the opinion of this department that sales of electrical energy, water, gas, heat, etc., when conveyed to another state and there sold to another company or other distributors, or to the ultimate consumer or user, are legal deductions in computing the retail occupation tax.

In the event a company is engaged in both intrastate and interstate sales of electricity, etc., all intrastate sales should be computed in arriving at the amount of the tax. This, however, is not applicable to tangible personal property sold in interstate commerce transactions, as there are various elements which enter into the sale of tangible personal property as it may be affected by the commerce clause.

This conclusion is based solely on the facts as presented in your question, and cannot be considered as decisive of all questions wherein the commerce clause is involved. The facts in each instance will require individual consideration.

VI.

Rental receipts from property used in operations, including rental of apparatus and real estate, rental of pole space, and conduit space, and rental of sub-station and equipment.

If this question applies to Section 2A in its entirety, it will be necessary to divide the question. If the rental receipts relate to telephone companies, then subsection (c) will govern. Subsection (c) provides:

> "Sales of service to telephone subscribers and others for the transmission of messages and conversations, both local or long distance, and upon the sale, rental or leasing of all equipment or services pertaining or incidental thereto."

Subsection (c) is plain and unambiguous in its terms and definitely states that such receipts are to be included. Subsections (a), (b), (d), (e), (f), (g) and (h) contain no such specific provisions with reference to the receipts from rental or leasing of other equipment, but clearly state that the receipts derived from the sale of services pertaining thereto are taxable, and it is our opinion that no legal deduction can be made therefrom in the case of subsection (c).

Subsection (a) of Section 2A places a tax of one-half of one per cent on sales of admission tickets, cash admissions, charges and fees to places of amusement, games and athletic events; subsection (b) relates to sales of electricity, water, sewer service and gas, while subsection (d) relates to sales of service for transmission of messages by telegraph companies. Subsection (g) relates to sales of tickets, fares and services by railroad companies, express companies, bus lines, truck lines, and all character of transportation companies engaged in the transportation of persons or freight for hire. It is our opinion that so far as the rental receipts as contained in your question are pertinent, the receipts from the same should not be included in the instances enumerated, i.e., subsections (a), (b), (d) and (g).

Subsection (e) of Section 2A relates to sales of newspaper advertising and newspaper service; subsection (f) relates to commercial laundry, cleaning and dyeing service; and subsection (h) relates to billboard and all other kinds of outdoor advertising. Section 2A states: "For the privilege of a person engaging in the business of rendering the services * * * a tax is hereby imposed upon such person at the rate of one-half of one per cent of the gross receipts * * *" In these three above mentioned subsections the Legislature has not stated definitely that the tax shall be computed on sales alone, as mentioned in the other subsections; therefore, we are of the opinion that the rental receipts wherein they include the furnishing of services as mentioned in the Act are not legal deductions.

VII.

Sales of material and supplies to employees mutual benefit association, sales of material and supplies to employees and sale of material and supplies in conjunction with house wiring.

Referring to the first part of your question, i.e., sales of material and supplies to employees of mutual benefit associations, it is our opinion that the same should be governed by subsection (g) of Section 1 (Laws of Mo. 1933-34, Extra Session, p. 156), which is as follows:

> "'Sale at retail' means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration."

Sub-section (b) of Sec. 1 is further pertinent to the question, and provides as follows:

> "'Sale' means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration, and the rendering, furnishing or selling for a valuable consideration any of the substances and things and services hereinafter designated and defined."

Sub-section (a) of Sec. 1 of the Act provides that a "Person" includes any * * * syndicate or other group or combination acting as a unit, and the plural as well as the singular number." We think that mutual benefit associations are included in the definition of the word "person" - that the association is conducting a business and selling at retail; therefore, the receipts should be computed in arriving at the tax. If, however, this question involves the element of wholesalers selling to mutual benefit associations, then the element of resale would be involved and the same would be deductible.

As to the sale of material and supplies to employees, we assume that this refers principally to wholesale firms who permit their employees to buy at wholesale or retail prices. The Act does not specifically exempt persons engaged exclusively in the wholesaling of merchandise; it merely exempts all tangible personal property which is sold for resale; hence, in the case of a wholesale firm making retail sales, the gross amount of such sales are subject to the tax. Therefore, when wholesale firms sell directly to the employees, for use or consumption, such sales are taxable, regardless of the amount of the consideration for such sales.

In regard to the question of sales of material and supplies in conjunction with house wiring, if same involves contractors, we have recently rendered an exhaustive opinion regarding the same. However, eliminating the question of contractors, the retail market value of the material and supplies should be included in the return, but the labor performed in connection with the material and supplies is a legal deduction.

We have heretofore rendered your department an opinion as to the taxability or non-taxability of the Act as it relates to municipal street lighting, municipal building, lighting and sales of electricity to state, county and federal governments for use in lighting public buildings, also sales to religious, charitable and fraternal and non-profit organizations.

As to fraternal, religious, charitable and non-profit organizations, the fact that an organization is religious

charitable or fraternal in nature does not necessarily exempt the gross receipts from the tax. The test is whether or not such an organization is a domestic, commercial or industrial organization. If it is a lodge or meeting place or a church used exclusively for that purpose, then the electrical energy consumed would, in our opinion, be deductible, but if the organization is carrying on a business in conjunction therewith, charitable, fraternal or religious in its nature, then the business in connection therewith would be using electrical energy under one of the above classes of consumers; therefore, the amount of energy consumed would not be deductible.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

STATE ATHLETIC COMMISSION: It is unlawful to pay members of Commission personally $25.00 per month as office expense, but the Commission with consent of Governor may appoint assistants whose salary shall not exceed $5.00 per day

June 10, 1935.

FILED
86

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of June 6, 1935 requesting an opinion as to the following state of facts:

> "Section 12998, R.S. Mo. 1929 provides that every commissioner (meaning Athletic Commissioner) shall serve as such without salary.
>
> The Commissioners in their meeting on July 5, 1933 passed a motion to pay each commissioner $25.00 a month for office expense.
>
> I would like an opinion from your office as to whether this $25.00 a month can be legally paid to the commissioners of this commission."

Section 12998, R.S. Mo. 1929 specifically provides that every commissioner shall serve as such without salary; however, Section 13001, R.S. Mo. 1929 provides:

> "The athletic commission shall, with the consent of the governor, appoint a secretary at a salary of five dollars ($5.00) per day while engaged in carrying out the provisions of this chapter and such other employes and clerical assistants as they may deem necessary to discharge the duties of the commission. The salary of each such employe or

Assistant shall not exceed
five dollars ($5.00) per day
while engaged in carrying out
the provisions of this chapter.
* * * * *"

CONCLUSION

It is the opinion of this department that it would be unlawful to pay to the members of the Athletic Commission of the State of Missouri personally $25.00 per month as office expense. Nevertheless, the Athletic Commission may, with the consent of the Governor, appoint employees or assistants whose salary shall not exceed $5.00 per day, and payments to these employees or assistants may be legally made upon warrants drawn on the State Treasurer and approved by the State Auditor.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH

STATE AUDITOR--CRIMINAL COSTS--COURT REPORTERS' FEES: On Statutory certificate from the Prosecuting Attorney and Trial Judge the State Auditor may pay criminal costs in criminal cases charged against the State.

June 14, 1935.

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We hereby acknowledge your request for an opinion, dated May 16, 1935, which reads as follows:

> "This office is in receipt of a fee bill from the Circuit Clerk of Stone County, Missouri, wherein the costs of the bill of exceptions furnished the defendant is charged as costs against the state. The facts surrounding the appeal are as follows: The defendant was convicted of murder and sentenced to ten years in the State Penitentiary on the 14th day of October, 1933. Defendant filed his affidavit for appeal and appeal was granted to the Supreme Court of Missouri on the same date, being October 14th, 1933. Thereafter on the 23rd day of August, 1934, the following record was made in the Stone County Circuit Court in the above case:
>
> > 'Now at this day it is ordered by the Court that T. E. Custer, the defendant in this cause be, and he is hereby permitted to perfect his appeal to the Supreme Court of the State of Missouri at the cost of the State.'
>
> "On October 10th, 1934, the transcript proper with a copy of the bill of exceptions was filed with the Clerk of the Supreme Court of Missouri. Thereafter the case was reversed and remanded

> to the Stone County Circuit Court for a new trial, and thereafter at the March Term 1935 of said Stone County Circuit Court the defendant entered a plea of guilty to the charge of manslaughter and his punishment was assessed at the term of two years in the State Penitentiary.
>
> "This office requests an opinion as to whether or not the state is liable for the bill of exceptions furnished defendant in view of the fact that the order was not made at the time the appeal was granted, but was made some ten months after.
>
> "I am enclosing a copy of an opinion received by this office on January 17th, 1930, on the question of costs of a bill of exceptions, but this opinion does not cover this question as the opinion of January 17th, 1930, was given on a different state of facts in that the appeal had already been disposed of by the Supreme Court at the time the orders of the Circuit Court were made taxing the costs on the state."

We also acknowledge receipt of the copy of an opinion written by the Honorable Stratton Shartel, Attorney General, to Honorable L. D. Thompson, dated January 17, 1930, and referred to in the above letter.

The facts disclosed in your request show that the appeal was perfected within one year from judgment, which was within the time allowed by law for perfecting an appeal.

Section 11732 R.S. Mo. 1929, referred to in the Shartel opinion could be applicable only to counties and cities of over one hundred thousand (100,000) inhabitants, and provides that a transcript of the evidence in a criminal cause be furnished by the stenographer, and that when the Court is satisfied the defendant is unable to pay for the making of said transcript, the same is to be taxed as costs against the State or county, as may be proper. Said section reads as follows:

"All shorthand notes of examination in criminal matters, other than regular trials thereof, shall be turned over at once by said reporter to the prosecuting officer of the court. But all other shorthand notes taken by said reporter shall be filed by him in the clerk's office of said court, and shall become a part of the record of said court, and such reporter shall transcribe, in legible English, any of such notes, or any part thereof, whenever required by the clerk so to do; and such clerk shall make out certified copies of such transcript or longhand notes for any person upon the payment of legal fees allowed by law for copies of records and papers, except that whenever said reporter shall be required to take notes before the grand jury he shall be sworn to secrecy, and all such notes so taken shall also be turned over by said reporter to the prosecuting officer of said court; and provided, that in cases of appeal and on motions for new trial, the transcript of the evidence shall be furnished to the defendant upon the order of the court without cost to said defendant when it shall appear to the satisfaction of the court that the defendant is unable to pay the cost of such transcript for the purpose of making such appeal; and provided further, that the stenographer shall be allowed for making such transcript the sum of fifteen cents per folio of one hundred words for each transcript so furnished; and when the court shall be satisfied that the defendant is unable to pay for making such transcript, the same shall be taxed as costs in the case against the state or county, as may be proper."

The population of Stone County at the last census was 11,614 inhabitants, hence section 11732, supra, has no application in Stone County, as suggested in your request for an opinion, but Court Reporters in Stone County hold their office, perform their duties, and are entitled to the fee as provided in Chapter 79 R. S. Mo. 1929.

Chapter 79, R. S. Mo. 1929, provides for the appointment of Court Reporters in Missouri as sworn officers of the Court, and Section 11719 R. S. Mo. 1929 sets out their duties as follows:

> "It shall be the duty of the official court reporter so appointed to attend the sessions of the court, under the direction of the judge thereof; to take full stenographic notes of the oral evidence offered in every cause tried kn said court, together with all objections to the admissibility of testimony, the rulings of the court thereon, and all exceptions taken to such rulings; to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said evidence or oral proceedings upon the payment to him of the fee hereinafter provided."

Of the same chapter, Section 11722, R. S. Mo. 1929 sets out the amount and manner of taxing Court Reporters' fees and costs, and provides that the Reporters' fees be taxed against the State or County as may be proper. Said section reads as follows:

> "Each court reporter shall also receive from any person or persons ordering transcripts of his notes the sum of fifteen cents per folio of one hundred words, each four figures to be counted as one word; and any judge may, in his discretion, order a transcript of all or any part of the evidence or oral proceedings for his own use, and the court reporter's fees for making the same shall be taxed in the same manner as other costs in the case:

> Provided, that in criminal cases where an appeal is taken or a writ of error obtained by the defendant, and it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished and the court reporter's fees for making the same shall be taxed against the state or county as may be proper; and in such case the court reporter shall furnish two transcripts in duplication of his notes of the evidence, for one of which he shall receive fifteen cents per hundred words, and shall receive no compensation for the other."

Neither, under the provisions of Section 11732, suppa, nor Section 11722, supra, is the Trial Court authorized, or has it jurisdiction, to arbitrarily fix the Court Reporters' fifteen cents per hundred words fee as a charge against the State. It is up to the Court to determine, under the law, whether the State be liable for said costs. The phrase, "as may be proper," as used in both sections allowing the Court Reporters' fees, means that the Criminal Court can allow fees for a transcript of the Bills of Exceptions, payable to the Court Reporter in the manner and in the amount as the Legislature has specifically providedfor.

Costs allowable against the State are only proper, and can only be legally taxed as costs, when the Court taxing them can lay its finger on the Statute authorizing the item or items specified to be taxed as costs against the State. The mere taxing of the costs by the Court against the State does not make the claim proper and legal.

In the case of Houts v. McCluney, 102 Mo. 13, l. c. 16; 14 S.W. 766, our Supreme Court said:

> "In the first place, no costs are allowed by the common law. They are, with us, creatures of the

> statute. They must be paid in the amounts and in the manner specified in the statute."

The primary liability to pay Court Reporters' fees, and all other costs in a criminal cause where the defendant is convicted and given a penitentiary sentence, as in the case under consideration, is upon the defendant and Section 3825 R. S. Mo. 1929, provides:

> "Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

On conviction, when the defendant is unable to pay the costs, the State is liable to pay costs, except costs incurred on behalf of the defendant, as provided in Section 3826, R. S. Mo. 1929. Said section reads in part:

> "In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. * * * *."

The Court Reporter's fee for transcribing the Bill of Exceptions, to be used by this defendant in his behalf on appeal, can possibly be a legal charge against the State under the above statute. Defendant was sentenced to the penitentiary and the costs taxed as they were, after finding defendant unable to pay the costs, were charged against the State by the Court's order. The order itself does not create the State's liability, but it does lend sanction to the truth of the Prosecuting Attorney's and Trial Judge's statutory audit. There is a duty on the Prosecuting Attorney and the Trial Judge to audit fee bills prepared by

the Clerk as charges against the State and for them to be reasonably sure that the fees charged are expressly allowed by law for such service, and Section 3842 R. S. Mo. 1929, provides:

> "It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

Section 3844 R. S. Mo. 1929, provides:

> "When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if

> convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be; that the services were rendered for which charges are made, and that the fees charged are expressly authorized by law, and that they are properly taxed against the proper party, and that the fees of no more than three witnesses to prove any one fact are allowed. In cases in which the defendant is convicted, the judge and prosecuting attorney shall certify, in addition to the foregoing facts, that the defendant is insolvent, and that no costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

The fact that the Trial Judge and Prosecuting Attorney, in compliance with Section 3842, supra, certify a charge against the State as a legal fee and part of the costs of a criminal case, as the statute requires in such matters, is not final and conclusive on the part of the State Auditor of the facts certified to. This exact point was raised in State ex rel. v. Wilder, 196 Mo. 418, l. c. 425; 94 S. W. 396, and the Court said:

> "An analysis of the sections of the statute in reference to bills of costs as herein pointed out, makes it manifest that the Legislature never intended that this section should be regarded as authority oh the part of the judge and prosecuting attorney to finally audit, adjust and settle all costs bills in criminal cases. The very term of the statute negatives any such intention on the part of the law-making power. There are no such terms used in any of those sections which indicate that they are to audit, adjust and settle bills of costs, but it is apparent that this section means to impose the burden upon the judge and prosecuting attorney, who are presumed to be familiar with the legitimate costs that have accrued in the case, to strictly examine the fee bills and

> certify them to the State Auditor, who finally adjusts and settles the same by the drawing of an auditor's warrant."

In the case of Morgan v. Buffington, 21 Mo. 549, which was a mandamus against the State Auditor, a case where the Speaker of the House of Representatives had, under the law, certified to an account for services rendered by one of the members, and the member was contending that the certification was conclusive of a legal obligation against the State, the Supreme Court said at l. c. 552.

> "Under these circumstances, the question recurs, whether the auditor can inquire into the truth of the fact, or contest the legality of the conclusion stated by the speaker in his certificate granted to the petitioner.
>
> "The auditor of public accounts is an important officer, entrusted with the management of the revenues of the state. Whilst the treasurer holds the iron or brazen key of the treasury, the auditor holds the legal key, and it is through his instrumentality alone that money can lawfully be drawn from it. The state looks to him as the protector of her treasure. The powers confided to him are necessarily large, and as by his mismanagement the state may at any time be rendered unable to fulfil her pecuniary engagements, so there should be a power in him to prevent such a state of things. No doubt there are cases in which the general assembly may make a voucher conclusive on the auditor, and require him, as a mere instrument of the law, to issue a warrant without any examination into the justice or legality of the claim. Whether the general assembly has, in any case, made a voucher conclusive on the auditor, is a question to be determined by the auditor, subject to the revision of the courts. We see nothing in the act fixing the pay of the members

of the general assembly which shows that it was designed to make the voucher of the speaker conclusive on the auditor."

CONCLUSION.

We are of the opinion that the rules of law announced in the cases and Statutes heretofore cited are applicable to the provisions set out in Sections 11732 and 11722, supra, giving the Trial Judge power in criminal cases to tax costs and issue cost bills against the State "as may be proper". We are of the opinion that the Trial Court's order set out in the request for this opinion, whereby he ordered "that T. E. Custer, the defendant in this cause be, and he is hereby permitted to perfect his appeal to the Supreme Court of the State of Missouri at the cost of the State," is of no legal force insofar as it being of any legal authority for the State Auditor to pay State money to a Court Reporter for a transcript of the evidence in said cause. The Court order would have no different legal effect if it had been made at the time the appeal was granted. It is up to the Court to determine that the defendant has no funds to pay the costs of a transcript for purposes of perfecting the appeal and when he so determines within the year allowed for perfecting an appeal, then he can tax the costs against the State or County as provided in Section 3826, supra.

Neither this Court order nor the statutory certificate of the Judge and Prosecuting Attorney to the auditor, as to the taxation of costs in criminal cases, is final and conclusive upon the State Auditor. Since by mistake the Prosecuting Attorney or Judge may charge to the State what the State is not bound to pay, it is the duty of the Auditor to reject so much of any criminal costs bill as is improperly charged to the State. In the present case we are of the opinion that the charge for court reporting is a proper charge within the provisions of Section 3826, supra, and should be allowed by the Auditor when the claim is properly certified to by the Prosecuting Attorney and

Trial Judge, as provided in Sections 3842 and 3844, supra, showing that defendant was sentenced to two years in the penitentiary, that defendant was insolvent and that none of the costs were incurred in behalf of defendant. The action of the Trial Judge and Prosecuting Attorney is presumed to be according to law.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

OFFICIAL BONDS - Payment of premium may only be made where authorized by statute and by appropriation act.

June 18, 1935

6-19

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of May 8, 1935 requesting an opinion as to the following state of facts:

> "I would like to be advised by your office as to my rights in paying premiums on official bonds.
>
> "It has been the custom of the state for years to pay the premium on bonds where a bond is required to be given in the performance of the duties relative to the state. Some of the appropriations provide for the payment of bonds, some of the statutes creating the office provide that the various officials must give a bond, and I am unable to determine what bonds I can legally pay and those I can not legally pay."

It will be impossible for this office in this opinion to cover every specific bond required by the statutes of the State of Missouri and to pass upon the appropriation acts of each department wherein official bonds are required. However, the general principles laid down for your guidance may be easily applied to each specific statute.

Article X, Section 19 of the Constitution of the State of Missouri provides:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; now unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Section 11421, R. S. Mo. 1929 provides:

> "No warrant shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

In determining whether or not the premium on an official bond may be paid for out of an appropriation made for the department wherein an official bond is required for some officer, depends entirely on two propositions: (1) Does the statute make any provision for the bond, and also make provision for the payment of the premium on the bond by the State? and (2) Does the appropriation act of that department provide for the payment of this premium?

In construing the appropriation act with respect to this question, it must be remembered that appropriation acts must specify the purposes for which the appropriation shall be used, and appropriations made for one purpose cannot be used for any other purpose. It must also be remembered that appropriation acts must be strictly construed.

> "Another general rule in the construction of statutes, applicable as well to municipal ordinances, is that acts of the character here under review are to be strictly construed. The limitation upon the use of the appropriation in proposition 8 is such, by reason of its terms, that the invoking of the general rule is not necessary."
>
> - Meyers v. Kansas City, 18 S.W. (2d) 900.

CONCLUSION.

In view of the foregoing, it is the opinion of this department that premiums on official bonds may only be paid by the State of Missouri where the statute requiring the bond provides for the payment of the premium by the State of Missouri, and the appropriation act for the department wherein an official bond is required of some official makes provision for the payment of the premium on said bond. In this connection, it must be remembered that in many instances the giving of the bond is a condition precedent to qualifying for the office and, unless otherwise provided by statute, can be viewed in no other light than the personal obligation of the office holder.

Yours very truly,

JOHN W. HOFFMAN, Jr.
Acting Attorney General

JWH:FE

FEES: Change of venue deposits to circuit judge in district are considered in fixing probate judge fees.

6-27

June 27, 1935.

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your inquiry which is as follows:

> "Section 11782 provides certain fees that the Judges of the Probate Courts of Missourimmay be entitled to retain for their services.
>
> I would like an opinion from your department as to whether the fees received by the Circuit Judge from change of venue cases should be used in ascertaining the amount of fees the Probate Judge can legally retain, and if so, should the change of venue fees for the entire circuit be used or only the change of venue fees arising from the particular county where the Probate Judge is located.

Section 11782 R. S. Missouri 1929, with respect to fixing the amount of fees for services for judges of probate courts in Missouri, provides in part as follows:

> "Provided further, that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of

> office, and irrespective of the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate from all sources and for all duties by virtue of the office, except the $1200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, then it shall be the duty of such probate judge to pay such excess less ten per cent thereof, within thirty days after the expiration of such year, into the treasury of the county in which such probate judge holds office, for the benefit of the school fund of such county."

It will be noted that the statute contemplates that all reasonable and necessary expenses for clerk hire shall be exempted and not considered for the purpose of determining the amount of fees the probate judge is allowed. Likewise, it is observed that the statute contemplates the fees that are actually collected within the given calendar year and not what fees accrued. The answer to your inquiry turns on the meaning of the words "annual compensation in the aggregate from all sources and for all duties by virtue of the office", except the $1200.00 and except the ten per cent provision.

If any fees in a given calendar year in excess of the above stated rule are collected after the term expires, they are likewise treated.

Section 922, R. S. Missouri 1929, in change of venue cases requires the litigant applying for the change to deposit ten dollars with the clerk of the court when he files his application.

Section 923 of said revision provides that "after a trial had or upon final disposition of such cause in said court" the clerk "shall pay said sum to the judge."

Section 923 aforesaid has an express proviso that said deposits received by the clerk of the circuit court of the city of St.Louis under these two sections shall be paid by him into the city treasury and used for the "payment of the salaries of the circuit judges and court stenographers of the said city."

In the case of Cunningham v. Current River Ry. Co., 165 Missouri 270, the court had under consideration this statute providing for the payment of a ten dollar deposit to the circuit judge and it was there contended that the provision was void and unconstitutional because it increased the salary of the circuit judge contrary to the constitutional provision. In that case the court held that the statute was constitutional and did not violate the provision thereof against increasing salaries but defined it to be "compensation" for extra labor. At page 277 the court uses this language:

> "The ten dollars whose payment is required to be made on the presentation of an application for a change of venue from the circuit where the cause is at the time pending, is not intended and is in fact in no sense an increase in the salary of the judge to whom it is to be paid, but compensation for extra labor imposed upon him by the person on whose application the venue is changed by reason of the cause being sent to him from another circuit.
>
> "The compensation mentioned in the Constitution means compensation paid by the State, or some subdivision thereof, in the way of an increase of salary or compensation, which can not be increased by legislation during the period for which the judge is elected, but does not mean that he may not be paid for extra services and expenses incurred in the performance thereof, even out of the State treasury."

See also the case of State ex rel vs. Cass, 317 Mo. 744 and Emmons vs. Farmer, 196 S. W. 1106, 271 Mo. 306.

The salary of the circuit judge is dependent on and is paid by reason of his official position as circuit judge of the district and not because he is the circuit judge in one county or other counties, the unit used being the judicial district and not the county. He receives the change of venue deposits or fees for cases sent into his district, and the district is the territory to be considered in determining how much money he receives for change of venue deposits.

You do not state whether your inquiry refers to the compensation relative to the circuit judges within the City of St.Louis or out over the state. We are making these observations with respect to the salaries and compensation of circuit judges outside of the city of St.Louis.

With respect to the question being considered, all the money received by the judge within the calendar year from any source and which he would not have received if he had not been such circuit judge, except the $1200.00 and the reasonable and necessary expenses for clerk hire, should be considered and computed.

It will be observed that the statute here considered uses a most comprehensive expression and does not say "salary" which is used in the constitutional provision, but instead uses the term "compensation" and says that the compensation includes the aggregate from all sources and "for all duties by virtue of the office."

CONCLUSION

We are of the opinion that the deposits made by applicants in change of venue cases and received by a circuit judge within the judicial district of which he is the judge are to be taken into consideration in determining his "annual compensation in the aggregate from all sources and for all duties by virtue of the office", for the purpose of determining the compensation of the Probate Judge.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
Acting Attorney General

DW:MM

BOARD OF HEALTH:) Director of medical licensure to be paid out
) of Department of Health fund.
APPROPRIATIONS:) Who to sign requisitions for disbursements from
funds, discussed.

July 10, 1935.

1-11

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge your letter dated July 1, 1935, as follows:

> "In your opinion of December 3, 1934 to Dr. Emmett P. North, President State Board of Health, on page 2, you quote:
>
> '* * * In order for these expenditures to be a proper charge against this fund it is necessary, first, that the services must have been rendered for the Board of Health, (not the department of Health) * *'
>
> "In your conclusions you state the following:
>
> '* * * When arriving at the purpose for which the appropriation was made, bear in mind that this amount is a sacred fund derived from fees for <u>licensure</u> and water analysis and should be expended for only maintaining the Board of Health, that is, to pay the traveling expenses of the members and all other expenses necessary for the carrying out of the purpose of the Board of Health concerning their activities relative to <u>licensure</u> and water analysis. * * *'

"The last Legislature appropriated under Section 22 of HB 536 to pay the salary of the Director of Licensure out of the Department of Health fund and not out of the Board of Health fund, the Department of Health fund being that part of the appropriation which comes out of the general revenue of the state.'

"I am in receipt of a voucher signed by Dr. Bourke, President of the State Board of Health asking that the salary of the Director of Medical Licensure be paid out of the Board of Health fund and not out of the Department of Health fund as shown by the appropriation.

"The Director of Medical Licensure performs no services in the Department of Health as his work is confined to the Board of Health.

"With the above explanation, I would like an opinion from your department on the following questions:

"First - Does the President of the State Board of Health have any authority to make requisition on appropriation out of Revenue fund or the Department of Health fund to pay employees working only for the Board of Health fund?

"Second - Who is authorized to sign request vouchers for salary payments out of the Board of Health fund and who should sign request payments out of Department of Health funds, the latter being the Commissioner's office located here in Jefferson City."

You state that on December 3, 1934, this Department rendered an opinion to Dr. Emmett P. North, President of the State Board of Health, and quoted certain parts of same. However, we invite your attention to the fact that said communication to Dr. North was not an official opinion but was a synopsis of an inquiry concerning the status of funds and disbursements therefrom. However, the portions quoted in your letter properly declare the law and the statutes of the Board of Health fund. But, as such was not an official opinion, we will pay no further attention to same.

I.

DIRECTOR OF MEDICAL LICENSURE TO BE PAID OUT OF THE DEPARTMENT OF HEALTH FUND.

On May 6, 1935, this Department rendered you an opinion, and we quote from said opinion, wherein, in part, we said the following:

> "'However, we invite your attention to a perfected bill now before the 58th General Assembly, namely, House Bill No. 536, page 18, which provides in part as follows:
>
> "STATE BOARD OF HEALTH-
> DEPARTMENT OF HEALTH-
>
> SECTION 22. There is hereby appropriated out of the state treasury, chargeable to the State revenue fund, the sum of Two Hundred Fifty Two Thousand dollars ($252,000) to be expended for the following purposes, in the amounts hereinafter stated:
>
> A. Personal Service:
>
> Health Commissioner's Office:

> The salary of the secretary, state health commissioner, secretary to the state health commissioner, director of licensure, supply clerk, multigraph operator and janitor."
>
> "'If the above appropriation Act is enacted and approved as above written, it would be our opinion that the salary to be paid to the Director of Medical Licensure would be paid out of the above fund.'"

On the 10th day of June, 1935, the Governor approved House Bill No. 536. In its final form, however, only $207,000 was provided for in lieu of $252,000. No change was made as to the payment out of said fund for the salary of the director of licensure.

We therefore conclude that, as the Appropriation Act, to-wit, House Bill No. 536, Section 22, has been approved and that such makes provision to pay the salary of the director of licensure, said director of licensure should be paid out of the Department of Health fund, or House Bill No. 536, Section 22, supra; and such is our opinion.

II.

DOES THE PRESIDENT OF THE STATE BOARD OF HEALTH HAVE ANY AUTHORITY TO MAKE REQUISITION ON APPROPRIATION OUT OF REVENUE FUND OR THE DEPARTMENT OF HEALTH FUND TO PAY EMPLOYEES WORKING ONLY FOR THE BOARD OF HEALTH FUND?

Your question is ambiguous but we assume that you allude to the medical licensure director, and having ruled that the medical licensure director should be paid out of the Department of Health fund, the answer to this question may be dispensed with. However, we are attaching herewith opinion rendered by this Department on October 19, 1934, to Dr. Emmett P. North, President of the State Board of Health, which gives

the history concerning the duties and functions of the Commissioner of Health and the State Board of Health.

It is to be borne in mind that the Board of Health is charged with the responsibility of supervising and enforcing matters relating to public health. Since the creation of the State Board of Health in 1883, its duties have become many times enlarged. And today there is a Department of Health consisting of many divisions over which the Board of Health has authority. To illustrate: The Board of Health is responsible for all matters concerning public health, and in order to effectively carry on the functions and duties regarding same, a Department of Health was provided for and the Department of Health was further sub-divided into divisions, so that the Board of Health is responsible for the activities of the Department of Health and all its sub-divisions. In order for the Board of Health to perform the duties relating to public health, and have money to accomplish same, the Legislature has provided that all expenses concerning the Department of Health (or those doing the clerical work) should be paid from the general revenue.

We know of no reason why the Board of Health should have any employes which are to be paid out of the Board of Health fund, as all persons employed by them should have their salaries paid from the appropriation made to the Department of Health.

Referring to House Bill No. 536, Section 21, it is seen that "Personal Service," paragraph "A", provides the following:

> "Compensation of members of the board and consultant; salary of reporter, notary and witness fees and costs of investigations and hearings, . . .$20,000."

And when House Bill No. 306 becomes effective, August 27, 1935, each member of the Board will receive $10.00 per diem compensation, when engaged in their duties for the Board.

The Board of Health fund is created by virtue of Section 9119, R. S. Mo. 1929, and in part provides as follows:

> "All fees so received from applicants for licenses shall be paid into the state treasury and shall be held by the state treasurer as a separate fund to be disbursed only in payment of expenses of maintaining said board of health, * * *."

"Maintaining said board of health" would include the per diem of members after August 27, 1935; also for paying of costs of investigations relative to unprofessional conduct of licensed physicians and surgeons etc.

III.

WHO IS AUTHORIZED TO SIGN REQUEST VOUCHERS FOR SALARY PAYMENTS OUT OF THE BOARD OF HEALTH FUND AND WHO SHOULD SIGN REQUEST PAYMENTS OUT OF DEPARTMENT OF HEALTH FUNDS, THE LATTER BEING THE COMMISSIONER'S OFFICE LOCATED IN JEFFERSON CITY.

All moneys to be paid out of the Board of Health fund must be signed by the president and the secretary of the State Board of Health. The Commissioner of Health is ex officio secretary. See opinion dated October 19, 1934, supra.

We invite your attention to this provision found in Section 9119, supra:

> "The state auditor shall issue his warrant on the state treasurer for payment out of said fund on the certificate of the president and secretary of the state board of health."

Section 9020, Laws of Missouri, 1933, page 269, amended by House Bill No. 306, by the 58th General Assembly, provides as follows:

> "* * * The president of the board shall certify the amount to the commissioner of health and the per diem, traveling and other expenses of members and on presentation of this certificate the auditor of state shall draw his warrant on the state treasurer for the amount."

It is seen that the Legislature intended that when moneys were withdrawn from the Board of Health fund that the president as well as the secretary (Commissioner of Health) should sign said requisition.

As to the Department of Health fund, we do not find any statute that provides who shall sign the requisitions. However, provision is made that the Board of Health shall have the power to make rules and regulations concerning health matters, and we suggest that the Board make known its wishes by adopting a by-law concerning the signing of requisitions for warrants. Until the Board of Health acts, we are of the opinion that all requisitions for moneys to be paid from the Department of Health fund should have the approval of the president of the Board of Health and the Commissioner of Health. We are of this opinion because the Board of Health is responsible for the expenditure of moneys appropriated to the Department of Health and, consequently, should approve all expenditures until it delegates that power to someone else, presumably the Commissioner of Health; the only exception to the above being as to the Water Analysis fund.

This provision found in Section 9032, R. S. Mo. 1929, concerning fees for the analysis of water, in part provides as follows:

> "The fees collected by the state board of health under this article shall be turned over to the state treasurer, who shall place them in

> a special fund to be known as the state board of health water and sewage fund and as much as is necessary of this fund shall be used for maintaining the division of the state board of health to be known as the division of water and sewage and said fund is hereby appropriated for said purpose, and the state auditor shall draw his warrant for claims against this fund after such claims have been approved by the secretary of the state board of health: * * *"

And it is our further opinion that on disbursements from the water analysis division fund, the requisition needs to have only the approval of the secretary of the State Board of Health (Commissioner of Health).

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG
Enc.

INCOME TAX: Royalties received for use of patents issued by U.S. Government during years 1929, 30, 31 and up to and including May 16, 1932 are subject to income tax laws of the State of Missouri.

August 16, 1935.

8-20

FILED
86

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Attention: Mr. E.T. Broughton

Dear Sir:

This department is in receipt of your letter of June 25 in which you request an opinion as to the following state of facts:

> "This office is informed that several taxpayers are not paying state income tax on royalties received for the use of patents and copyrights based on the United States Supreme Court decision May 14, 1928 in the case of Long Commissioner vs. Rockwood as shown in Court decision Volume 277, United States Reporter, Page 142, wherein it is stated that a state may not tax the income received by its citizens on royalties for the use of patents issued to him by the United States.
>
> "During the year 1932 the decision of the United States Supreme Court above mentioned was overruled in the case of the Fox Film Corporation vs. Doyal, Volume 286, Page 123, United States Reporter, and held that the state may tax income received by citizens on royalties.
>
> "The question before us is whether or not the state has a right to tax such royalties, for income tax purposes, received by citizens during the period

> from May 14, 1928, when the Long Commissioner vs. Rockwood decision was given, and May 16, 1932, the date of the Fox Film Corporation vs. Doyal decision. Will you please give us your decision in this matter at your early convenience?"

On March 22, 1933 this department rendered an opinion that income taxes could not be levied under our statute on incomes derived from the use of patents or copyrights for the years 1929, 1930, 1931 and 1932. Since the rendition of that opinion, however, the Supreme Court of Wisconsin in the case of Laabs v. Wisconsin Tax Commission, 261 N.W. 404 specifically decided that royalties received by taxpayers for the use of patents issued by the United States Government were subject to tax during the years 1929, 1930, 1931 and 1932, and we therefore at this time overrule our opinion of March 22, 1933.

In the case of Laabs v. Wisconsin Tax Commission, supra, the Court, in passing on this specific question, said:

> "In May, 1928, the Supreme Court of the United States, in Long v. Rockwood, 277 U.S. 142, 48 S. Ct. 463, 72 L. Ed. 824, held that income from patent royalties was not subject to taxation by the states.
>
> * * *
>
> "On May 16, 1932, the United States Supreme Court in the case of Fox Film Corporation v. Doyal, 286 U.S. 123, 52 S. Ct. 546, 76 L. Ed. 1010, overruled the decision of Long v. Rockwood, supra, and held royalties on patents and copyrights to be taxable.
>
> * * *
>
> "The first and principal question upon this appeal has to do with the effect of the overruling of the decision in Long v. Rockwood, supra, by the subsequent Fox Film Corporation Case.
>
> * * *
>
> "The New Jersey court, in Stockton v. Dundee, Manufacturing Co., 22 N.J. Eq. 56, on virtually the same facts, held that the later decision

was retrospective in operation. The case of People v. Graves, 242 App. Div. 128, 273 N.Y.S. 582, involving the effect of the Fox Film Corporation Case upon the doctrine announced in Long v. Rockwood, likewise held the effect of the later decision to be retrospective and the state entitled to assess an income tax during the years that the Long Case was accepted as law.

* * *

"In the instant case, there is no such situation as existed in the Gelpcke or Muhlker Cases. Plaintiff did not contract or acquire other property rights in reliance upon the doctrine of Long v. Rockwood. To compel him to pay a tax which, by the doctrine of the Fox Film Corporation Case, the state was entitled to collect, does not seem to us to produce injustice or undue hardship. To deprive the state of revenue to which it was justly entitled upon a correct view of the law would produce injustice."

CONCLUSION

In view of the foregoing, it is the opinion of this department that royalties received by taxpayers in the State of Missouri for the use of patents and copyrights issued by the United States Government during the years 1929, 1930, 1931 and up to and including May 16, 1932 are subject to the income tax laws of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

RECORDER OF DEEDS: Statute requiring Recorder to hold deeds for one year applies only to those both signed and acknowledged more than one year prior to filing.

8-27

August 22, 1935.

FILED
86

Mr. Forrest Smith,
Circuit Clerk and Ex-officio Recorder,
Unionville, Missouri.

Dear Sir:

We acknowledge receipt of your inquiry which is as follows:

> "Sec. 11559 R. S. Mo. 1929 provides 'whenever the recorder of deeds.... shall record any instrument...affecting real estate, which purports to have been signed and acknowledged more than 12 months prior to the time the same is presented for record, he shall retain such instrument....for one year.'
>
> "In the event a deed or other instrument is dated more than twelve months previous to the time it is presented for recording, but acknowledged within twelve months of such presentment should I hold the same in my office, subject to the inspection of interested parties, for one year?
>
> "May I call your attention to the fact that in the ordinary form of acknowledgment to deeds there is nothing to indicate <u>when</u> the deed is <u>signed</u>. The form says that on a date named, which of course cannot be subsequent to the date of the acknowledgment, the party or parties acknowledge that he or they acknowledge the execution of the same to be their free act and deed.

"At present I have under consideration an instrument dated in December, 1933, but acknowledged in 1935. I have no way of knowing whether the parties signed it in 1933 when it is dated, or whether it was signed when acknowledged in 1935. It is doubtful if any acknowledgment is required to lend validity to a deed, but of course is necessary for other reasons and to entitle it to be recorded.

"Your opinion as to what I should do in such cases will be appreciated."

Replying thereto, Section 11559, R. S. Mo. 1929, is as follows:

"Whenever the recorder of deeds, or any other person acting as recorder of deeds, in any county in this state, shall record any instrument of writing affecting real estate, which purports to have been signed and acknowledged more than twelve months prior to the time the same is presented for record, he shall retain such instrument of writing in his office, subject to the inspection of all parties interested, for one year next succeeding the time such instrument shall be recorded: Provided, that if any such instrument of writing shall affect real estate in more than one county, then as soon as it shall be recorded in the first county in which it may be filed, it shall be sent from county to county in the order named in the instrument of writing, by the respective recorders thereof, until it shall have been filed and recorded in each county in which any such real estate may be situated, and retained in the office of the recorder of the county in which it shall be last recorded until the expiration of one year after the last filing thereof: Provided that the recorders shall not be required to

> transmit such deed from county to county unless the party desiring the same recorded in such other county or counties shall first pay the recorder's fee, to be transmitted with the deed."

It will be noted that this statute contemplates dealing with the recording and control of a certain class of deed, to-wit, such as "purports to have been signed and acknowledged more than twelve months prior to the time the same is presented for record." The statute appears to not apply to deeds that fail to come within the above class. The officer is not required at all hazards to ascertain in truth and in fact when the deed was signed and when it was executed. We do not find where this particular section of the statute has been construed by the courts, but the meaning of it largely turns on the effect and meaning of the word "purport".

In the case of State v. Chinn, 142 Mo. 507, l. c. 512, the Supreme Court of this state says:

> "What significance then is to be attached to the word 'purport?' In the case of Fogg v. State, 9 Yerg. (Tenn.) 392, the court, quoting from Buller, J., in Gilchrist's case, 2 Leach, 753, said: 'Old cases have given rise to much learning and argument on the words "purport" and "tenor" and the books are full of distinctions as to the meaning of these words, and the necessity of using the one or the other of them in indictments where instruments are to be stated, but in the many cases upon the subject I can find no judicial determination that the purport and the tenor should both be stated in any case whatever. Purport means the substance of an instrument as it appears on the face of it to every eye that reads it, and tenor means an exact copy of it; and therefore, where the instrument is stated according to its tenor, the purport of it must necessarily appear.' 19 Am. and Eng. Ency. of Law, 590; 2 Russell on Crimes (1896 Ed.), 646; Fogg v. State, 9 Yerg. (Tenn.) 392."

In Words and Phrases, Vol. 7, p. 5864, it is said:

> "The word 'purport,' as used in speaking of the purport of an instrument, means the substance thereof as it appears on the face thereof to every eye that reads it. Dana v. State, 2 Ohio St. 91, 93.
>
> "Purport imports what appears on the face of the instrument. McClellan v. State, 32 Ark. 609, 611. It is usually intended to express the substance and effect as appears from the face of the instrument, in distinction from 'tenor,' which means a copy or exactness. State v. Callendine, 8 Iowa, 288, 296."

The date that a deed bears is only persuasive or suggestive proof of the life of the instrument. As between the parties and others having notice, the deed becomes effective upon delivery thereof. The acknowledgment is important with respect to the question of constructive notice. It must be acknowledged before it may be placed of record by the recorder. The acknowledgment is taken solemnly before an officer authorized by law so to take, and usually is before a notary public, who has an official bond for the protection of the public against his misconduct. The statute does not say "which purports to have been signed or acknowledged," but it says "which purports to have been signed and acknowledged."

Conclusion

We are of the opinion that the statute is directed at deeds which on the face thereof appear to be both signed and acknowledged more than one year prior to the filing thereof,

and that if they do so appear, then the recorder should hold them for one year, and that otherwise he is not required by the statute to hold them for one year.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

AUTOMOBILES - LICENSE: License required when Oklahoma automobile enters Missouri, absent reciprocity.

9-3

August 30, 1935.

FILED
86

Honorable Wayne V. Slankard,
Prosecuting Attorney,
Newton County,
Neosho, Missouri.

Dear Sir:

We acknowledge receipt of your inquiry of August 22nd, which is as follows:

> "Under Section 7768, R. S. Mo. 1929, I would like to know whether or not a truck in this state from Oklahoma is required to be registered? Said truck being at the time unloaded and bearing Oklahoma tags."

Replying thereto, Section 7761, R. S. Mo. 1929, was repealed by the Extra Session, 1933-34, and a new section enacted in lieu thereof. See Laws of Missouri, Extra Session, 1933-34, p. 99. Said section provides:

> "Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall, except as herein otherwise expressly provided, cause to be filed"

an application for registration containing a brief description of the motor vehicle sought to be registered, the name of the manufacturer, the motor number, amount of motive power, the name, residence and business address of the owner, etc. It further provides that the schedule of registration fees shall be as therein set out.

Section 7768, R. S. Mo. 1929, provides that "a non-resident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered" at the

place where the owner is a resident, and which has displayed upon it the number plates, etc., of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle

> "provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

Section 10281 of the General Laws of Oklahoma, 1931, provides that:

> "Any foreign motor vehicle bearing a legal native tag or mark showing that it has complied with the laws of the state or country from which it came relating to the registration and licensing of vehicles, may use the roads and streets of this state without obtaining additional license or registration within this state for the same period of time that the laws of the state or country in which such foreign motor vehicle is registered permit motor vehicles lawfully registered in this state to use the roads and streets of such state or country. Provided in event that the laws of any other state or country fix no definite period of time which motor vehicles lawfully registered in this state shall be entitled to use the roads and streets of such state or country, motor vehicles from such state or country shall be permitted to use the roads and streets of this state for not more than sixty (60) days in any one calendar year without obtaining additional license or registration within this state. Provided, that foreign motor vehicles used for commercial purposes within this state shall be registered and licensed in this state * *."

It will be noted that, absent the reciprocity spoken of in Section 7768 of the Missouri laws, our law Section 7761, Extra Session Laws of 1933-34, requires "every owner of a motor vehicle or trailer which shall be operated or driven upon the highways of this state" to be licensed.

We find no provision in the Oklahoma laws empowering the Oklahoma State Highway Commission to suspend the requirement as set out in the latter part of the above quoted Oklahoma law, to-wit, "that foreign motor vehicles used for commercial purposes within this state shall be registered and licensed in this state." That being true, it would be a violation of the laws of Oklahoma for Missouri busses and trucks or any other motor vehicles used for commercial purposes and driven over the highways of the State of Oklahoma to be so used without first being licensed under the laws of Oklahoma, and under the reciprocity statute of this state, such motor vehicles are required to be registered under the Missouri law when owned and licensed under the Oklahoma law and used for commercial purposes on the highways of the State of Missouri.

Conclusion

Under the facts as set out hereabove, our opinion is that motor vehicles which are owned by residents of Oklahoma and are operated or driven upon the highways of this state for commercial purposes are required to be registered in this state, and if such motor vehicles are operated or driven upon the highways of this state without so being registered, it is a violation of the law.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MISSOURI DENTAL BOARD: Authorized to employ counsel.

9-5

September 5, 1935.

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Acknowledgment is herewith made of your requestfof an opinion of this office on the following matter:

> "Enclosed you will please find a bill of the Yates and Wild against the appropriation made to the Missouri Dental Board which is self-explanatory.
>
> I would like an early opinion from your office relative to the payment of the same. Will you please return this bill with your opinion."

The question involved is the power of the Missouri Dental Board to employ and pay counsel for services rendered in connection with the duties of the Board prescribed by law.

The Missouri Dental Board is constituted a body corporate with power to sue and be sued in that name, Section 13557. Chapter 106, R. S. Missouri 1929, prescribes many duties to be performed by this Board and likewise delegates certain powers. Section 13567 provides in part:

> "The Board may take oral and written proof for and against the accused, and may also employ a competent attorney to represent the board in such proceedings."

Section 13573 provides in part:

> "The board shall be authorized and empowered to employ and pay all necessary legal and clerical services whenever, in their opinion, the same is necessary; all necessary and reasonable traveling expenses of their counsel may be paid by the board when their counsel is absent from his office at the request of the board."

From the foregoing provisions the Missouri Dental Board is specifically authorized to employ such counsel as is, in their opinion, necessary to enable them to perform the duties imposed by statute. By reason of this specific statutory authority there can be no doubt as to the power of the Missouri Dental Board to employ counsel.

With reference to the payment of the expenses of the Board, Section 13573 provides for compensation of the members of the Board at Five Dollars per day and a salary for the Secretary of the Board to be fixed by the Board. The section then provides:

> "All expenses and salaries provided for in this chapter shall be paid from the fees received by the Board under the provisions of this chapter and no part of said salaries or expenses shall at any time be paid out of any funds in the State Treasury."

By this provision it is clearly the legislative intent that the Missouri Dental Board must earn from the fees received all the salaries and expenses incurred. The only salary provided is that of the Secretary, and it is apparent that the statute has included all other charges against the fees as "expenses".

CONCLUSION.

It is therefore the opinion of this office that the Missouri Dental Board is specifically authorized by statute to employ legal counsel and that the payment therefor is a proper charge as an "expense" of the Board.

We are herewith returning the bill as per your request.

Respectfully submitted,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, JR.,
(Acting) Attorney General.

DW:MM
Enclosure.

SCHOOL FUND MONEYS: A loan good when made remains a valid loan although borrower thereafter is elected to county office, except county judge.

9-17

September 10, 1935.

FILED
16

Mr. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

We acknowledge your inquiry which is as follows:

> "Section 9244 R. S. Missouri, 1929, pertaining to the loaning of the County School Funds by the County Court states in part as follows:
>
> "'The County Court shall not loan any money belonging to the School Fund to any Officer of the County or his deputy, nor shall such Officer or his deputy be accepted as security on the obligation given by the person borrowing * **'.
>
> "If an individual has obtained from the County Court one of these School Loans and is later elected and becomes a County Official, can he continue to be a valid borrower of this School Money?"

Section 9244, R. S. Mo. 1929, is as follows:

> "The county court shall not loan any money belonging to the school fund to any officer of the county or his deputy nor shall such officer or his deputy be accepted as security on the obligation given by the person borrowing. Any officer of the county who shall violate the provisions of

> this section by authorizing any such loan or drawing any warrant for moneys loaned in violation of this section shall be held responsible for the sum so loaned, with interest thereon to be recovered in the name of the county to the use of the district whose fund has been so used."

In the case of Sharp's Administrator v. Collins, 74 Mo. 266, l. c. 269, having under consideration the validity of a second mortgage securing school money when the statute required that such money should be loaned only on first mortgage security, the court said:

> "The object of that requirement was to secure the school funds loaned, and it would be a singular construction of the statute which would destroy the security because not as complete as the county was required to take."

In Morrow v. Pike County, 189 Mo. 610, among other things, the court considered the rights and duties of the officials charged with the control of county school funds, and said, l. c. 622:

> "The public school fund does not belong to the county in a technical sense. It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the law-making power in relation to the fund (Ray County to use v. Bentley, 49 Mo. l. c. 242); it may not divert the general county revenue to its protection, and, on the other hand, it can not apply the school fund to the payment of ordinary county debts."

And at l. c. 623:

> "It was said, among other things, that the court was a mere agent of the State for the management of a trust, and that,

> 'It is authorized to sell lands, to lease them, to receive and sue for the purchase money, and if there be danger of loss of a debt contracted for the purchase of these lands, the court, we think, might resort to those extraordinary remedies provided for creditors generally. It might sue by attachment, and, if the purchaser is stripping the land of its timber, and thereby endangering the security for the debt, must the agent of the State stand by and witness this spoilation, and trust to the criminal law to indemnify the township by the fine imposed against persons committing the waste on such lands?'"

In Montgomery County v. Auchley, 103 Mo. 492, l. c. 503, the court says:

> "'In relation to these funds the county courts are trustees. They have no authority to dispose of the principal intrusted, or any of its interest, otherwise than is prescribed by law. There is no difference in this respect between the principal and interest of these funds. If they can give away the one, they can give away the other. * * * The welfare of the state is concerned in the education of the children. She has provided and is providing means for that purpose, not only for those now in existence, but for those who may come after them. The fund, as has been said, is a permanent one, and, if every man, woman and child in a township should petition the county court to give away, that which is by law intrusted to it, for the education of its children, it should without hesitation reject their prayer.'"

And at l. c. 506:

> "We deem it a wholesome rule to hold county courts to a strict performance of their duties in the management of

> this trust. With all these stringent provisions large sums of these moneys are frequently lost through negligent management."

Section 9243, R. S. Mo. 1929, provides in part as follows:

> "It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent. per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund."

Section 9248 specifically places these funds under the care and management of the county courts, and Sections 9250 and 9251 further prescribe the security to be taken for such loans.

From the above it appears that the legislative policy of this state has been marked and defined by enactment of statutes and by construction placed on those statutes by the courts, and that such policy is that there shall be great care and caution exercised in the management and control of such funds. This perhaps, among other justifiable reasons, because the proper safeguarding of these funds means so much to the education of the oncoming generations and therefore to the welfare of the sovereign state.

However, Section 9244, supra, contemplates an affirmative act to be done by the county court, to-wit, "to loan" the money to such officer, and it is this affirmative act that is prohibited. Said section does not say that no person shall continue to hold a school fund loan after he is so elected to office if he had the loan before being elected. When he as an individual who was not an officer procured the loan of school funds, there was a valid contract entered into between him and the county court. He had the right thereafter to rely upon the terms of that contract being fulfilled by the county court, and

likewise the county court had the right to rely upon his fulfilling the terms of the contract thereby placed upon him.

In the event a person has borrowed school funds and owes them and is thereafter elected a member of the county court, a serious question is presented as to whether he could qualify to said office when he owes money under such school fund contract. The general principle of law is that a person can not act as a trustee of property when he is a debtor. In the case of Samuels v. E. F. Drew & Co., 296 Fed. 882, a part of the syllabus is as follows:

> "A debtor can not be a trustee of its obligation to creditor, nor can debtor hold its obligation to creditor as security, for security presupposes the existence of property."

Under the holdings of the Missouri decisions, the members of the county court are trustees of these school funds and would appear to come within the prohibition of the above announced rule and be unable to qualify as to said office of county judge so long as said person was a borrower of said school funds.

CONCLUSION

It is our opinion that an individual who has borrowed school moneys from the county court, who is not at the time he borrows said funds a county officer, but is thereafter elected a county officer, does not because of such later election disqualify himself, nor does the law disqualify him from continuing to be a lawful borrower of such school funds.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JONN W. HOFFMAN, Jr.,
(Acting) Attorney General

DW:HR

AX: Grain shipped to mill between two intrastate points, transportation charges are subject to 1% tax regardless of whether or not same is to be rebilled and sold in interstate commerce.

9-17

September 16, 1935.

FILED
86

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of September 2, together with correspondence from several parties giving their views in regard to the question which will be hereinafter discussed. Your letter is as follows:

> "Re: Merchants' Exchange of St. Louis;
> F. Gordon Willis, Kansas City;
> Waggoner-Gates Milling Company, Independence, Mo.
>
> FREIGHT ON INTERSTATE TRANSIT SHIPMENTS OF GRAIN.
>
> "I am enclosing letters from each of the above mentioned companies, with the request you furnish this department an official opinion as to whether or not the one per cent sales tax will apply on transportation charged on grain in Missouri, milled-in-transit, and destined for points in other states. * * * *"

It must be readily conceded that if grain is shipped and sold in interstate commerce, the tax on the transportation charges are exempt from the Missouri state sales tax. Section 3 of the Act, being one of the exemption sections, specifically makes it so, but regardless of whether or not such shipments are exempted by the Act itself, the commerce clause of the Constitution and decisions bearing on the same prohibit such a

tax from being imposed on such shipments. Therefore, you, as State Auditor, can exact a tax on transportation charges only on intrastate shipments.

Your question restated is:

> When grain is shipped from a given point in Missouri to another given point for the purpose of milling, and from the milling point to be shipped out of the State for final sale to purchasers out of the State, are the transportation charges taxable in whole or in part?

We shall at once eliminate from the question the last shipment, i.e., from the mill to the purchaser outside the state, as that transaction constitutes interstate commerce; this leaves for discussion the question of the first transaction, i.e., from the producer to the mill.

The Missouri Sales Tax Act undertakes to impose a tax on two forms of sale--sales of tangible personal property when not sold for resale, and a tax of one per cent of the amount paid or charged for certain substances, services and things. Among the services enumerated is the following (Laws of Mo. 1935, Sec. 2 (h), p. 416):

> "A tax equivalent to one (1) per cent. of the amount paid or charged for tickets, fares and services by every person operating a railroad, sleeping car, dining car, express car, and such buses and trucks as are licensed by the Public Service Commission of Missouri, engaged in the transportation of persons or freight for hire."

We note from the attached correspondence numerous mention that the grain itself is in each instance being transported for the purpose of resale. This element, we think, has no bearing on the question. The grain, or the commodity itself, is tangible personal property and whatever tax, if any, is imposed on the same is imposed under sub-section (a) of Sec. 2, dealing with

tangible personal property. There is no exemption of any nature under the sections dealing with taxation of services wherein the element of resale of same automatically exempts the services from the collection of the tax from the purchaser, the exemption from resale being strictly confined to the sale of tangible personal property. Whether the transaction in question is or is not taxable must therefore be determined solely by the terms of sub-section (h) supra.

Further, we are of the opinion that the rates and rules promulgated by the Interstate Commerce Commission, permitting a lesser or greater rate by transportation companies on shipments of grain when milled in transit, would have no bearing on the question if the shipment of the grain by the producer or broker to the mill constitutes a complete and final transaction within the borders of the State of Missouri.

We note that Mr. Cunningham of the Waggoner-Gates Milling Company incloses two forms of bills of lading covering flour shipped from Lexington to Independence on July 18, 1935, and certain flour shipped from Lexington to Minneapolis on August 22, stating that the rate differed in the case of intrastate shipments from that of the interstate shipment. To us this appears to be one shipment of an intrastate nature and another interstate in its nature.

We note the statement of Mr. F. Gordon Willis and copy the following excerpt from his letter:

> "After years of experience with milling-in-transit, carriers and shippers alike found it impracticable to bill shipments to the final destinations, with instructions to stop at specified points for milling; and for years it has been the custom to bill the cars to the milling point as if that were the destination, and after milling, the shipments are rebilled to their respective destinations. That is the custom in the handling of 'transit shipments', both in intrastate and interstate commerce."

From the facts contained in the above, we base our statement heretofore made that the rates, interstate and intrastate, decreasing or increasing, would not have a bearing on the question, as we would still be confronted with a question of fact, i.e., as to whether or not the first transaction is a final and complete intrastate transaction.

Assuming, as Mr. Willis states in his letter, that the grain is to be reshipped after milling in interstate commerce, the transportation company, as stated in his letter, treats the first shipment as a final one for convenience and to avoid confusion. If the first shipment is final, it is subject to the tax, because it is an intrastate shipment.

The case of Central Railroad Co. of New Jersey v. United States, 257 U.S. 245, being an injunction suit to restrain the Interstate Commerce Commission from enforcing an order on the ground that it was arbitrary and void, discussed the question of forest products being creosoted in transit, and the Court said (l.c. 254-255):

> "By the privilege called creosoting in transit, forest products received for shipment may be stopped and unloaded at an intermediate point, there subjected to the process of creosoting, and later forwarded on the original bill of lading to the destination therein named. Where the privilege is granted and availed of, delivery is made of the commodity to the creosoting plant, as if that were the final destination. It is there unloaded and treated; and at some time thereafter it is delivered to the carrier, as if there were an initial shipment of the creosoted product. Then it is forwarded to the final destination. Although some charge is made for the transit service, the shipper secures thereby a lower freight rate. For through rates are generally much less than the rate on the untreated forest product from point of origin to the transit point, plus that on the treated product from there to destination."

Again, in the same decision which was mentioned in the letter to the grain companies, we quote the following: (l.c. 256)

> "Creosoting in transit, like other transit privileges, rests upon the

fiction that the incoming and outgoing transportation-services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination. The practice has its origin partly in local needs, partly in the competition of carriers for business. The practice is sometimes beneficial in its results; but it is open to grave abuses. To police it adequately is difficult and expensive. Unless adequately policed, it is an avenue to illegal rebates, and seriously depletes the carriers' revenues. Railroad managers differ widely as to the policy of granting such privileges. The Commission clearly has power, under section 1 of the Act to Regulate Commerce, as amended, to determine whether, in a particular case, a transit privilege should be granted or should be withdrawn. For that section requires, among other things, that carriers establish, in connection with through routes and joint rates, reasonable rules and regulations. The Commission might, therefore, acting under section 1, have directed the Central and the Pennsylvania to establish the creosoting in transit practice at Newark, if it deemed failure to do so unreasonable or unjust; or it might, in an appropriate proceeding, have directed the southern and midwestern carriers to discontinue the practice on their lines, if it deemed the granting of the privilege to be unreasonable or unjust. But it did neither. Instead, it sought to accomplish by indirection either one result or the other, and ordered, under section 3, that the discrimination found to exist to be removed. Twenty-one of the appellants are powerless either to cause the Central and the Pennsylvania to install the privilege at Newark, or to cause the southern and midwestern carriers to discontinue the practice on their lines. The Central and the Pennsylvania are likewise powerless to cause these connecting

> carriers to withdraw the privilege. They can, it is true, equalize conditions by establishing the privilege at Newark. But to do so, would involve departure from a policy to which they have steadfastly adhered, and adhesion to which was held by the Commission not to be unreasonable. If they should establish the privilege at Newark, they would act contrary to their judgment, and would adopt a practice which some connecting carriers had introduced without their concurrence or consent,and which may hereafter, upon appropriate inquiry, be held by the Commission to be unjust and unreasonable. Congress could not have intended that, under such circumstances, relief should be afforded under section 3, when a direct remedy is available under section 1."

The question of the power of the state to tax property which has come to rest within the state is discussed in the case of Minnesota v. Blasius, 290 U.S., l.c. 11, as follows:

> "Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power. In Brown v. Houston, 114 U.S. 622, 29 L. ed. 257, 5 S. Ct. 1091, coal mined in Pennsylvania and sent by water to New Orleans to be sold there in the open market was held to have 'come to its place of rest, for final disposal or use', and to be 'a commodity in the market of New Orleans', and thus to be subject to taxation under the general laws of the State; although the property might, after arrival, be sold from the vessel on which

the transportation was made for the purpose of shipment to a foreign port. As the Court said in Champlain Realty Co. v. Brattleboro, supra (260 U.S. p. 376, 67 L. Ed. 313, 43 S. Ct. 146, 25 A.L.R. 1195), the coal in Brown v. Houston 'was being held for sale to anyone who might wish to buy.' A similar case is Pittsburg & S. Coal Co. v. Bates, 156 U.S. 577, 39 L. Ed. 538, 15 S. Ct. 415, 5 Inters. Com. Rep. 30. In General Oil Co. v. Crain, 209 U.S. 211, 52 L. Ed. 754, 28 S. Ct. 475, the company conducted an oil business at Memphis where it gathered oil from the North and maintained an establishment for its distribution. Part of the oil was deposited in a tank, appropriately marked for distribution in smaller vessels in order to fill orders for oilalready sold in Arkansas, Louisiana and Mississippi. The Court held that the first shipment had ended, that the storage of the oil at Memphis for division and distribution to various points was 'for the business purposes and profit of the company;' and that the tank at Memphis had thus become a depot in its oil business for preparing the oil for another interstate journey. This decision followed the principle announced in American Steel & Wire Co. v. Speed, 192 U.S. 500, 48 L. Ed. 538, 24 S. Ct.365. See Champlain Realty Co. v. Brattleboro, supra (260 U.S. p. 376, 67 L. Ed. 313, 43 S. Ct. 146, 25 A.L.R. 1195); Atlantic Coast Line R. v. Standard Oil Co., 275 U.S. 257, 270, 72 L. Ed. 270, 275, 48 S. Ct. 107; Carson Petroleum Co. v. Vial (279 U.S. supra, pp. 104, 105, 73 L. Ed. 630, 49 S. Ct. 292).

"In Bacon v. Illinois, 227 U.S. 504, 57 L. Ed. 615, 33 S. Ct. 299, supra, Gacon, the owner of the grain and the the taxpayer, had bought it in the South and had secured the right from

the railroads transporting it to remove it to his private grain elevator for the purpose of inspecting,weighing, grading, mxing, etc. He had power to change its ownership, consignee or destination, or to restore the grain, after the processes above mentioned, to the carrier to be delivered at destination in another State according to his original intention. The Court held that, whatever his intention, the grain was at rest within his complete power of disposition, and was taxable; that 'it was not being actually transported and it was not held by carriers for transportation;' that the purpose of the withdrawal from the carriers 'did not alter the fact that it had ceased to be transported and had been placed in his hands;' that he had 'the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit.' What he had done was to establish 'a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination.' Id. p. 516. In Champlain Realty Co. v. Brattleboro, supra (260 U.S. p.375, 67 L. Ed. 313, 43 S. Ct. 146, 25 A.L.R. 1195), the court thus restated the point of the Bacon Case: 'His storing of the grain was not to facilitate interstate shipment of the grain, or save it from the danger of the journey.' 'He made his warehouse a depot for its preparation for further shipment and sale. He had thus suspended the interstate commerce journey and brought

> the grain within the taxable jurisdiction of the State.' See also Susquehanna Coal Co. v. South Amboy, 228 U.S. 665, 669, 57 L. Ed. 1015, 1016, 33 S. Ct. 712, and Nashville C. & St. L. R. Co. v. Wallace, 288 U.S. 249, 269, 77 L. Ed. 730, 737, 53 S. Ct. 345, 87 A.L.R. 1191."

A question similar to that involved in the instant case is found in State ex rel. v. Public Service Commission, 269 Mo. l.c. 72-73:

> "These definitions are sufficient to distinguish generally between the two classes of commerce--the one regulated by Federal and the other by State law. Thus regulated we look to the rulings of the United States Supreme Court and those of our own court to aid in the construction of these statutes and thus determine the classification of a shipment in any given case.
>
> "Here it is admitted that the contracts of shipment were from points in the State to Kansas City, Missouri. There is an absence of intention, either express or implied, on the part of shippers to ship the grain beyond Kansas City, Missouri. Intention, while it may not in some instances be controlling, is in these cases important. The owners of the grain, in the exercise of a proper dominion over their property, ship it to said city for sale. It is there delivered to and sold by a consignee of the shipper on the floor of the Board of Trade. The delivery to the consignee completes the contract between the shipper and the carrier (Adams Express Co. v. Kentucky, 214 U.S. l.c. 223; L & N R.R. Co. v. Cook Brewing Co., 223 U.S. l.c. 82;Kirkmeyer v. Kansas, 236 U.S. l.c. 572), and the transaction having been confined to this State, no question can arise as to the nature of the shipment, viz, that it is

> intrastate. The following concurrent conditions confirm this conclusion: (1) The intention of the parties evidenced by the bill of lading naming Kansas City, Missouri, as the point of final destination; (2) the continuous movement of the grain to such point; and (3) its delivery there to the consignee of the shipper on the hold tracks of the carrier. The essential character of the commerce is properly determinable from the presence of these requisites, and while influenced by the billing or form of contract, the character of the shipment is not to be controlled by it except when taken in connection with the other essentials in the case. Upon the sale of the grain its further movement is subject to the direction of the purchaser. He may, dependent upon the location of his business or his purpose in the disposal of the grain, direct its shipment to a point outside of the state, but until he so directs the character of the commodity as an article of commerce continues as under the original shipment."

In the case of Arkadelphia Milling Company v. St. Louis S.W.R. Co., 249 U.S. 134, the Court discussed the example of rough lumber being shipped to a point and there graded, smoothed and otherwise processed, and reshipped in interstate commerce. We believe the same to be controlling in the instant question. The Court said:

> "Likewise, the hauling from the forest by a railroad of rough lumber to a milling point, where it was manufactured into materials for barrels and casks and most of the finished product sold and carried to customers outside the state, while the wastings were burned, was not interstate commerce, so as to render inapplicable rough shipment freight rates by the Arkansas railroad commission, where the whole process

of manufacturing and storing until sales were made occupied a period of five months, for the reason that there was no continuous movement and no intention to transport the lumber out of the state until its character, utility, and value were changed, although there were knowledge and intention that the greater part of the finished product would be carried out of the state."

CONCLUSION

In determining whether or not a shipment is intra or interstate commerce, the facts in the individual case govern strongly. Most of the decisions consulted involve the jurisdiction of the Interstate Commerce Commission to fix or change rates. It does not follow that because the courts hold that a shipment is sometimes subject to the jurisdiction of the Interstate Commerce Commission, the same is interstate or not interstate in its nature, thereby precluding the state from taxing the shipment. We are of the opinian that the facts in the instant case and the decisions controlling the same warrant our conclusion that when grain is shipped to a mill between two intrastate points, regardless of the fact that the grain is to be rebilled, shipped and sold in interstate commerce, the first shipment is an intrastate shipment and the transportation charges are therefore subject to the tax of 1%.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

APPROPRIATION: In view of the effect of the decision in the case of State v. Thompson, printing and clerical help may be charged against the teacher-training appropriation for 1935.

September 18, 1935.

9-18

FILED
86

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge your letter as follows:

"Will you please advise if I am authorised to pay bills for printing for Teachers-Training out of the appropriation for Teachers-Training made by the Legislature in Section 57, Page No. 113 of the Appropriation Laws?

"It is my understanding the decision of the Supreme Court in the Thompson case holds that printing can be legally paid out of the appropriation made for Teachers-Training.

"Will you also please advise me what salaries, if any, can be paid out of this appropriation made for Teachers-Training?"

Laws of Missouri, 1935, page 113, Section 57, is the appropriation act relating to "Teachers Training in High Schools" and reads as follows:

"Teachers Training in high schools.-- There is hereby appropriated out of the State Treasury chargeable to the

> general revenue fund, the sum of Thirty-Five Thousand Dollars ($35,000.00), for the purpose of carrying into effect the provisions of Article VII, Chapter 57, of the Revised Statutes of Missouri, 1929, which provides for teacher-training work in high schools, provided, however, in the event the funds appropriated herein are insufficient to pay the apportionment in full as provided by law; they shall be pro-rated to schools in pro-rata proportion."

Section 9405, R. S. Mo. 1929, provides as follows:

> "The appropriation provided for the instruction of pupils in the science and practice of rural school teaching and the teaching of elementary agriculture, may be expended in part for the inspection and supervision of such instruction by the state superintendent of public schools and by such person as he may designate, and the expense of such inspection and supervision shall be paid out of said appropriation on vouchers certified by the State superintendent of public schools. In accordance with the foregoing provisions of this section, the state superintendent of public schools is authorized to appoint an inspector of teacher-training in high schools and private and denominational schools at a salary of not to exceed twenty-five hundred dollars ($2,500.00) per year, and the necessary traveling expenses while in the discharge of his duties."

It is to be noted that the appropriation act, supra, does not in detail express the purposes for which said sum may be expended, but refers to Article 7, Chapter 57, R. S. Mo. 1929. Reference must be had, therefore, to said article

and chapter to determine how the moneys appropriated may be expended. Nowhere in Article 7, Chapter 57, is it provided that any moneys may be expended for printing. However, Section 9405, supra, provides for the appointing of an inspector at a salary not to exceed twenty-five hundred dollars ($2,500.00) per annum, and the necessary traveling expenses while in the discharge of his duties. But said section does not provide for any other specific expenditure of moneys appropriated for teacher-training courses. Said section does state, however, the following:

> "The appropriation provided for * * may be expended in part for the inspection and supervision of such instruction by the state superintendent of public schools and by such person as he may designate, * * *"

Thus, if any money may be expended from said appropriation act it would have to relate to inspection and supervision of such instruction or to pay the salary of the instructor.

The effect of the decision of the Supreme Court of Missouri, en Banc, in the recent case of State of Missouri v. Lorenzo D. Thompson, et al., (not yet reported) was that the former State Auditor, Thompson, was not liable when he charged the 1931 appropriation to teachers-training with certain items of printing, because the evidence in that case showed that such printing was necessary and connected with the furtherance of teachers-training. However, the court ordered judgment to be entered for the State on items of printing having no connection with teachers-training. We quote from the court's opinion:

> "Under the application of the doctrine enunciated above the inclusion in printing bill "C" (count three of the petition) of the items admittedly having no connection with teachers' training was an obvious and inexcusable error, while all other items in suit were properly for the determination of the trial judge."

Therefore, in view of the effect of the decision of the above case, wherein the court permitted printing to be charged to the appropriation act of 1931, similar to the one under consideration, it is our opinion that the burden is upon you, as State Auditor, to determine as a matter of fact whether printing sought to be charged is connected with teachers-training and used in furtherance thereof. And, if you find as a fact that the printing is so used, then such may be charged against the 1935 appropriation act.

Our opinion as to charging of clerical help against said appropriation, would be the same as to printing.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JLH:EG

CRIMINAL COSTS - Liability of State for defendant's costs where case is nolle prosequi.

September 27, 1935 101

FILED 86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion, which is as follows:

" In Re: State vs. O. S. Hart, Lou Hart, Burr Davidson, Gladys Davidson.

This office is in receipt of a supplemental fee bill in the above entitled case which amounts to the sum of $1475.20, and the contents of said bill contain costs that were made on behalf of the defendants only. Sometime ago the original bill in this case was filed in this office containing the cost now contained in the supplemental bill, and also the costs made on behalf of the State. The case at the November term, 1932, was continued generally and each term the Clerk certified the bill to this office for payment.

Your office handed down an opinion on January 22, 1934 wherein you held that the State was not liable for defendant's cost for the reason that at the time the case was continued generally, the Circuit Court did not tax the cost against the State.

> Thereafter, on April 25, 1935 a warrant was issued against said defendants to appear at the May term, 1935, of the Circuit Court of Ozark County and at that term of said court, the Prosecuting Attorney entered a nolle prosequi in this case and the Circuit Clerk has now certified to this office for payment the defendant's costs which were deducted from the original bill filed with the State Auditor.
>
> We desire an opinion as to whether the State is now liable for the defendants' costs in this case."

In answering your request, it appears that a construction of Section 3828, R. S. Mo. 1929 is involved. That section in part is as follows:

> "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; * "

We note that the crime charged in the costs bill was bank robbery. This is a crime which comes within the terms of Section 3828, R. S. Mo. 1929 wherein imprisonment in the penitentiary is the minimum punishment for the offense.

The next question turns upon the meaning of the word "acquitted." In the case referred to in your request for an opinion, it appears that the charges against the defendant were dismissed. While the statute under consideration must be strictly construed, State ex rel. v. Wilder, 94 S. W. 495, 197 Mo. 27, the dismissal of a case is equivalent to an acquittal insofar as this statute is concerned.

#3 - Honorable Forrest Smith

In State ex rel. v. Platte County (1890), 40 Mo. App. 503, l.c. 506, the court said:

> "The nolle prosequi amounted to an acquittal in the sense of the statute."

It is, therefore, the opinion of this office that the entering of a nolle prosequi in the above case imposed upon the State the burden of paying such costs as are properly chargeable in the case.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

SHERIFFS: Sheriff's fees for custody of prisoner when transferring him within Randolph County from one Circuit Court to another.

October 2, 1935. 10-2

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated September 17, 1935, which is as follows:

> "The Deputy Sheriff of Randolph County arrests a defendant at Moberly, Missouri, and holds said defendant in jail or a holdover in the court house at Moberly used to hold persons on trial for two days or more and then said defenants are given a preliminary hearing in Moberly and are bound over to await the action of the Circuit Court and are committed to jail at Huntsville upon a commitment issued by the Justice of the Peace, so we desire an opinion as to whether or not the sheriff is entitled to the sum of $1.25 per day for such custody when the number of days exceeds one, as provided by Section 11791, R. S. Mo. 1929."

Section 11791 R. S. Mo. 1929, provides in part as follows:

> "* * * * The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment morethan one day for trans-

> porting, safekeeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and five cents per mile for every mile necessarily traveled in going to and returning from one county to another, and the guard employed, who shall in no event exceed the number allowed the sheriff, marshal or other officer in transporting convicts to the penitentiary, shall be allowed the same compensation as the officer. One dollar and twenty-five cents per day, mileage same as officer, shall be allowed for board and all other expenses of each prisoner. No compensation shall be allowed under this section for taking the prisoner or prisoners from one place to another in the same county, excepting in counties which have two or more courts with general criminal juriddiction. In such counties the sheriff shall have the same fees for conveying prisoners from the jail to place of trial as are allowed for conveying prisoners in like cases from one county to another, and the expenses incurred in transporting prisoners from one county to another, occasioned by the insufficiency of the county jail or threatened mob violence, shall be paid by the county in which such case may have orginated. * * * *"

There are two courts of general jurisdiction in Randolph County, one in Moberly and one at Huntsville.

CONCLUSION.

Construing the above section of law, we are of the opinion that the sheriff of Randolph County is entitled

to $1.25 per day for each day said prisoner is in his custody, so long as the prisoner be in custody over one day.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

INCOME TAXES: Net income received by non-resident as salary from resident corporation is taxable.

25225.8 PC 468.
" " 445.
" #1753 Cooley Lexation.

October 25, 1935. 11-9

FILED
86

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of the following inquiry from you:

> "Will you kindly advise this office as to whether or not in accordance with Section 10115 of the Revised Statutes, 1929, and Amended Laws, 1931, salary received by a non-resident individual for services rendered entirely without the State of Missouri to a corporation located within this State is taxable income to the State of Missouri."

Your inquiry is: A corporation resident within Missouri has a salaried employee who resides without this state and performs out of this state all of the services he performs for the corporation. Is such salary taxable income in Missouri within the meaning of the Missouri income tax law?

Section 10115 of the income tax law, being found in Laws of 1931, page 365, in part reads as follows:

> " * * * and a like tax shall be levied upon, assessed against, collected from, and paid by every individual, not a resident or citizen of this state, upon net income received from

63 1/4
91 5/8

> all sources within this state, during the preceding year in excess of the exemptions now or hereafter provided."

The party in question receives his salary from "sources within this state", to-wit, the corporation which is within this state.

In the case of State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission, et al., decided by the Supreme Court of Wisconsin in 1915, 152 N. W. 848, the court in construing that state's income tax law, said:

> "The taxing power of a state does not extend beyond its territorial limits. * * * If the tax be on property it, or its lawfully constituted situs, must be found within the state. If an interest in property is taxed the situs of either the property or interest must be found within the state. If an income be taxed the recipient thereof must have a domicile within the state, or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein."

In the case of Shaffer v. Carter, State Auditor, et al., 252 U. S. 37, l. c. 51, the United States Supreme Court, in discussing this question, said:

> "'All subjects over which the sovereign power of a State extends, are objects of taxation,' etc. In Michigan Central R. R. Co. v. Powers, 201 U. S. 245, the court, by Mr. Justice Brewer, said (pp. 292, 293): 'We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of National interference are well settled. There is no general supervision on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to

objects and methods.' That a State may tax callings and occupations as well as persons and property has long been recognized. 'The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business..... It (taxation) may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.' State Tax on Foreign-Held Bonds, 15 Wall. 300, 319. See also Welton v. Missouri, 91 U. S. 275, 278; Armour & Co. v. Virginia, 246 U. S. 1, 6; American Mfg. Co. v. St. Louis, 250 U. S. 459, 463.

"And we deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. This is consonant with numerous decisions of this court sustaining state taxation of credits due to non-residents, New Orleans v. Stempel, 175 U. S. 309, 320, et seq.; Bristol v. Washington County, 177 U. S. 133, 145; Liverpool etc. Ins. Co. v. Orleans Assessors, 221

U. S. 346, 354; and sustaining federal taxation of the income of an alien non-resident derived from securities held in this country, De Ganay v. Lederer, 250 U. S. 376.

"That a State, consistently with the Federal Constitution, may not prohibit the citizens of other States from carrying on legitimate business within its borders like its own citizens, of course is granted; but it does not follow that the business of non-residents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State."

When a corporation is located within the State of Missouri and carries on a substantial part of its business within this state, it is assisted and protected therein by this state and by the legal machinery of this state, and the person who resides without this state and who carries on outside the state his part of the business of the corporation receives his income because of the existence of the corporation within this state and the protection which is afforded to the corporation by the State of Missouri. The fountain source of such salary is the corporation which is located in Missouri and which could not exist except by virtue of the laws of this state. The situs of the income under such conditions is within the State of Missouri.

CONCLUSION

It is our opinion that such a salary, less the exemptions, is taxable for income purposes under the income tax laws of Missouri.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

TAXATION: Fees, commissions and costs for services actually performed allowed in bankruptcy.

October 30, 1935. 11-5

FILED 86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention of Mr. W. A. Holloway.

Dear Sir:

Acknowledgment is made of your request for an opinion of this office on the following matter:

> "We request that you furnish this Office with your official opinion as to the following points of railroad tax law.
>
> Where a railroad is in bankruptcy in the United States District Court under the present amended bankruptcy statutes providing for reorganization, should the Federal Court allow and order the trustees in bankruptcy to pay the interest, penalties, Collectors' commissions, Attorneys' fees and costs which are provided for by Article 13, Chapter 59, R. S. Missouri, 1929, with reference to taxes on railroads. Sections 10043, 10044, 10035, 10034 and other sections of said article.
>
> The railroad was adjudged a bankrupt June 7, 1933 and the tax bill is for taxes levied in the same year, 1933.
>
> It is urged by the railroad that Section 57J of the Bankruptcy Act and the Federal decisions, forbid the allowance of penalties and forfeitures on taxes and that their contention is further supported by the case of State ex rel. Crutcher vs. Koeln, 61 S. W. (2nd) 750.

Section 57J (or 93J) is as follows:

'Debts owing to the United States, a state, a county, a district, or municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.'

Are the tax penalties, interest, commissions, attorney's fees etc, debts within the meaning of the bankruptcy law?

It appears to us that the Koeln case above mentioned is not a railroad case, that it does not interpret railroad law, and that the statutes passed upon by it have mostly been repealed or have expired by their own limitation, such repeal and expiration having occurred before January 1, 1934, that being the date when the tax penalties began to accrue on the instant tax bills. And it seems to us that our Legislature made an almost entirely separate code of laws for the assessment and taxation of railroads in Missouri, providing among other things for Collector's commissions, interest, Attorney's fees and costs, on delinquent railroad taxes."

Sometime ago we had an occasion to pass upon this question and under date of March 26, 1935, this office rendered an opinion to Hon. David R. Clevenger, Prosecuting Attorney of Platte County, Missouri, wherein it is stated:

"Insofar as other charges are concerned such as collectors' commissions, clerks fees etc., it is difficult, if not impossible, to place these within the provisions of Subdivision J of Section 93, Title 11, U.S.C.A. as being penalties and forfeitures, as they are certainly compensations allowed others who are required

> to perform duties by virtue of the failure of the taxpayer to pay the tax when due, and if the acts have actually been performed, the costs allowed by law should be paid by the Trustee in Bankruptcy."

The conclusion of that opinion reads as follows:

> "It is therefore the opinion of this office that the Trustees of the Chicago, Rock Island and Pacific Railroad Company are liable to the State of Missouri as interest on delinquent taxes six per cent per annum on such taxes from the date of delinquency until paid."

While it is true that the statements relative to the commissions, fees and costs were not directly involved in that opinion, that opinion does conclusively dispose of your question relative to the penalty interest on taxes due from bankrupt railroads. We are enclosing a copy of that opinion for your examination.

We shall not deviate from the statements made in that opinion relative to the commissions, fees and costs, but due to the fact that the case of State ex rel. Crutcher vs. Koeln, 61 S. W. (2d) 750 has been cited in your request and might tend to confuse the issues, we herewith give to you our views concerning such case and its application to Section 57J of the Bankruptcy Act, 11 U.S.C.A. 93J. It is true that the Supreme Court of this State in the case of Crutcher vs. Koeln supra stated that the term "penalties" was generic and included within its terms commissions, fees and costs allowed the various county officials and appointees for their services rendered in connection with the collection of delinquent taxes, however, it must be remembered that that decision construed a state statute having in mind the relief of delinquent taxpayers, and the Court was called on to construe that law in view of the relief which the legislature undoubtedly indended to grant delinquent taxpayers of this state. While it is true that these commissions, fees and costs may have been construed as within the term "penalty" as used in Senate Bill 80 of the 57th General Assembly in Regular Session, that holding does not necessarily indicate that these charges are the type and character of penalties which may not be allowed under the provisions of Section 57J of the Bankruptcy Act and certainly if they are to be construed as penalty or forfeiture they must be held to be within the exception set forth in that section. For convenience we herewith quote the section:

> "Debts owing to the United States, a state, a county, a district, or municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

The exception is that the amount of pecuniary loss sustained by the act out of which the penalty arose shall be allowed. Therefore, if the delinquency of the tax has required the performance of additional duties by the taxing authorities and it has been necessary to employ attorneys to effect the collection of the tax, the compensation for these acts, which have actually been performed is not to be construed as an outright penalty, it represents a pecuniary loss sustained by the action of the taxpayer in failing to pay his taxes within the time required by law.

The situation presented is somewhat analogous to that considered by the Supreme Court of the United States in the case of United States vs. Childs, 266 U.S. 304, 69 L.Ed. 299. In this case the Federal Government presented a claim for taxes accompanied by a claim for penalties of five per cent and interest of one per cent per month. The trustee took the position that the taxes alone should be ordered paid with simple interest and that the penalty of five per cent should be disallowed and interest in excess of six per cent per annum likewise disallowed because of the provisions of Section 57J hereinbefore referred to. The Supreme Court ordered interest paid at the statutory rate of one per cent per month, arriving at its conclusion partly by means of the following statement, l. c. L.Ed. 300:

> "At the outset we are confronted with the difference between penalty and interest. A penalty is a means of punishment; interest a means of compensation."

The opinion concludes with this statement, l. c. 301:

> "The tax in this case is one on income; a burden imposed for the support of the government. Interest is put upon it and so denominated, distinguished from the 5 per cent as penalty, clearly intended to compensate the delay in payment of the tax, the detriment of its nonpayment, to be continued during the time of its nonpayment--compensation, not punishment."

So in the instant case the commissions, fees and costs are not assessed as a pure matter of punishment to the delinquent taxpayer but are charges made to compensate those obligated to perform services made necessary by the acts of the delinquent taxpayer.

It has been the uniform ruling in this state that tax collectors are to receive additional compensation for services performed in the collection of the delinquent taxes. This principle was announced in the case of State ex rel. Shannon County vs. Hawkins, 169 Mo. 615, construing what is now Section 9969, page 429, Laws of Missouri 1933, the section which allows collectors two per cent commission for the collection of delinquent taxes, other than railroad taxes. The Court at page 620 stated:

> "Section 9309 deals with the <u>costs allowed him for his extra services</u> in addition to his commissione, and these are to be paid by the delinquent, and the collector is allowed only four per cent. Otherwise we would have the result in Shannon county that the State freely allows the collector five per cent for merely receiving and paying over taxes which the taxpayer tenders, but allowing him nothing by the State or county for collecting delinquent taxes at the end of a lawsuit, and after making out various delinquent lists and performing other duties, in enforcing payment."

The extra services referred to in the foregoing quotation are those which are made necessary by the failure of the taxpayer to pay his taxes within the time required by law.

You ask if taxes, penalties, interest, commissions, attorneys fees, etc., are debts within the meaning of the bankruptcy law. Taxes have always beenconstrued and treated as debts within the meaning of the Bankruptcy Act. Kaw Boiler Works vs. Shaw, 230 Fed. 587; United States vs. Childs supra. It appears that the term "debts" as used in Section 57J of the Bankruptcy Act is used in its broad sense and is synonymous with existing dues of all types and descriptions. This is evidenced by the fact that to give a law any significance a penalty is a debt within its meaning, while according to the weight of authority a penalty is not a debt within the ordinary or restricted use of that term. As stated in 17 Corpus Juris 1376, Section 1:

"Ordinarily the term imports a duty or obligation to pay, the enforcement for which an action will lie."

The term "debt" as used in the Bankruptcy Act has been construed to include attorneys fees. Oldham vs. Parker, 5 Federal (2d) 682. As far as Section 57J of the Bankruptcy Act is concerned the term "debt" includes commissions and costs as well as attorneys fees.

CONCLUSION.

It is therefore the opinion of this office that the provisions of Subdivision J of Section 57 of the Bankruptcy Act, 11 U.S.C.A. 93J, do not forbid the allowance of such commissions, fees and costs as the statutes of Missouri grant to officials and appointees for the performance of duties required to be done because of the failure of the taxpayer to pay the tax when due, if such duties have actually been performed.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

Enclosure.

CIRCUIT CLERK - Must account for certain fees; fees for jury script and for opening and closing court.

November 1, 1935

11-7

FILED
86

Honorable Forrest Smith
Circuit Clerk and Ex-officio Recorder
Putnam County
Unionville, Missouri

Dear Sir:

We have your request of October 30, 1935 for an opinion as follows:

"Section 8766, Revised Statutes of 1929 provide that the Circuit Clerk shall receive $1.50 as compensation for his services at each term of Court for issuing jury script.

"I also have a ruling from your office that the Clerk shall receive $.30 each for the order, opening and closing Court.

"Is the Clerk entitled to these fees above his regular salary or should I collect them and pay them over to the County Treasurer in his report of fees?"

We refer you to Section 11786, Laws Mo. 1933, p. 369:

"The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's ser-

> vice shall not in any case exceed the amount hereinafter set out. * * * provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be considered as one for the purpose of this section; provided, further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; * "

Section 13, Article IX of the Constitution of Missouri, relating to fees of county and other officers, provides:

> "The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

The above mandate of the Constitution is carried out by Section 11810, R. S. Mo. 1929, wherein it is made the duty of,

> "Every clerk of a court of record in every county in this state shall

> make return quarterly to the county court of all fees by him received to date of return, from whom received and for what services, * * "

The fees provided for in Section 8766, R. S. Mo. 1929, wherein the circuit clerk is paid $1.50 as compensation for issuing jury script, and the $.30 fee allowed the clerk for opening and closing court, are fees that are earned by virtue of the office of clerk, and under both the Constitution and statutory provisions above cited, must be accounted for in the returns made to the county court.

It is, therefore, the opinion of this department that both the above named fees must be included in the circuit clerk's return, and the same accounted for as other fees of the office.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

SHERIFFS - State not liable for mileage for transporting prisoners for safekeeping;
COUNTIES - Liable for sheriffs' fees in transporting prisoners for safekeeping.

November 4, 1935

11-6

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We have your request of October 14th for an opinion, which request is as follows:

> "This office is in receipt of a fee bill from the Circuit Clerk of Dunklin County, Missouri, wherein the sheriff of said county has charged $102.20 for his per diem and mileage and for the per diem and mileage of two guards pursuant to an order of court that C. D. Ward, under death sentence in this case, be conveyed for safe-keeping from the city jail in Kennett, Dunklin County, Missouri, to the city jail in the City of St. Louis, Missouri. Also, said sheriff has charged $102.20 for the return of this defendant from the City of St. Louis to the City of Kennett pursuant to an order of court because of the excessive per diem for defendant's board in the city jail of St. Louis. Also, the sheriff has charged $146.20 for his per diem and mileage and for two guards' per diem and mileage in transporting defendant to

the State Penitentiary at Jefferson City for safe-keeping pursuant to an order of the circuit court. Also, said sheriff has charged $146.20 for sheriff's per diem and mileage of two guards for the return of said C. D. Ward from the penitentiary to the city jail at Kennett, Missouri, to execute the death warrant in this case.

Section 12043, R. S. Mo. 1929 provides:

> "There shall be erected and maintained in each county, at the established seat of justice thereof, a good and sufficient court house and jail."

It is the request of this office that we have an opinion as to whether or not the state is liable for the transportation of this defendant to and from the City of St. Louis and to and from the State Penitentiary at Jefferson City, Missouri, as he was transported to said places of confinement for the purpose of his safe-keeping."

We call your attention to that portion of Section 11791, R. S. Mo. 1929 relating to fees of sheriffs, which in part provides as follows:

> " * * the expenses incurred in transporting prisoners from one county to another, occasioned by the insufficiency of the county jail or threatened mob violence, shall be paid by the county in which such case may have originated: * * "

#3 - Honorable Forrest Smith

A statute which specifically taxes costs has been construed to be controlling over general statutes taxing costs upon the losing party. State ex rel. v. Holladay, 67 Mo. 299.

It is, therefore, the opinion of this office that the fees of the sheriff as outlined in your request for an opinion, are not chargeable to the State, but under the statute are chargeable to the county.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

INCOME TAX: Stockholders of Kansas City Life Insurance Company subject to tax.

W-8

November 6, 1935.

FILED
86

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request for an opinion with respect to the claim for state income tax against J. B. Reynolds and other individual stockholders of the Kansas City Life Insurance Company on dividends paid in 1930, 1931, 1932 and 1933.

We have been furnished by Mr. James W. Broaddus and Mr. Frank W. McAllister, Counsel for J. B. Reynolds and others, a memorandum of authorities supporting their position in the matter. Briefly, it is the position of these gentlemen that the dividends they receive from the Kansas City Life Insurance Company are not subject to the income tax laws of the State of Missouri, for the reason that if the dividends had been paid by the Kansas City Life Insurance Company to a corporation the same would not be subject to tax, and to tax individual stockholders would be discriminatory and in violation of Section 3 of Article X of the Constitution of the State of Missouri, which provides as follows:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

Section 10113 Laws of Missouri 1931, page 365, provides in part as follows:

> "There is hereby levied a per centum tax on net income in each year as follows: First, for the portion of the year 1931 after June 30, 1931, remaining after this act becomes effective and for the whole of each succeeding year thereafter, at the times and in the manner now or hereafter provided, a tax shall be levied upon, assessed against, collected from, and paid by every individual, a citizen or resident of this state, upon net income received from all sources during the preceding year in excess of the exemptions now or hereafter provided.* * * *"

Section 10117 Laws of Missouri 1931, page 363, provides in part as follows:

> "Income shall include gains, profits, and earnings derived from salaries, wages or compensation for personal services of whatever kind and in whatever form paid; and from professions, vocations, businesses, trade, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or the use of any interest in real or personal property; and from interest, rent, dividends, securities and gains, profits and earnings from any other transactions of any business carried on for gain or profit; and from any source whatever; * * * * * *"

It is clear therefore from a consideration of these two statutes that in the absence of constitutional restrictions the dividends to J. B. Reynolds and others paid by the Kansas City Life Insurance Company are subject to the income tax law of the State of Missouri. It is claimed however that the following portion of Section 10117 violates Section 3 of Article X of the Constitution of the State of Missouri:

> "Dividends on corporate stock owned by another corporation shall not be income of the corporation receiving such dividends where the corporation declaring the dividend has paid its tax to this state on the portion of its income subject to tax by this state.* * * *"

In the case of State vs. Wisconsin Tax Commission, 163 N. W. 639, the Supreme Court of Wisconsin said:

> "Much confusion of thought arises from regarding the income tax as a tax that is levied upon or attaches to property as such, irrespective of the person sought to be taxed. It is the recipient of the income that is taxed, not his property; and the vital question in each case is, Has the person sought to be taxed received an income during the tax year? If so, such income, unless specifically exempted, is subject to a tax though the property out of which it is paid may have been exempt from an income tax in the hands of the payor. It is the relation that exists between the person sought to be taxed and specific property claimed as income to him that determines whether there shall be a tax. If the person sought to be taxed is the recipient during the tax year of such specific property as income in its ordinary significance, then the person is taxed. But the tax is upon the right or ability to produce, create, receive, and enjoy, and not upon specific property. Hence the amount of the tax is measured by the amount of the income, irrespective of the amount of specific property or ability necessary to produce or create it. In the ordinary acceptation of the term this may be said to be a tax upon income as the statute denominates it. But the tax does not seek to reach

> property, or an interest in property as such. It is a burden laid upon the recipient of an income. State ex rel. Manitowoc Gas Co. v. Wis. Tax Comm., 161 Wis. 111, 152 N. W. 848; State ex rel. Bundy vs. Nygaard, 183 Wis. 307, 198 N. W. 87.
>
> It follows from this that though the surplus on hand January 1, 1911, was not assessable as income to the Northwestern Lumber Company, it was assessable as such to the stockholders thereof when distributed as dividends during 1911." * * * *"

The uniformity clause of our constitution does not apply to income taxes, the only uniformity required being uniformity within a class. A corporation is one person, a stockholder in the corporation is an entirely different person and both may be taxed separately, and the fact that income payable to an individual might be subject to tax whereas the same income if payable to a corporation would be exempt, does not violate the uniformity clause of our constitution. In fact, corporations might be entirely exempted from the provisions of our income tax law and the law yet remain valid. This is made clear in the case of Franklin vs. Carter, cited by the Circuit Court of Appeals, Tenth Circuit, and reported in 51 Fed. (2d) 345, wherein the Court said:

> "The question here is whether the classification in the instant case rests upon a substantial difference and bears a reasonable relation to the object of the legislation. This precise question was considered in Conner v. State, 82 N.H. 126, 130 A. 357, and the court held the New Hampshire statute valid on the ground that avoidance of double taxation was a sufficient basis for such classification.
>
> A general income tax law imposing a tax alike on corporations and natural persons will result in double taxation of the earnings of corporations paid as dividends, unless some method is devised to exempt either the corporation or its stockholders

> from the tax on such earnings. In framing the income tax law in question, the Oklahoma legislature undertook to avoid the injustice of taxing both the corporation and its shareholders on the earnings paid as dividends, by providing that the shareholders should pay taxes on such earnings when received by them in the form of dividends, and exempting the corporation from the tax.
>
> A tax laid upon only the earnings of a corporation when paid to its stockholders as dividends results ultimately in a tax on a substantial portion of such earnings and avoids double taxation thereon.
>
> It is our opinion that there is a substantial difference between corporations and natural persons for income tax purposes because, ordinarily, a large portion of the earnings of a corporation are paid to its stockholders as dividends and are income of both the corporation and such stockholders; that it affords a rational basis for the classification provided by the statute here in question; that such classification rests on a difference having a fair and substantial relation to the object of the legislation; and that it results in like treatment to all persons similarly situated." * * *"

In the case of Shields vs. Williams, 19 S. W. (2d) 260, the Supreme Court of Tennessee said with respect to the uniformity section of the Tennessee Constitution:

> "We see no necessity of an inquiry as to the nature of the income tax authorized by the Tennessee Constitution. Section 28 of article 2 of our Constitution, ex vi termini, excludes the income tax from the scope of the equality and uniformity clause. The language is that 'all property shall be taxed according to its value (ad valorem)' * * *so that taxes

> shall be equal and uniform throughout the State.' The requirement for equality and uniformity applies to taxes on property taxed according to its value or ad valorem. Such requirement is not imposed with respect to privilege taxes authorized in the next clause, nor is such requirement imposed in the following clause on the authorized 'tax on incomes derived from stocks and bonds not taxed ad valorem.' Both the privilege tax clause and the income tax clause are special provisions, exceptions to the ad valorem tax clause, clear of the restrictions contained in the ad valorem tax clause." * * * * *

See also Conner vs. State (Sup. Ct. New Hampshire) 130 Atl. 357. Appeal of Van Dyke (Sup. Ct. of Wisconsin), 259 N. W. 700.

And in the case of Diefendorf vs. Gallet (Sup. Ct. Idaho) 10 P. (2d) 307, L. c. 317, the Court said:

> "None of the classifications complained of are objectionable. State ex rel. Knox vs. Gulf, M. & N. R. Co., 138 Miss. 70, 104 So. 689. The Supreme Court of the United States, in construing the Federal Income Tax, has uniformly sustained the progressive graduation of tax, and the differences in exemptions and rates of tax as applied to individuals and corporations. Brushaber vs. Union Pacific R. Co., 240 U. S. 1, 36 S. Ct. 236, 60 L. Ed. 493, 504 L.R.A. 1917D, 414, Ann. Cas. 1917B; Fort Smith Lumber Co. vs. Arkansas, etc., 251 U.S. 532, 40 S. Ct. 304, 64 L. Ed. 396, 399. Credits allowed to individuals are based upon the need of reserving to them unimpaired an income adequate to provide the necessities of life (In re Opinion of the Justices, 84 N.H. 559, 149 A. 321), a purpose which cannot be applied to corporations. See, also, Stanley v. Gates, 179 Ark. 886, 19 S. W. (2d) 1000. The progressive form

> of tax has been upheld in State vs. Frear, 148 Wis. 456, 134 N.W. 673, 135 N. W. 164, L.R.A. 1915B, 569, 606 Ann. Cas. 1913A, 1147, and Shields vs. Williams, 159 Tenn. 349, 19 S. W. (2d) 261.* * * **

The Supreme Court of Missouri in 1932 in the case of Bacon vs. Hanson, 56 S. W. (2d) 786, likewise passed upon this question. Judge Ragland said:

> "As to its contravention of the uniformity provision, we said: 'The Constitution (section 3, art. 10) provides 'taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects,' etc. By necessary implication this constitutional provision recognizes the power of the Legislature to classify the subjects falling within its restriction, and only requires that the tax shall be uniform upon the classified persons, or the classified subjects of taxation. In the Missouri act under review, persons, corporations, and entities are distinguished and classified. The act also provides a classification as to the amount of the portion of the net income of each class of persons, corporations, or entities which is subject to taxation therein. The act further provides for the payment of an identical rate of taxation upon each of the classifications of income subject to its burden, and that each person, corporation, or entity shall pay the same tax which is paid by every other person, corporation, or entity belonging to the same class. That the Legislature had the power to create such classification, is implied by the very terms of the provision of the Constitution (section3, art. 10) that taxes thereunder shall be uniform upon the same class of subjects. Necessarily

> this language would be meaningless unless interpreted to empower the Legislature to create distinct classes of 'subjects.' In the act under review it is not even contended 'conceding the power to levy the tax) that the provisions distinguishing the persons and grading the tax to be paid in accordance with such distinctions are not founded in reason, in justice, and for the utility of the public--the true criteria which should govern all legislative action. Indeed, the essential justice of the various classifications of the act seems to be evident.'" * * *"

CONCLUSION.

In view of the foregoing, it is the opinion of this Department that the exemption provided for in Section 10117 as to dividends received by one corporation from another corporation, is not arbitrary nor discriminatory and does not violate Section 3 of Article X of the Constitution of the State of Missouri. This classification between corporations and private persons is reasonable and within the power of the General Assembly of the State of Missouri. Whether the exemption should or should not be provided for by law is not ours to determine, the propriety, wisdom and expediency of legislation being exclusively a matter for the Legislature.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:MM



SALESTAX: A contract of sale made by parties within the State of Missouri of merchandise to be shipped from outside the State, involves interstate commerce and is exempt from the tax.

11-20

November 19, 1935.

FILED
86

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of October 9 wherein you submit to this department for a ruling the question of whether or not a car load of milk bottles would be subject to the tax under the conditions as outlined in your letter, which is as follows:

> "A, a foreign corporation, authorized to do business in Missouri, and having a jobbing house in St. Louis, enters into a contract with the Central Dairy at Columbia, Missouri to furnish the Dairy a car load of milk bottles. The contract specifies that the bottles are to be manufactured for the Central Dairy with the name Central Dairy on the bottles. The contract also specifies that the bottles may be shipped direct from the factory to the Central Dairy. 'A' causes the bottles to be manufactured by a manufacturer located outside the State of Missouri, and the bottles are shipped direct from the factory outside the State to the Central Dairy at Columbia, Missouri.
>
> "'A', the jobber in St. Louis, bills the Central Dairy for the milk bottles and receives remittance from the Central Dairy. 'A', the jobber in St. Louis, pays the factory for the bottles.
>
> "The question, is this a sale made in interstate commerce and therefore not subject to the Missouri sales tax?"

You have very kindly called the attention of this department to several decisions which appear to be in point.

In the case of Federal Trade Commission v. Pacific States P.T. Asso., 273 U.S. l.c. 64, the Court discusses a contract and transaction similar to the one here involved, in the following language:

> "Paragraph (c) applies only to mill shipments from one state to another. For the consummation of a transaction involving such a shipment, two contracts are made. The first is for sale and delivery by wholesaler to retailer in the same state. The seller is free to have delivery made from any source within or without the state. The price charged is that fixed by the local association. The other contract is between the wholesaler and the manufacturer in different states. There is no contractual relation between the manufacturer and retailer. By the shipment of the paper from a mill outside the state to or for the retailer, the wholesaler's part of the first contract is performed. The question is whether the sale by the wholesaler to the retailer in the same state is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer. 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' Swift & Co. v. United States, 196 U.S. 375, 398, 49 L. Ed. 518, 525, 25 Sup. Ct. Rep. 276. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. Dozier v. Alabama, 218 U.S. 124, 128, 54 L. Ed. 965, 967, 28 L.R.A. (N.S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transporta-

> tion, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. Dahnke-Walker Mill. Co. v. Bondurant, 257 U.S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; Lemke v. Farmers Grain Co., 258 U.S. 50, 55, 66 L. ed. 458, 462, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling) 262 U.S. 506, 515, 67 L. ed. 1095, 1100, 43 Sup. Ct. Rep. 643. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. Cf. Dozier v. Alabama, supra; Western U. Teleg. Co. v. Foster, 247 U.S. 105, 113, 62 L. ed. 1006, 1015, 1 A.L.R. 1278, P.U.R. 1918D, 865, 38 Sup. Ct. Rep. 438; Lemke v. Farmers Grain Co., supra, 55 (66 L. ed. 462, 42 Sup. Ct. Rep. 244). The election of the seller to have the shipment made from a mill outside the state makes the transaction one in commerce among the states. And on these facts the sale by jobber to retailer is a part of that commerce."

As the decision in the case of Sonneborn Bros. v. Cureton, 262 U.S. 506 is referred to and the holding therein contained in the Federal Trade Commission Case, supra, we will make no further reference to it.

The case of Banker Bros. Co. v. Pennsylvania, 222 U.S. l.c. 214 bears strongly on the right to tax sales as in the instant case, and the Court said:

> "It is contended that Banker Brothers Company were agents and the Pierce Company an undisclosed principal. It is urged that the sale was an interstate transaction between the manufacturer and the purchaser, with Banker Brothers Company merely acting as an agent which looked after the delivery of the machine and collected the purchase price.
>
> "This is one of the common cases in which parties find it to their interest to occupy the position of vendor and vendee for some purposes under a contract containing terms which, for the purpose of restricting sales and securing payment, come near to creating the relation of principal and agent. But, as between Banker Brothers Company and the Pittsburg purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him, and under the duty of paying to the state a tax on the sale.
>
> "The name of the Pierce Company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Brothers Company, with whom alone he dealt. If he had failed to complete the purchase, the Pierce Company would have no right to sue him on the contract. The fact that he was liable for the freight by virtue of the agreement to 'pay the list price F.O.B. factory' did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because, with the machine, Banker Brothers Company also delivered to the buyer in Pittsburg a warranty from the

manufacturer direct.

"These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser in Pittsburg, who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city, or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See American Steel & Wire Co. v. Speed, 192 U.S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365; American Exp. Co. v. Iowa, 196 U.S. 146, 49 L. Ed. 423, 25 Sup. Ct. Rep. 182. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania."

There is, however, this controlling difference in the Banker Bros. Case and the instant case - the contract in the instant case specifies that the bottles are to be shipped direct from the factory to the user, while in the Banker Bros. Case it was not specified that there was a third party or that the automobile in question was to come from outside the state; therefore, as said in the Federal Trade Commission Case, "such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse, and it includes the buying and selling of commodities for shipment from one state to another." And further, "If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states."

CONCLUSION

In view of the Federal Trade Commission decision, supra, we are of the opinion that the transaction mentioned in your letter is not subject to the sales tax for the reason that it tends to burden interstate commerce.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

WARRANTS: The warrants in question cannot be paid out of the revenue of 1935.

February 13, 1935. 2-16

FILED
87

Hon. R. A. Starling,
Prosecuting Attorney,
Miller County,
Tuscumbia, Missouri.

Dear Sir:

This department has received your letter of January 23rd, containing the following request:

"I would appreciate an opinion on the following matter:

"In October 1933 the county court of this county issued warrants on the general road fund of the county in the amount of $3,062 in payment of right of way for farm to market road much of which was located in a special road district. At the time the warrants were issued there was little or no money in this general road fund and the amount so issued was far in excess of the revenue provided for that fund for that year. Money did not come into the fund for the payment of the warrants for that year and on March 9th. 1934 more warrants were issued in the amount of $3,062.00 to take up these old warrants. This amount was again far in excess of the revenue provided for the general road fund for the year 1934. The warrants have not yet been paid. I should like to know if the court can put this amount in this year's budget and pay these warrants out of the revenue provided for this year. If so, in what class of the 1933 budget law does this come.

"Further does Sec. 8131, R. S. 1929 give the county court the right to purchase right of way for "farm to market" roads or state highway out of general road funds of the county when such right of way is located in a special road district or are they limited to purchase of same outside of the special road district. I am asking this because it appears that under the budget law above referred to class three is the only class provided for road moneys and that is restricted to use outside of the special road district."

I.

Under Section 4, Page 343, Laws of Missouri, 1933, entitled County Budget Act, it is the duty of the county clerk not later than the first day of February of each year to prepare certain data. This section contains the following paragraph:

> "Total unpaid obligations of the county on January 1st of current year. This shall include unpaid warrants and the outstanding bills for which warrants may issue."

In the decision of the case of Kansas City, Fort Scott & Memphis Railroad Company v. Thornton, 152 Mo. l.c. 575, the court, in speaking on the question of using the revenue for a current year to take care of a deficit of a previous year, said:

> "If the revenue collected for any year for any reason does not equal the revenue provided for that year and hence is not sufficient to meet the warrants issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the warrants drawn and debts contracted for such other year have been paid, or in other words, only the surplus of revenue collected for any one year can be applied to the deficit of any other year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debt of a previous year, The intended effect of all which is to abolish the credit system and to establish a cash system in public business."

Relating to the funds out of which warrants, such as mentioned in your letter, may be paid, the court said in the case of State ex rel. v. Johnson, 162 Mo. l.c. 621:

> "A county warrant valid when issued is not rendered invalid because the revenue provided to pay it is not collected during the year in which it was issued, or is misappropriated by the officers of the county for whose act the holder of the warrant is not responsible. On the contrary, the surplus county revenue remaining after the payment of all current expenses of every kind for the year for which such revenue was levied and collected, may be used in the payment of outstanding valid unpaid county warrants for previous years."

A further decision bearing on the matter is that of the case of Trask v. Livingston County, 210 Mo. l.c.599, in which the court said:

> "But confining ourselves to the facts in evidence and the statute governing the building of bridges, as already said the statute required the county court to make an appropriation before the Road and Bridge Commissioner let the contract. The record shows that the county court on the 5th of September, 1889, made an appropriation to pay for the building of the bridges. Now, out of what revenue was it authorized to make this appropriation, that of 1889 or that of 1890? We think the Constitution answers this question: they could only make it out of the revenue of 1889, and in this particular case this conclusion is reinforced by the fact that the bridges contracted for were to be completed in the year 1889, and as the obligation was incurred in 1889 and the bridges were to be built in that year and the appropriation was made in that year, we think there can be no escape from the conclusion that the indebtedness thereby created was a charge against the revenues provided for the year 1889, and not the revenues of 1890. Clearly the county court was not authorized to appropriate revenues which were to be derived from taxation in the year 1890, when such taxes had never been assessed, levied or collected. While the county court may in any one year draw warrants, after the revenue has been provided and the taxes levied within the scope of the levy and income for such year, it is too plain for argument that the Constitution forbids the anticipation of the revenues of any subsequent years; If not, all that has been said in regard to the force and effect of section 12 of article 10 of the Constitution to the effect that its purpose was to put counties upon a cash system instead of the old credit plan, has been in vain."

The County Budget Act, for the purpose of permitting efficiency and economy in county government, qualified the expenditures and funds of the counties with a population of less than fifty thousand inhabitants into six classes, making each class a priority over the succeeding class, with the exception of classes five and six, designating specifically the purpose of the fund to be set aside and apportioned.

Class Six contains the provision "that if there be outstanding warrants constituting legal obligations, such warrants shall be paid before any expenditure", as authorized under Class Six.

CONCLUSION.

It is the opinion of this department that the warrants in question may be paid out of Class Six, if any funds remain in that class, after the priorities are adequately and sacredly preserved in the other five classes, or if at any time during the course of the year there can be determined with any decree of safety a surplus will result in any of the prior classes, said surplus may be used, provided it does not jeopardize the priorities in the other classes. In other words, as was said in Bank v. Johnson, quoted supra, the surplus county revenue remaining after the payment of all current expenses of every kind for the year for which such revenue was levied and collected may be used in the payment of outstanding valid unpaid county warrants for the previous years, and, of course, the delinquent taxes from the road funds of prior years may be used towards paying the warrants.

II.

Regarding the question of the county court's right to pay for right-of-ways for farm to market roads when located in special road districts, this department rendered an opinion bearing on this question to Hon. C. R. Marsden, Hillsboro, Missouri, a copy of which is herewith enclosed, and we believe that the same properly answers the inquiry contained in Paragraph 2 of your letter.

Respectfully submitted,

OLLIVER W. HOLEN,
Assistant Attorney-General

APPROVED:

Roy McKITTRICK
Attorney-General

OWH/LD

GAMBLING - Lottery, gift enterprises.

March 29, 1935.

3-30

FILED
87

Honorable C. Spannagel
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Sir:

We have your two requests of March 23, 1935 for an opinion, which are as follows:

> "I am writing to you with reference to something in the nature of a lottery that is going on in the city of Lebanon, Laclede County, Missouri, whereby the Lyric Theatre is alloting numbers to those who attend the show on various nights. On Friday night of each week, a drawing is held and if the person holding the lucky number is present, a prize in money is alloted to him.
>
> "I am writing to you with reference to something in the nature of a lottery that is going on in this town. It seems that an orgamization of business men have instituted a plan in the nature of a game whereby they give away tickets with purchases of goods, and on a certain day named in advance a drawing is held and a prize is awarded to the winner."

We refer you to the provisions of Section 4314, R. S. Mo. 1929, which covers the establishment of any lottery,

gift enterprise. The three essential elements under the above statute are consideration, chance, and prize. State v. Emmerson, 1 S. W. (2d) 109.

I am enclosing with this opinion a copy of an opinion written by this office on April 12, 1934 holding "Bank Nights" in theatres to be a violation of the lottery law.

In State ex rel. v. Meyer Tailoring Co., 25 S. W. (2d) 98, it was held that the arbitrarily maturing certificates for suits of clothes was in violation of the lottery law of this State.

It is, therefore, the opinion of this office that the drawings held at the Lyric Theatre are in violation of this lottery statute; that the other plan of giving away tickets with purchases of merchandise is also a violation of the above section as a gift enterprise.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE
Enc.

GRAIN INSPECTION AND WEIGHING DEP'T.: Suggestions for group insurance.

4-26

April 18, 1935.

FILED
87

Grain Inspection & Weighing Dep't.,
State of Missouri,
317-326 Board of Trade Bldg.,
Kansas City, Missouri.

Attention: Chief Clerk

Gentlemen:

This department is in receipt of your letter of March 26 requesting an opinion as to the following state of facts:

> "We have been trying for some time to get cheap insurance to cover the employees of this Department. We have found a group insurance which seems to meet these requirements so that all may be covered in case of death.
>
> However, this group insurance requires the employer to sign an agreement to pay any premium in excess of .60 per month per person (providing average age is over 35 years) as per example:

Age	Total Premium	Employee's Payment	Employer's Share
36	.59	.60	.00
37	.61	.60	.01
38	.63	.60	.03
39	.65	.60	.05
40	.67	.60	.07

> Could we form a mutual association of the employees of the Grain Department with J.B. Hopper, Commissioner, as our employer as president of the Association?"

The plan you have in mind is one that we should like to assist in developing. To our mind, there is no reason why it cannot be carried to completion, provided, the State of Missouri is not involved in any manner. In any form of group insurance it is necessary that there be an "employer" and an "employee". This relationship is fundamental. While it might be workable for Mr. Hopper to be the "employer" in the group insurance plan, it would not be possible for the Commissioner as such to be the "employer" in view of Section 47, Article IV of the Constitution of the State of Missouri, which provides:

> "The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association, or company; * * * * *"

It was the obvious purpose of the framers of the Constitution of 1875 to prevent counties, cities, towns, townships and all other political corporations or subdivisions of the state from venturing upon the uncertain seas of business activities and to confine their operations to matters concerning strictly public service.

The case of School District v. Twin Falls County Mutual Fire Insurance Company, 164 Pac. 1174 denied recovery on a policy issued by a mutual fire insurance company to a school district. The Constitution of the State of Idaho contains substantially the same provisions as the provisions in the Constitution of Missouri above set out. The Court, at page 1174 of the opinion, said:

> "In the case of Atkinson v. Board of Commissioners, 18 Idaho, 282, 108 Pac. 1046, 28 L.R.A. (N.S.) 412, this court, speaking of sections 2 and 4 of Article VIII of the Constitution, said:
>
> 'Section 2 prohibits the state in any manner ever becoming interested with any individual, association,

> or corporation in any business enterprise, and it likewise prohibits the state in any manner loaning its credit to the aid of such an enterprise or becoming a stockholder therein; * * * * "

CONCLUSION

In view of the foregoing, our suggestion to you is that, for the purpose of acquiring group insurance from some company authorized to do group insurance business in the State of Missouri, you form an association of your employees and institute that entity as the "employer", for the purpose of complying with the requirements of insurance companies with reference to group insurance, with the members of said entity assuming the position of the "employees". This form of organization is now in effect, we are informed, in the State Highway Department.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

MISSOURI OCCUPATION TAX ACT: Dairymen who engage in the business as their principal work are subject to pay the tax on their gross receipts if they sell their products to the ultimate consumer direct.

5-18

May 15, 1935.

FILED
87

Hon. R.W. Starling,
Prosecuting Attorney,
Miller County,
Eldon, Missouri.

Dear Sir:

This department is in receipt of your letter of May 12 wherein you request an opinion regarding the retailers' occupation tax of Missouri as it affects dairymen. Your letter is as follows:

> "Several dairymen of this county have been to see me about paying sales tax on the milk and other dairy products which they sell. They have the idea that since they own their own cows, raise most of their feed and do not buy any milk, they are exempt from paying the tax. * * * * *"

Since the passage of the retailers' occupation tax act, it has been generally accepted by the public that farmers were exempt from the provisions of the Act. This is an erroneous impression insofar as the Act itself is concerned. The Act contains no provision specifically exempting farmers; however, this department has consistently ruled that a person engaged in tilling the soil and producing certain commodities as a result of his own toil does not come underthe tax. The reasons therefor will follow.

Section 2 of the Retail Occupation Tax Act, Laws of Mo., Extra Session 1933-34, p. 157, is as follows:

> "For the privilege of a person engaging in the business of selling tangible personal property at retail a tax is hereby imposed upon such person at the rate of one-half of one per cent of the gross receipts of any such person from the sale of all tangible personal property sold in this state on and after the effective date of this act to and including December 31, 1935."

The expression "a person engaging in the business of selling tangible personal property at retail" is construed to mean that such person is regularly engaged in the business and that the same is his principal business.

Section 1-A of the Act (Laws of Mo. 1933-34, Extra Session, page 156) provides:

> "The isolated or occasional sale of tangible personal property, service, substance, or thing, by a person not engaged in such business does not constitute engaging in business within the meaning of this act."

Because farmers are not engaged in the business of selling tangible personal property, the products of the farm, such as butter, eggs, etc. should be classed as "occasional sales" when same are not regularly sold as a business, there being no specific exemption in the Act, and it is the opinion of this department that those so engaged are exempt from the payment of the tax.

The question of dairymen being subject to the tax presents a different matter. We will not argue the question of whether or not a dairyman is a farmer, as the same is not essential to the determination of the inquiry before us. The test appears to be as to whether or not a person is engaged in the business of farming in the ordinary conception of the occupation, or whether said person is engaged in selling tangible personal property in such a manner that it constitutes his vocation and in such a way that it would take him out of the "occasional sale" class. The fact that the dairyman produces his own feed and does not buy any milk would not remove him from the category of those engaged in the business of selling tangible personal property.

This matter is discussed at length in the case of Winter v. Barrett, 352 Ill., l.c. 461-463, wherein the Court said:

"It is argued as to the seller of farm products or produce, that his sales at retail of such property are not a part of the business in which he is engaged but are an incident thereto, namely: that his business is producing, and that he does not conduct the business of selling 'to the consumer for use and not for the purposes of resale in any form' as sales at retail are defined in the act; that this places him in a different class from the grocer or the clothier, whose business is to sell to the consumer, and he may be exempted from the class to which the act applies, and that such exemption is founded on fact, and therefore has a reasonable basis. It will be observed that the exemption of farm products or farm produce, when sold by the producer, from the category of tangible personal property exempts those selling those commodities from the operation of the act whether sales at retail by them are but an incident to their business of producing or are a part of the business of selling such property at retail in which they may be engaged.

"Counsel for the People cite in support of their argument that there is a valid reason for holding that farm products or produce and motor fuel and the sellers thereof at retail belong to a different class from that created by the language of the act, the case of American Sugar Refining Co. v. Louisiana, 179 U.S. 89. In that case the court had before it the question whether an act of the State of Louisiana requiring the payment of an annual license tax on all persons engaged in refining sugar and molasses denied equal protection of the laws because it provided that it should not apply to planters and farmers grinding and refining their own sugar and molasses nor to those planters who granulated syrup for other planters during the rolling season.

"It was held that while the act discriminated in favor of a certain class, the discrimination was founded upon a distinction in principle, in that its effect was to exempt producers from the taxation of the methods employed by them to put their produce upon the market, and that it lay within the power of the legislature to determine whether anything done to prepare a product more perfectly for the needs of the market should not be treated as an incident to its growth or production, and that the act did not deny to others engaged in a general refining business the equal protection of the laws.

"It may be conceded that the right to sell is an incident to the right to manufacture or produce, and where the producer of farm products or produce engages in the business of selling at retail but so sells only as an incident to his business of producing, it cannot be said that he is within the class to which this act applies, and therefore the uniformity provisions of the constitution do not require that he be taxed for such sales. This act has declared, in effect, that such producer does not belong to that class no matter how he sells such products or produce. The sales of farm products generally are not to the consumer, and therefore do not come into competition with those engaged in the business of selling such commodities at retail. The occasional sale of farm products or produce at retail by the producer to the consumer, or such sales of the surplus of his produce raised for his own use, cannot be said to put such producer into the business of selling such property at retail to the consumer. Many such producers do not engage in the business of selling to the consumer but sell generally to grain or produce merchants and cannot be classed with those in the business of selling tangible personal property at retail, for such is not their business. It is different, however, with the producer of farm products and produce, such as vegetables and the like, who not only conducts the business of producing

such produce, of which sales generally may be an incident, but who also conducts the business of selling his produce only to consumers at retail. It is a matter of common knowledge that there are many so engaged. He thus conducts the separate business of selling at retail in competition with other retail dealers in such commodities. He is in the business of selling tangible personal property at retail in addition to the business of producing, and the exclusion of such business from the operation of the act, under such circumstances, finds no basis in fact upon which he may be reasonably placed in a different classification from the general class of those engaged in the selling of tangible personal property at retail created by the act. He is of the class to which the act applies, just as the druggist who compounds and produces the proprietary remedies which he sells at retail is in that class, and so far as the act attempts to exclude him from its provisions it is not uniform in its application to the class on which it operates and cannot be sustained."

CONCLUSION

It is the opinion of this department that where a person is engaged in the dairy business wherein the same is carried on as his principal business and not incidental to general farming, the gross receipts are subject to the tax, provided the person sells his products direct to the ultimate consumer or user. If the dairyman sells his products to stores and they are in turn to be sold to the ultimate consumer, then, in that event the receipts from such sales should not be included as part of the gross receipts for the reason that the same would constitute sales for resale, and such sales are specifically exempted in Sec. 1 of the Act (Laws of Mo. 1933-34, Extra Session, p. 156).

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

CITIES: City of the third class may require all persons handling food to take a physical examination.

6-76

June 22, 1935

FILED 87

Mr. George A. Spencer
City Attorney
Columbia, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "We have a proposition here in the City of passing an ordinance requiring all persons handling food to have a physical examination at their own expense. I am wondering if you would be kind enough to give me an opinion as to whether the City can make this requirement or not."

Section 6803 Revised Statutes Missouri 1929, which is applicable to the City of Columbia, specifically gives the mayor and council of cities of the third class the power to pass ordinances for the benefit of the health of the inhabitants. Said section reads as follows:

> "The mayor and council of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of

> trade and commerce, and the health of the inhabitants thereof,and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

Section 6807 Revised Statutes Missouri 1929, provides, in part:

> "The council may make regulations and pass ordinances for the prevention of the introduction of contagious diseases into the city, * * * * * * * * *."

43 Corpus Juris, Section 207, page 207, states the law,in regard to a city's right to pass ordinances for the preservation of the health of the inhabitants thereof, as follows:

> "The preservation of the health of the population is uniformly recognized as a most important municipal function. It is not only the right but the duty of a municipal corporation possessing the police power to pass such regulations as may be necessary for the preservation of the health of the people; * * * * * * * *."

Section 446, at page 372 of the same Volume , states the law as follows:

> "Municipal corporations may require that persons engaged in handling food products offered for sale subject themselves to medical examinations, and may prohibit the employment of persons suffering with infectious or contagious diseases."

The case of Langley v. City of Dallas 252 S. W. 203, was an injunction to restrain the enforcement of an ordinance

which required all those engaged in operating food establishments, including grocery stores, to have medical examinations of themselves and their employees made at intervals of not more than six months. The court upheld the validity of the ordinance and refused the injunction. At l. c. 203 and 204, the court said:

> "The charter grants the city the power 'to enact and enforce ordinances necessary to protect health, life, and property, * * * to protect the lives, health, and property of the inhabitants of said city; * * * and it shall have and exercise all powers of municipal government not prohibited by this charter,or by some general law of the state of Texas,or by the provisions of the Constitution of Texas.' This charter language is an express delegation of authority to enact the ordinance. It passes to the municipality the inherent police power to regulate the sale of food, including the power to regulate the places of such sales and the power to impose reasonable restrictions and requirements upon those who personally handle food products at such places.
>
> The city having been expressly clothed by the Legislature with the power to pass the ordinance, its act in passing it must be accorded the dignity and respect to be ascribed to any legislative act expressing the inherent police power of government. The legislative right and power to regulate the sale of articles of food is well established and now universally recognized. Such legislation does not transcend the inhibitions of constitutions against depriving citizens of privileges, immunities, and property without due process of law. Persons and property are subjected to restraints and burdens by it, but the presumption is that for the restrictions thus imposed they are compensated by the benefits and securities derived therefrom by the public in general. Furtherance of the protection of public health in a large

city is a paramount function of the municipal government, especially when he municipality receives the authority expressed by the charter provision above quoted.

The ordinance complained against is not patently arbitrary. We cannot say from the general knowledge or common experience of mankind, nor by any other proper test, that the ordinance inflicts an unreasonable and unnecessary destruction of either property or personal rights upon those to whom it applies. In such circumstances courts cannot undertake to determine the question of the necessity for the regulations imposed. That question, under these conditions, is one of legislative policy belonging exclusively to the board of commissioners.

The ordinance applies uniformly and without distinction or discrimination to all those of the classes affected and regulated by it in the interest of the public health, and hence does not contravene the constitutional provision for the equal protection of the law.

The ordinance has been held to be a valid and constitutional enactment by our Court of Criminal Appeals. Ex parte Vaughan (Tex. Cr.App.) 246 S. W. 373. Also see Hanzal v. City of San Antonio (Tex. Civ. App.) 221 S.W. 237. In this case an ordinance of a similar nature was upheld by the San Antonio Court of Civil Appeals, and the theory and principle which sustain such ordinances as that here under consideration are fully treated."

CONCLUSION

In view of the above, it is the opinion of this Department that an ordinance passed by a city of the third

class, requiring all persons handling food to take a physical examination at their own expense, would be a valid exercise of such city's power to preserve the health of the inhabitants of such community and to prevent the introduction of contagious diseases into said city.

Very truly yours,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

JET:LC

NON-INTOXICATING BEER: "Set ups" are not prohibited under the provisions of Non-Intoxicating Beer Act.

8-27

August 27, 1935.

FILED
87

Hon. H. W. Starling
Prosecuting Attorney
Miller County
Eldon, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "I have been asked to rule on whether a person holding a permit for the retail sale of 3.2 beer by the drink can also sell soda water, ice and etc. as 'set ups'. My attention has been called to the fact that Secs. 13139-Z-1, 13139-Z-17 and 13139-Z-21 do not prohibit such sales and it occurs to me that this is probably true.
>
> "I would appreciate an opinion as to just what a permittee can do with regard to selling 'set ups'."

There is no provision under the Non-intoxicating Beer Act that prohibits the sale of ice, soda water or any other liquids as "set ups" by a licensee holding a permit for the sale of malt liquor not in excess of 3.2% by weight.

It is our opinion that a holder of a permit for the sale of 3.2 non-intoxicating beer at retail is not prohibited from the sale of "set ups" on the premises covered by such permit. We wish to call your attention to Section 13139-Z-1 of the Non-intoxicating Beer Act relating to the increasing of the alcoholic content of non-intoxicating beer by any person on the premises described in the permit. This section makes it the duty of the licensee to use every precaution in preventing the increasing of the alcoholic content of non-intoxicating beer.

Your attention is further directed to Section 13139-Z-17 relating to the keeping, storing or secreting of intoxicating liquor upon the premises described in any permit by a licensee and also that the licensee shall not knowingly allow any other person, while upon the premises, to violate any law of this State.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

CIRCUIT CLERKS FEES - For order opening or closing court.

9-17

September 13, 1935

FILED
87

Honorable Guy M. Sone
Circuit Clerk
Cole County
Jefferson City, Missouri

Dear Sir:

We have your request of September 9, 1935 for an opinion, which request is as follows:

> "On each day of Court I carry an order of the Circuit Judge ordering the opening of Court and also one for closing Court.
>
> "Will you kindly advise as to whether or not the Circuit Clerk is entitled to collect from the county the usual 50¢ for each order of the Court?"

In answering your inquiry, we call your attention to pertinent parts of some of the statutes involved:

Section 1832, R. S. Mo. 1929:

> "Full entries of the orders and proceedings of all courts of record of each day shall be read in open court on the morning of the succeeding day, * * "

Section 11785, R. S. Mo. 1929 in part provides:

> "The clerks of the several circuit courts of this state * shall receive in all civil proceedings the following fees for their services:
>
> * * * * *
>
> "For all orders not herein provided for . . . . . $.30 "

Section 1940, R. S. Mo. 1929:

> "All expenditures accruing in the circuit courts, * shall be paid out of the treasury of the county in which the court is held, in the same manner as other demands."

Thus, from the above, it appears that the clerk must enter daily all records of the court, and keep a record thereof, and for such orders a specified fee is allowed, which is taxed against the county.

The necessity for an order opening court is shown by the provisions of Section 1849, R. S. Mo. 1929, which provides that if any court shall not be held on the first day of any term, such court shall stand adjourned from day to day, until the third day, at which time, under Section 1850, it shall be the duty of the sheriff to adjourn the court to the next regular term or to such special or adjourned term as the judge shall direct. Thus, an order opening court is essential at the beginning of the term. Since courts are not in session during term time for the entire day, it would appear to be proper for the court to fix by order the opening and closing of each day of court.

Although the above statutes do not specifically require an order opening and closing court,

it is very clear that the opening and closing of court is a matter within the control of the circuit judge, and is necessary for the transaction of court business, and the authority of the circuit judge to make such orders for the opening and closing of court each day may be implied from the general powers and duties imposed upon a circuit judge. That which is implied in a statute is as much a part of it as what is expressed. State v. Riedel, 46 S. W. (2d) 131.

It is, therefore, the opinion of this office that the circuit clerk is entitled to a fee of thirty cents (30¢) for entering an order opening or closing a daily session of circuit court, and that such liability for the payment of such fee is placed upon the county.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FE

COUNTY HIGHWAY COMMISSION - May not appoint more than two commissioners from same county court district; quo warranto is proper remedy to try title to office.

1-29

January 16, 1935.

FILED
88

Hon. Louis V. Stigall,
Chief Counsel,
Mo. State Highway Dep't.,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

> "The term of William Dunn, formerly a member of the Henry County Highway Commission, expired in 1934. He refused reappointment. He was a member from the North judicial district. Despite the fact that the County Court had pointed out to them that the law prohibits appointment of more than two members from each district to the Commission, they named a man from the extreme southwestern part of the county--Claude Lampkin, of Montrose--to the vacant position.
>
> Is not the appointment void? Will the fact that it is void invalidate acts of the Commission?"

Preliminary to turning to the pertinent statutes and cases construing these statutes, we wish to submit for your consideration the general rule respecting the validity of the acts of officers de facto, which rule is as follows: The exercise of a power by an officer de facto, either judicial or ministerial, which lawfully pertained to the office of which he had possession, is valid and binding, where it is for the interest of the public, or of any individual, except the officer himself, to sustain the officer's act; but where the officer himself founds a right upon such exercise, either personally or officially,

it is not valid in his favor. (Throop's Public Officers) However, as was early decided in the case of People v. Nostrand, 46 N.Y. 357, "where a person sets up title to property, by virtue of an office, and comes into court to recover it, he must show an unquestionable right. It is not enough that he is an officer de facto, that he merely acts in the office; but he must be an officer de jure, and have a right to act."

I.

At the outset, it would appear not inappropriate to observe that an appointee of a county highway board is a public officer within the meaning of that term as frequently judicially defined. In the case of State ex rel. v. Morehead, 256 Mo. 683, l.c. 690-691, the Court said:

> "Under the express statute, therefore, creating the position of a member of the highway board and in the light of the reasons stated in the cases above cited, an appointee to this position, upon qualifying, becomes a public officer, the act of his creation not only stating his term but definitely defining his duties."

II.

While the facts as presented to us in the rescript heretofore set out do not clearly so indicate, we take it that the County Court of Henry County, in the appointment of one Claude Lampkin to the County Highway Commission, has appointed more than two of said commissioners from the same county court district. Conceding, then, that this be a fact, we can but conclude that the County Court was without the authority to make the appointment, Section 7857, R.S. Mo. 1929, in part, expressly providing: "Not more than two of said commissioners shall be appointed from the same county court district. ****"

However invalid the appointment may be, nevertheless, the acts of the Commission will not thus be invalidated.

> "While an appointment will be presumed to have been made in accordance with the law, at the same time the appointing power must comply with the formalities prescribed by law in order that an appointment be valid, and the

> appointment of an ineligible person is an absolute nullity, except that the official acts of such a person are regarded as the acts of an officer de facto, and cannot be validated either by ratification or recognition."
>
> 46 Corpus Juris, Sec. 63, p. 950.

Judge Scott, in the early case of St. Louis County Court v. Sparks, 10 Mo. 80, decides this question most convincingly (l.c. 82-93):

> "****When the appointing power has made an appointment, and a person is appointed who has not the qualifications required by law, the appointment is not therefore void. The person appointed is de facto an officer; his acts in the discharge of his duties are valid and binding. He may be guilty of usurpation, and be punished for acting without being qualified; but the peace and repose of society imperiously require that his official acts, so far as others are concerned, should be valid. ****"

III.

Article II, Chapter 42 of the Revised Statutes of Missouri, providing for the creation of a County Highway Commission, does not provide for the removal of a commissioner by a county court once the appointment has been made. Section 1618, R.S. Mo. 1929, however, provides that an action in quo warranto may be brought against any person who shall usurp, intrude into or unlawfully hold or execute any office or franchise.

One of the more recent cases wherein this section was considered is that of Civic League v. City of St. Louis, 223 S.W. 891. In that case Henry L. Weeks had been holding the position of Superintendent of Excavation in the City of St. Louis. The city charter provided for an examination to be held and an eligible list to be prepared containing the names of those having the requisite qualifications. One W. J. McKenzie had been certified as eligible , but the street commissioner refused to appoint him and retained the defendant Weeks. The Court held that

injunction was not the proper remedy to correct the situation and particularly pointed out what is now Section 1618, R.S. Mo. 1929 as the proper procedure:

> "The jurisdiction of a superintendent of excavation in the City of St. Louis is coextensive with the boundaries of said city. He has superintending control over all excavations therein. He is paid out of the treasury of said city, and from its funds. His duties relate to the public welfare of said municipality, and we can conceive of no good reason for holding that the provisions of the statute heretofore quoted, should not apply to this office, as well as to any other office of said city. The statute, supra, affords a speedy and complete remedy, without resorting to a court of equity. Under its provisions, the right of the incumbent to hold the office can be inquired into, and his removal obtained, if he is wrongfully holding same. The fact that the incumbent is holding said position at the pleasure of the street commissioner presents no obstacle in the way of contesting his right to hold the position under above statute. **** The above statute is not only sufficient to cover the present case, but it has been the established doctrine of this court from its earliest history that an information in the nature of a quo warranto was a proper remedy to determine the title to an office. *****

CONCLUSION

In view of the foregoing, it is the opinion of this department that the appointment to the County Highway Commission of one not qualified is not void. The person appointed is de facto an officer and his acts in the discharge of his duties are valid and binding.

It is our further opinion that an information in the

nature of a quo warranto is the proper remedy to determine the title to an office.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

CLERK OF THE HANNIBAL COURT OF COMMON PLEAS: - Compensation to be received after the first Monday in January, 1935.

2-2

January 31, 1935.

FILED

Hon. Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

This is to acknowledge receipt of your letter dated January 8, 1935, requesting an opinion, which reads as follows:

> "The opinion of this office has been requested by the County Court of Marion County, as to the status of the Clerk of the Hannibal Court of Common Pleas relative to salary. It is contended that under the terms of sections 11786, 11808, 11811, 11812 and 11814, of the Laws of Missouri, 1933, found on page 369 repealing the so-called salary sections pertaining to Circuit Clerks that this office is on a fee basis. In this behalf your attention is called to the fact that the Hannibal Court of Common Pleas has territorial jurisdiction of only two townships in Marion County, the population of which is approximately twenty-five thousand.
>
> "Section 14540 R. S. Mo. 1929 and following sections that deal with the creation and existence of the Hannibal Court of Common Pleas has a salary statute, to-wit, 14563, and it is my opinion that because this section has never by implication been repealed, that it is applicable to our local situation and that the salary of our Clerk should be governed thereby. The opinion of your office would be greatly appreciated on this question."

Prior to the first Monday of January, 1935, the Clerk of the Circuit Court received a salary under the provisions of Sections 11786 and 11813, R. S. Mo. 1929. After the first Monday of January, 1935, the Circuit Clerk will receive as compensation for his services fees not to exceed the amount specified in Section 11786, Laws of Missouri, 1933, page 369. Said section provides:

> "The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. In counties having a population of less than 7,500 persons, the sum of $1000.00; in counties having a population of 7,500 and less than 10,000 persons, the sum of $1100.00; in counties having a population of 10,000 and less than 12,500 persons, the sum of $1300.00; in counties having a population of 12,500 and less than 15,000 persons, the sum of $1500.00; in counties having a population of 15,000 and less than 17,500 persons, the sum of $1700.00; in counties having a population of 17,500 and less than 20,000 persons, the sum of $1900.00; in counties having a population of 20,000 and less than 25,000 persons, the sum of $2100.00; in counties having a population of 25,000 and less than 30,000 persons, the sum of $2300.00; in counties having a population of 30,000 and less than 70,000 persons, the sum of $2500.00; in counties having a population of 70,000 and less than 80,000 persons, the sum of $3000.00; provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be considered as one for the purpose of this section; provided, further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees

> earned by them in cases of change of venue from other counties; provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

Section 14563, R. S. Mo. 1929, which applies to the Clerk of the Hannibal Court of Common Pleas reads as follows:

> "The clerks of the circuit courts of this state shall receive for their services, annually, the following sums: In counties having a population of 7,000 persons and less than 10,000 persons, the sum of eleven hundred dollars; in counties having a population of 10,000 persons and less than 15,000 persons, the sum of twelve hundred and fifty dollars; in counties having a population of 15,000 persons and less than 20,000 persons, the sum of sixteen hundred dollars; in counties having a population of 20,000 persons and less than 25,000 persons, the sum of nineteen hundred and fifty dollars; in counties having a population of 25,000 persons and less than 30,000 persons, the sum of two thousand dollars; in counties having a population of 30,000 persons and less than 40,000 persons, the sum of two thousand dollars; in counties having a population of 40,000 persons and less than 100,000 persons, the sum of twenty-five hundred dollars; in counties having a population of 100,000 persons and less than 300,000 persons, the sum of three thousand dollars. In counties having a population of less than 7,000 persons the clerk shall receive no salary, but shall be allowed to retain all fees earned by him, out of which he shall pay his deputies and assistants: Provided, that the provisions of this law shall not apply to any county wherein the clerk of the circuit court is ex-officio recorder of deeds of said county; and provided further, the provisions of this law shall not apply

> to any county which now contains or may hereafter contain a city of 75,000 inhabitants or more, or to any county which now contains or may hereafter contain 80,000 inhabitants and less than 150,000 inhabitants, in which circuit court is held in two or more places in said county. For the purposes of this law the population of any county shall be determined by multiplying by five the total number of votes cast in such county at the last presidential election prior to the time of such determination: Provided, that the provisions of this law shall also apply to clerks of courts of common pleas in all counties in this state which now or may hereafter have a population of not less than 30,000 people and not more than 40,000 people, and which said courts of common pleas now have and exercise or may hereafter have and exercise within well defined territorial limits within their respective counties the same exclusive original jurisdiction in both civil and criminal actions as is now had and exercised by circuit courts of this state, and such clerks of courts of common pleas shall receive for their services, annually, the sum of two thousand dollars ($2,000)."

Unless Section 11786, Laws of Mo. 1933, has repealed Section 14563, supra, by implication, said section would still govern compensation of the Clerk of Hannibal Court of Common Pleas. It will be noted that Section 11786, supra, refers to "any clerk of the Circuit Court" but does not specifically mention Clerk of the Court of Common Pleas.

We call your attention to Section 656, R. S. Mo. 1929, which reads as follows:

> "Whenever the term 'circuit court'

> is used in any law general to the whole state, the same shall be construed to include 'courts of common pleas,' unless such construction would be inconsistent with the evident intent of such law, or of some law specially applicable to courts of common pleas."

In the case of Koehler v. Snider, 177 Mo., l.c. 556, the Court, in construing this section, said:

> "Counsel for defendants refer us to section 4161, Revised Statutes 1899, which provides that 'whenever the term "circuit court" is used in any law general to the whole State, the same shall be construed to include "courts of common pleas," unless such construction would be inconsistent with the evident intent of such law or of some law specially applicable to courts of common pleas.' And inasmuch as section 3627, Revised Statutes 1899, provides that 'injunctions may be granted by the circuit court or judge thereof in vacation," if we read into said section, 'common pleas court' instead of 'circuit court' the judge of said common pleas court would by express statute be given the power in vacation to issue writs of injunction. But by recurring to section 4161, Revised Statutes, 1899, it will be observed that the words 'common pleas' is not to be read into the statute if by so doing such a construction would be inconsistent with 'some law specially applicable to courts of common pleas.' As we are considering a statute 'specially applicable' to the Cape Girardeau Court of Common Pleas, and as that statute expressly provides that 'writs of injunction issued by the judge of said court shall be returnable to the circuit court,' it is quite obvious that section 4161 in no way enlarges the powers of the judge of the Cape Girardeau Court of Common Pleas, but is inconsistent with the special act creating that court."

In the recent case of State ex rel. Aquamsi Land Co., v. First National Bank of Cape Girardeau, (Sup. Ct.) No. 33,775, (not yet officially reported) the Court said:

> "Repeals by implication are not favored (Cooley's "Constitutional Limitations" (8th ed.) p. 316; Black on "Interpretation of Laws" (2d ed.) Sec. 107, page 351; 12 C. J., p. 710, n. 54; Endlich on "Interpretation of Statutes", Sec. 210, p. 280.) At page 281 in the authority last cited it is said: 'A rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict or liberal construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject."

In conclusion, it is our opinion that the following provision of Section 14563, supra, namely "*** the provisions of this law shall also apply to clerks of courts of common pleas in all counties *** which now or may hereafter have a population of not less than, 30,000 people and not more than 40,000 people, and which said courts of common pleas now have and exercise or may hereafter have and exercise *** exclusive original jurisdiction in both civil and criminal actions *** and such clerks of courts of common pleas shall receive for their services annually, the sum of two thousand dollars ($2000.),"

has not been repealed by implication and such governs as to the compensation of the Clerk of the Hannibal Court of Common Pleas.

Marion County has a population of 33,493 inhabitants according to the United States decennial census for 1930. The Hannibal Court of Common Pleas exercises original jurisdiction in both civil and criminal actions.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

JET/JLH:afj

SCHOOLS: Parent residing ondistrict school line to send children to school in district he deems himself a resident of.

5-7

May 4, 1935.

FILED 88

Hon. Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

This will acknowledge your request for an opinion as follows:

> "I have been requested to obtain a ruling from your office involving a school situation. The facts are that Tilden School operates under the consolidation statutes and this school comprises land both in Ralls and Marion County. A gentlemen whose name I can not now remember lives right on the school district line, that is the district line runs through the middle of his house. This gentleman has six children and in the past they have been attending Tilden School. To-day he was informed by the Superintendent of Tilden School that the Directors had instructed him to order the children not to come to Tilden School. The question involved is, in what school district are these children located for the purpose of attending school without the payment of tuition. For your information, I might add that some of the children sleep in the Tilden District and others sleep in the other district.
>
> "I realize this question is quite novel and I trust you will pardon my seeming presumption in asking your opinion, but I am advised that the directors of Tilden School will not change their opinion without a ruling from your office. Thanking you, I am "

We direct you to authorities which, in our opinion, govern the matter in question.

In the case of Johnson v. Smith, 43 Mo. loc. cit. 501, the Court said:

> "**** a man's domicile is where he has fixed his ordinary dwelling, without a present intention of removal, ****."

In discussing one's mental attitude, the Court in State ex rel. Ramey v. Dayton, 77 Mo. loc. cit. 682 said:

> "**** The physical act of staying must be accompanied with the mental determination of making a home or domicile in the place where the party stays or abides. ****"

In the case of In re Lankford Estate, 272 Mo. loc. cit. page 9, the Court stated:

> "Residence is largely a matter of intention. (Lankford v. Gebhart, 130 Mo. 621.) This intention is to be deduced from the acts and utterances of the person whose residence is in issue. ****."

In Trigg v. Trigg, 41 S. W. (2d) loc. cit. 589, the Court said:

> "**** We hold in accord with the general expression of the law that residence is largely a matter of intention evidenced by some act or acts in confirmity with such intention.****"

We now turn to the domicile of minors.

In the cases of Lacy v. Williams, 27 Mo. 280, Marheineke v. Grothaus, 72 Mo. 204; Lewis v. Castello, 17 Mo. App. 593; De Jarnett v. Harper, 45 Mo. App. 415; and Smith v. Young, 117 S. W. 628, the courts heretofore mentioned in effect have held that the domicile of the parents is

primarily the domicile of the minor children.

In light of the foregoing, it is the opinion of this department that residence and domicile, as we determine from the above, will govern in the instant matter. If a person's house is situated on a district school line, which line would place such person's house partly in one district and partly in another, we conclude that the parent, who has by his acts evidenced his intention of residence in a particular school district by sending his children to school in such school district, is a resident thereof; as well as his minor children, and such minor children shall attend school in the school district where the parent so deems himself to be a resident.

We further conclude that since such intent of residence has been demonstrated in the instant school district by the parent, that such minor children shall attend school therein without the payment of tuition.

Very truly yours,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

RCS/JET:afj

STATE HIGHWAY DEPARTMENT: Legal - Limitation in Sec. 1 of H.B. 277 "Not to exceed four attorneys" is unconstitutional and void.

June 12, 1935. 7-2-35

FILED
88

Hon. Louis V. Stigall,
Chief Counsel,
State Highway Department,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of June 1 requesting an opinion concerning the validity of certain language in an appropriation bill enacted by the 58th General Assembly of the State of Missouri. Section 1 of said Act (House Bill No. 277) provides as follows:

"A. Personal Service:

The per diem of the commissioners, the salaries of the chief engineer, assistant chief engineer, secretary, chief counsel, not to exceed four attorneys, bureau heads, assistant bureau heads, division engineers, assistant division engineers, special engineers, clerks, stenographers, bookkeepers, janitors and other employees.....$1,294,357.00."

The point involved is as to the constitutional validity of the limitation "not to exceed four" as provided in this section.

Section 8098, R.S. Mo. 1929 provides:

"The state highway commission shall select and fix the salary, which salary shall not exceed $6,000 per year of a chief counsel who shall possess the same qualifications as judges of the supreme court and who shall serve at the pleasure of the commission and shall appear for

> represent the commission in all actions and proceedings under this article or any other law administered by the highway commission, or in any decision, order or proceeding of the commission, or of the chief engineer and shall commence, prosecute or defend all actions or proceedings authorized or requested by the commission or to which the commission is a party, and shall advise the commission or the chief engineer, when requested in all matters in connection with the organization, powers and duties of the commission or the powers and duties of the chief engineer. The chief counsel shall, with the consent of the commission, appoint such assistant attorneys as the commission may deem necessary and their salaries shall be fixed by the commission. The legal department of the commission shall be furnished offices in the state highway building."

It will be noticed by a reference to the above section that the Chief Counsel shall, with the consent of the Commission, appoint such assistant attorneys as the Commission may deem necessary. While it is clear that the Legislature may, by a proper amendment to Section 8098, supra, limit the number of assistant attorneys to be employed by the State Highway Commission, nevertheless, the question before us is whether the Legislature may accomplish this result by means of an appropriation act.

Article IV, Sec. 28 of the Constitution of the State of Missouri provides:

> "No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of section forty-four of this article) shall contain more than one subject, which shall be clearly expressed in its title."

In the case of State ex rel. Hueller v. Thompson, (Supreme Court of Missouri) 289 S.W. 338, the court had before it the interpretation of this section of our Constitution, and said: (l.c. 340-341)

> "It is manifest that the real purpose of this provision was an undertaking to regulate, determine, and fix the salaries of all such officers or employees affected by the Appropriation Act whose compensation might not be fixed at all by statutory law, or, if at all, where the statute fixed a maximum only. This provision has no other character than that of general legislation, and to inject general legislation of any sort into an appropriation act is repugnant to the Constitution (article 4, sec. 28, Constitution of Mo.), and the appropriation bill, as provided by the Constitution (article 4, sec. 28, may have a plurality of subjects, while a bill for general legislation may have but one.
>
> An appropriation bill is just what the terminology imports, and no more. Its sole purpose is to set aside moneys for specified purposes, and the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations.
>
> * * * *
>
> "Here we have an appropriation act which not only appropriates money for the various subjects embraced therein, but which attempts to fix and regulate all salaries affected by the act which either have not been fixed by any statute, or not definitely fixed, which would include all salaries where the maximum alone was named. That the Legislature has the right by general statute to fix salaries is beyond question, but has it the right to do so by means of an appropriation act? We think not.
>
> * * * *

> "The question remains, does the invalidity of said section 100 render the entire Appropriation Act void? We hold that it does not. It is well settled that a legislative act may be void in part, leaving the remainder a good and valid statute, where the part that is valid may be separated from the part that is void. State ex rel. v. Gordon, 236 Mo. l.c. 170, 139 S.W. 403; State ex rel. v. Taylor, 224 Mo. 474, 123 S.W. 892."
> (Emphasis ours)

And in the case of State v. Smith, 75 S.W. (2d) 828, the Supreme Court of Missouri said (l.c. 830):

> "***Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend Section 13525, it would have been void in that it would have violated Section 28 of Article 4 of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as section 13525, and the mere appropriation of money are two entirely different and separate subjects. State ex rel. Hueller v. Thompson, State Auditor, 316 Mo. 272, 289 S.W. 338."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the limitation "not to exceed four", as incorporated in Section 1 of House Bill No. 277 making the appropriation of the State Highway Department is unconstitutional and void.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY MCKITTRICK,

JWH:AW

MOTOR VEHICLES AND LICENSES: Lessor owning and leasing truck to lessee for more than ten days must procure a license.

6-22

June 20, 1935.

FILED
88

Honorable V. H. Steward,
Commissioner, Motor Vehicle Department,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge your request for an opinion which is as follows:

> "This department desires your opinion and advice as to the proper method of handling a problem with which we are confronted. The facts are as follows:
>
> "The Anderson Motor Service Company of St. Louis is engaged in the business of transporting property for hire as a motor carrier of freight as defined by Article 8 of Chapter 33, as amended by the Laws of 1931. The Anderson Motor Service Company also leases trucks and employs the owners of said trucks as the drivers, and uses said trucks and drivers in the carrying on of its business as a motor carrier, the Anderson Motor Service Company paying the fees to the Public Service Commission on said leased truck, as required by the Motor Carrier Act of 1931. The lease is for a period of one year.
>
> "The owner and driver of the truck leased to the Anderson Motor Service Company has procured proper license tags in his own name from the Motor Vehicle Department of the State of Missouri. Despite the fact that the real owner and driver of the truck leased to and operated for the Anderson Motor Service Company in its business of a Motor carrier,

has registered the vehicle in the name of its real owner and has obtained proper license plates from this department, the Anderson Motor Service Company has been notified by the Highway Patrol, or its officers, that the actual owner and driver of the truck will be arrested because the Anderson Motor Service Company has not registered the vehicle in its own name and obtained proper license plates issued to it. This is evidently done on the theory that the Anderson Motor Service Company is the "owner" as defined by Section 7759. We, therefore, face the situation of knowing the actual owner and driver of the vehicle has properly registered the same with this department, and, because of the lease to the Anderson Motor Service Company, a requirement of the Public Service Commission, the Anderson Motor Service Company is now required to register such vehicle and obtain a second license. The Anderson Motor Service Company has mailed check in the proper amount to this department, giving the motor number and name of the actual owner of the vehicle. We have declined to issue a license to Anderson Motor Service Company unless there is a transfer of title from the real owner of the vehicle to the Anderson Motor Service Company. There has been no sale of the vehicle and consequently we cannot receive the registration and issue a title to the Anderson Motor Service Company.

"In view of the above facts, do you consider the Anderson Motor Service Company the "owner" of the leased vehicle, and if so what is the proper method to use in receiving the application for registration from the Anderson Motor Service Company as the "lessee owner" of the motor vehicle."

Section 7758, R. S. Mo. 1929, provides as follows:

"This article shall be exclusively controlling on the registration, regulation,

> operation, ownership and sale of motor vehicles, their use on the public highways and upon the registration and regulation of chauffeurs, operators, and other drivers of motor vehicles, on the accessories, equipment, safety and signaling devices and lights of motor vehicles and on the regulation of traffic on the highways of the state, and all laws, ordinances, or regulations of municipal corporations or political subdivisions in conflict, inconsistent with, or contrary to the provisions of this article shall be void except as herein otherwise expressly provided."

Section 7761, R. S. Mo. 1929, provides:

> "(a) Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall, except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration on a blank to be furnished by the commissioner for that purpose", etc.

Subsection (b) thereof provides:

> "Upon the filing of such application, exhibition of certificate of ownership and the payment of the fees hereinafter provided, the commissioner shall assign a number to such motor vehicle, and without other expense to the applicant shall issue and deliver to the owner a certificate of registration in such form as the commissioner shall prescribe, and a plate, or set of plates, bearing such number."

Section 7770 provides for the issuance of number plates.

Subsection (c) thereof states:

> "Every motor vehicle or trailer shall at all times have displayed the registration plates issued by the commissioner, entirely unobscured, unobstructed, all parts thereof plainly visible and kept reasonably clean, and so fastened as not to swing. On all

> motor vehicles one plate shall be displayed on the front and the other on the rear of such motor vehicle", etc.

Subsection (e) thereof provides in part as follows:

> "No person shall operate a motor vehicle or trailer on which there is displayed on the front or rear thereof any other plate, tag or placard bearing any number except the plate furnished by the commissioner or the placard herein authorized, and the official license tag of any municipality of this state."

Section 7772 provides in part:

> "The commissioner shall file such application and register such motor vehicle, trailer, chauffeur, registered operator, manufacturer or dealer, together with the facts stated in the application", etc.

Section 7774 provides the program followed when the transfer of ownership of the motor vehicle is made. "Upon the transfer of ownership of any motor vehicle or trailer its certificate of registration and the right to use the number plates shall expire", but on permission in writing of the owner the purchaser may use the plates for five days.

Subsection (c) of Section 7774 says:

> "No certificate of registration of any motor vehicle or trailer, or number plate therefor, shall be issued by the commissioner unless the applicant therefor shall make application for and be granted a certificate of ownership of such motor vehicle or trailer, or shall present satisfactory evidence that such certificate has been previously issued to the applicant for such motor vehicle or trailer."

It further provides that the application shall contain, among other things,

> "a statement of the applicant's source of title and of any liens or encumbrances on the motor vehicle or trailer."

And if the commissioner is

> "satisfied that the applicant is the lawful owner of such motor vehicle or trailer, or otherwise entitled to have the same registered in his name", he shall issue the appropriate certificate, and the certificate shall contain a "statement of any liens or encumbrances which the application may show to be thereon. * * * The certificate shall be good for the life of the motor vehicle or trailer, so long as the same is owned or held by the original holder of the certificate."

Further:

> "In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued the holder of such certificate shall endorse on the same an assignment thereof, with warranty of title in form printed thereon, and prescribed by the commissioner, with a statement of all liens or encumbrances on said motor vehicle or trailer, and deliver the same to the buyer at the time of the delivery to him of said motor vehicle or trailer."

It then provides that the buyer shall present this assigned certificate and get a new one, etc.

Further:

> "It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless, at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void."

The word "owner" is defined in Section 7759 as follows:

> "The term owner shall include any person, firm, corporation or association, owning

> or renting a motor vehicle, or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively."

In the case of Baltimore & Ohio R. Co. vs. Walker, 16 N. E. 475, 480, 45 Ohio St. 577, "owner" is defined as one who owns; a rightful proprietor. And in said case it is stated that an owner is not necessarily one owning the fee simple, or one having in the property the highest estate it will admit of. One having a lesser estate may be an owner, and indeed there may be different estates in the same property vested in different persons and each be an owner thereof. In this case it was held that lessees of a railroad were owners of the tracks of the roads operated by them in the sense of a statute requiring the owner of a railway track to make grade crossings and keep them in repair and maintain a watchman thereat.

In the case of Proctor vs. Hannibal & St. Joseph R. Co., 64 Mo. 112, 123, it is held that a statute giving a right of action against the owner of any locomotive or car by the defects in which a person is injured, means the owner at the time of the injury--owner for the purpose of operating the road--and not necessarily the party in whom the absolute right of property is vested. In this case it is also stated, if a corporation hires cars from a car builder and runs them on its road, the corporation, not the lessor, is the party liable to the statutory action.

In the case of Camp v. Rogers, 44 Conn. 291, 298, the court in construing a statute providing that the driver of any vehicle, meeting another on the public highway, who shall neglect to turn to the right, and thereby drive against the vehicle so met and injure its owner, shall pay to the party injured treble the damages, and that the owner of the vehicle so driven shall, if the driver is unable to do so, pay such damages, holds that the word "owner" means the person in control of the vehicle, either mediately or immediately, and not the literal and technical owner, and that any person hiring a carriage, for the time for which he takes it, in a certain sense, is its owner, that he has a special property in it.

We see no expression in the statute of an intent that the "owner", as applied to the person who actually purchased the auto and has the certificate of title, be relieved from the duty of taking out a license before his motor vehicle is driven on the highways of this state.

Section 7761 provides that certain things shall be done as to such vehicles "which shall be driven upon the highways of this state". In other words, the statute contemplates that if a man buys and owns a car and it is driven upon the highways of this state, either by him or someone else, he shall take out the statutory license.

Section 7774 states that on a transfer of ownership the right to use the license number plates shall expire, etc. By subsection (c) provision is made that no certificate of registration shall be issued unless the applicant has a certificate of ownership and makes full disclosure as to the source of title and liens thereon.

It is a recognized fact that the state receives annually several million dollars by reason of licensing motor vehicles, and the Legislature, after providing for the course of handling of licenses and for the collection thereof, and of tracing ownerships by requiring the registration of motor vehicles and the issuance of certificates of title to them when the owners have satisfied the commissioner of motor vehicles that they are entitled to them, also defined the word "owner" to include lessees for a period greater than ten days successively.

This definition is part of one law, all enacted at the same time, and the proper interpretation of the law should give effect to all parts of the act.

Bearing in mind that this is a revenue measure, as stated in the case of State ex rel. vs. Becker, 288 Mo. 507, 223 S. W. 54, we are of the opinion that this definition of "owner" was so defined and stated because the Legislature thought it would, and intended that it should, bring others under the provisions of the act who would not be thereunder without this definition.

The lessee has a special interest in the car, and it must be a beneficial one, otherwise he would not have it, and having a limited ownership in the motor vehicle, he must pay a license fee to the state for operating it on the highways.

A lessee is for many purposes considered the owner and under the interpretation of that word as construed by the courts in the above three cases, it appears to us entirely reasonable that the Legislature had in mind in defining this word

"owner" that it would thereby require a license from people who operate in the fashion that the Anderson Motor Service Company is stated in your inquiry to be operating. It evidently so defines "owner" in order to widen the scope of the law and to take care of just such instances as the one inquired of.

By Section 7761 the commissioner is authorized to prepare the form of application for registration. Under Section 7773 the commissioner files the application together with the facts stated therein.

While under Subsection (c) of Section 7774 it is provided that before a certificate of registration shall be issued, the applicant must first procure a certificate of ownership, etc., and that the application shall contain a statement of the applicant's source of title and all liens thereon, there is no prohibition in the act of there being a qualified ownership, and if the contract or lease, or a duly authenticated copy thereof, between the lessor and lessee is attached to the application, and the commissioner is satisfied that the title at that time is in the lessor and that the limited owner applicant is "otherwise entitled to have the same registered in his name" as such qualified owner, he may issue a qualified or limited ownership certificate, and the original certificate of title should show the existence of the limited or qualified ownership, and likewise the certificate of title issued to the limited owner should plainly show, in such form and words as the commissioner selects, that it is a limited ownership certificate. Then the lessee, having procured this certificate of limited ownership, may present the same and procure the certificate of registration and license plates on payment of the proper statutory fees.

By the Extra Session Laws of 1933-1934, page 99, Sections 7761, 7762 and 7769 of the Revised Statutes of 1929 are repealed and two new sections are enacted in lieu thereof, known as Sections 7761 and 7769.

Section 7761 contains the same provisions as the repealed Section 7761 except that it decreases the amount of the license fees and provides for the termination of the license to be the end of the calendar year.

Section 7769 as enacted by the 1933-1934 Legislature, provides for the registration of motor vehicles and that they be renewed annually, and that all certificates of registration and number plates shall expire on the succeeding thirty-first day of December, and that if the application for registration is made between the first of July and the last of September, only

half of the annual fee shall be paid, and that if the application is made during the period beginning October 1 and ending December 31, one-fourth of the full annual fee shall be paid.

Of course, the payment of the whole annual fee should be required if a license is issued prior to the end of the first six months.

An opinion has been heretofore rendered by this department of date December 31, 1934, to Hon. B. M. Casteel, Superintendent, Missouri State Highway Patrol, and to the extent that said opinion conflicts with this one, that opinion is hereby modified.

CONCLUSION

It is our opinion that if the Anderson Motor Service Company has leased from the owner a motor vehicle and, as lessee, has the exclusive use thereof for a period greater than ten days continuously, said Anderson Motor Service Company is a limited owner of said motor vehicle within the meaning of the motor vehicle laws of Missouri and should procure a limited ownership certificate of title and pay the statutory fees required for obtaining licenses and license plates before being permitted to operate said leased motor vehicle upon the highways of this state.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

1. Nepotism- Employment by county collector of daughter.
II. Taxation and Revenue- County collector, compensation of
III. Taxation and Revenue- Rate of penalties on delinquent personal property taxes.

6-20

June 20, 1935.

FILED
88

Mr. Robert E. Stone,
Collector of Revenue,
Macon, MIssouri.

Dear Sir:

A request for an opinion has been received from you under date of March 13, 1935, such request being in the following terms:

> "I would like to ask you the following questions:
>
> (1) I want my daughter to help me in the Collector's Office. Is this permissible under the law.
>
> (2) As I understand the reading ofthe law pertaining to this office, the limit is $4500.00. This does not cover the fees for drainage tax and railroads and other corporations. Is this true?
>
> (3) What are the penalties on delinquent personal taxes for 1933 and prior?
>
> I would appreciate an early answer."

I.

NEPOTISM.

In response to your first question we herewith enclose to you a copy of the official opinion of this office dated October 4, 1935, to Hon. Samuel M. McKay, Prosecuting Attorney, DeSoto, Missouri, the conclusion of this opinion being as follows:

> "It is therefore the opinion of this Department that the Collector of your county is not guilty of violating Section 13 of Article XIV by permitting his daughters to render to him personal service where the daughters are not holding an official position and are not, as officials, rendering service to the State."

If the facts in your case conform to the facts related in the opinion enclosed, to-wit, that your daughter will do some work in your office, that she will not be paid any salary or hold any official position in your office, then the conclusion to said opinion is applicable to your case.

II.

TAXATION AND REVENUE---
COMPENSATION OF COLLECTOR.

Section 9935, R. S. Missouri 1929, as repealed and reenacted by Laws of 1933, page 454, fixes the compensation of collectors in various counties of this State, dependent as to amount upon the amount of taxes assessed and levied for any one year in the particular county, but from your figure of $4500 we assume that Subdivision XI of Section 9935 is applicable to your county, which subdivision provides as follows:

> "In all counties wherein the total amount of all such taxes and licenses levied for any one year exceeds two hundred thousand dollars and is less than two hundred and fifty thousand dollars, a commission of one and three-fourths per cent on the first two hundred thousand dollars collected and two per cent on whatever amount may be collected over two hundred thousand dollars."

If this assumption is correct, then the total maximum compensation which you would be entitled to, assuming your commissions entitle you to such compensation, would be $4500, except as modified by the following paragraph.

Subdivision XV of such Section 9935 contains the following:

> "and all fees and commissions coming into the hands of any collector from any source whatever in excess of the amounts herein specified, * * *shall be paid into the city, county and state treasuries in proportion to the amount received on taxes collected for each;* * *provided, that the limitation on the amount to be retained as herein provided shall apply to fees and commissions on current, back and delinquent taxes, but shall not apply to commissions on the collection of ditch and levee taxes, and the compensation of the county collector for the collection of levee taxes and ditch taxes, collected for drainage purposes, shall be one per cent of the amount collected."

It appears from the foregoing that the maximum of $4500 allowed you applies to "fees and commissions on current, back and delinquent taxes" and it is our opinion that fees for the collection of railroad and other corporation taxes are to be included within this limit of $4500. However, by the terms of the foregoing section compensation allowed the county collector for the collection of levee and drainage taxes may be retained by you in excess of the $4500.

III.

PENALTIES ON DELINQUENT PERSONAL TAXES.

Section 9914, R.S. Missouri 1929, as repealed and re-enacted by Laws of 1933, page 449, provides in part as follows:

> "If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required* * *then it shall be the duty of the collector, after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 9952."

The amount fixed by Section 9952 is "ten per centum on such tax delinquent for the preceding year and an additional annual ten per centum on taxes for each year prior to the proceding year, * * *provided, the per centum of penalty added shall not exceed one per centum per month."

The above statutes are modified by Senate Bill No. 143 enacted by the Fifty Eighth General Assembly, and approved by the Governor, which contains an emergency clause, and which provides in Section 1 thereof as follows:

> "That all penalties and interest on personal and real estate taxes, delinquent for the year 1934 and prior years shall be computed after December 31, 1934, on the same penalty and interest basis as the taxes delinquent for the year 1934 until paid."

It is our opinion in view of the foregoing that the interest penalty on personal taxes and real estate taxes is the same, to-wit, one per cent per month but not in excess of ten per cent per annum, during the period of delinquency. In view of the last quoted act, all delinquent personal taxes are to bear interest penalty as though they were taxes assessed for the year 1934, and therefore at one per cent per month the interest penalty on personal taxes would, during the month of June, amount to six per cent. We assume that by the term "penalty" in your request you refer to the interest penalty. Senate Bill 143 supra, became effective April 29, 1935.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
Acting Attorney General.

HGW:MM

ROADS AND HIGHWAYS: State Highway Commission may include minimum wage scale in contracts for construction of highway projects if necessary to get Government funds.

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July 29, 1935

FILED

Hon. Louis V. Stigall,
Chief Counsel,
Missouri State Highway Department,
Jefferson City, Missouri.

Dear Sir:

This acknowledges receipt of your request which is as follows:

> "May I request an opinion from your office on the following question:
>
> "Is it legal for the State Highway Department to incorporate in its contracts with contractors for the construction of highways under regular federal aid a provision for a minimum wage scale for labor as predetermined by the State Highway Department?
>
> "The situation is this: At the May Term, 1935, the Supreme Court held that a contract let under a law providing that the contract must be let to 'the lowest responsible bidder' is void if such contract incorporates a provision providing for a minimum wage scale. The court decided this upon the theory that such a provision prevents the contract from being let to the 'lowest responsible bidder.' This case not having been in the books, a typewritten copy is herewith attached for your use.
>
> "The statutes of Missouri, however, provide that the State Highway Department

shall 'comply with the provisions of any act of Congress providing for the disposition and expenditure of funds of the United States appropriated by Congress for highway construction, and to comply with any of the rules or conditions made by the Bureau of Public Roads of the Department of Agriculture . . . in order to secure to the State of Missouri funds allotted to this state by the United States Government for highway construction.' Section 8106 R. S. Mo. 1929.

"Under the old federal aid statutes of 1916 to 1921 and amendments thereto, there was no provision for minimum wage schedules. There was no minimum wage schedule in the rules and regulations of the Federal Bureau of Roads so providing under those acts until the rules and regulations issued February 27, 1935, called to our attention by Mr. Thomas H. McDonald, Chief of Bureau of Roads, in a letter of July 23. Both his letter and copy of these regulations are herewith appended for your use. The federal aid act approved July 11, 1916, is also herewith appended and attached for your use with special reference to Section 6 on page 2 thereof. This act has not been repealed and is still in force.

"I append these documents in order that you may determine whether or not compliance with the minimum wage scale requirements appears necessary in order for us to secure federal aid funds as meant by our statute directing compliance with such rules and regulations.

"In this connection, also, I desire to refer you to the opinion of our Supreme Court in Logan vs. Matthews, decided August 5, 1932, 52 S. W. (2d) 989, which seems to show that our Supreme Court, which on May of this

year decided that a federal wage schedule is void, yet would hold such a contract made by the Highway Department legal if it were necessary to insert it 'in order to secure to the State of Missouri funds allotted to this State by the United States Government for highway construction.'

"It is true in regular federal aid a part of the funds are state funds and part of them are federal aid funds involved in one and the same contract.

"I would have asked you sooner for this opinion but I have only this morning received the letter I considered necessary from the Chief of the Bureau. His letter is in answer to mine asking him if compliance is absolutely essential to our receiving the funds.

"Would it be asking too much of you to let us know as promptly as possible for the reason that certain contracts, if let, must be let at once.

"Since the enclosures are public documents of which we only have the original copies, we would like for you to return them for filing in our Department. They will be available to you at any time the same may be necessary."

You also enclose a pamphlet of the United States Department of Agriculture containing the Federal Legislation and Regulations relating to Highway Construction, Section 6 on page 2 thereof being as follows:

"That any State desiring to avail itself of the benefits of this act shall, by its State highway department, submit to the Secretary of Agriculture project statements setting forth proposed construction of

> any rural post road or roads therein. If the Secretary of Agriculture approve a project, the State highway department shall furnish to him such surveys, plans, specifications, and estimates therefor as he may require: Provided, however, That the Secretary of Agriculture shall approve only such projects as may be substantial in character and the expenditure of funds hereby authorized shall be applied only to such improvements. Items included for engineering, inspection, and unforeseen contingencies shall not exceed ten per centum of the total estimated cost of the work. If the Secretary of Agriculture approve the plans, specifications, and estimates, he shall notify the State highway department and immediately certify the fact to the Secretary of the Treasury. The Secretary of the Treasury shall thereupon set aside the share of the United States payable under this act on account of such project, which shall not exceed fifty per centum of the total estimated cost thereof. No payment of any money apportioned under this act shall be made on any project until such statement of the project, and the plans, specifications, and estimates therefor, shall have been submitted to and approved by the Secretary of Agriculture."

Likewise is enclosed a pamphlet of Rules and Regulations with reference to Carrying out the Federal Highway Act, and on page 8 thereof and as part of Regulation 10, entitled "Labor and Employment", is the following provision:

> "Section 3. (a) To prevent the exploitation of labor all contracts for the construction of highways under this Act shall prescribe the minimum rates of wages, as predetermined by the State highway department, which

> contractors shall pay to the different classes of labor, and such minimum rates shall be stated in the advertisement for bids and in proposals or bids which may be submitted. The wage rates so determined shall be a minimum rate for unskilled labor, a minimum rate for labor, intermediate grade, and a minimum rate for skilled labor. The classification of labor employed on highway work into the three classes mentioned shall be in accordance with instructions issued by the Chief of the Bureau of Public Roads."

Likewise is enclosed a letter dated July 23, 1935, from Mr. Thomas H. MacDonald, Chief of Bureau of Public Roads, Washington, D. C., to Mr. T. H. Cutler, stating that these rules were approved February 27, 1935, and that they supersede all prior rules, etc; also copy of a letter dated July 19, 1935, from the Chief Engineer of your Department to Mr. Thomas H. MacDonald, Chief of Bureau of Public Roads, Washington, D. C.

An excerpt from an opinion rendered by this office of date January 17, 1934, to Hon. Edward H. Miller, is as follows:

> "It is and will be the policy of this office not to express an opinion as to any particular form of policy or contract of insurance with reference to whether the same is a contract for mutual insurance or not. The foregoing should make it clear as to what our idea of mutual insurance is and those interested will determine for themselves the legal effect of the policy or insurance contract they may or may not accept."

It is not the policy of this office to make a finding of fact, and we assume for the purpose of this opinion that the Federal Government has made a regulation which requires the existence of a minimum wage provision in contracts for highway projects let in Missouri and in the construction of which federal money is used.

Your inquiry is, do the laws of Missouri permit the inclusion of a minimum wage provision in contracts for highway projects?

Section 8104, R. S. Mo. 1929, among other things, provides that the State Highway Commission shall

> "(8) Prepare plans, specifications and estimates for all state highways.
>
> "(9) Let all contracts for the construction or improvement of state highways."

Section 8106 provides in part as follows:

> "The commission is hereby directed to comply with the provisions of any act of congress providing for the distribution and expenditure of funds of the United States appropriated by congress for highway construction, and to comply with any of the rules or conditions made by the bureau of public roads of the department of agriculture, or other branch of the United States government, acting under the provisions of federal law in order to secure to the state of Missouri funds allotted to this state by the United States government for highway construction."

Section 8116 provides in part as follows:

> "All contracts for the construction of said work shall be let to the lowest responsible bidder or bidders," etc.

It further provides:

> "That in all cases where the project advertised shall be for the construc-

> tion of more than five miles of road, such advertisement shall provide for bids on sections of said road not to exceed five miles, as well as on the project as a whole, and such contract shall then be let so as to provide for the most economical construction of said project."

The Supreme Court of this state in an opinion not yet officially published, being the case of Hillig v. City of St. Louis, et al., No. 33,787, decided that a city ordinance of the City of St. Louis which that city had enacted containing a minimum wage scale was invalid as contrary to the provisions of the charter of the City of St. Louis, which contains a provision as to the letting of public contracts similar to the provision in Section 8116, supra, that the contracts should be let to the lowest responsible bidder. A careful analysis of that case leads us to conclude that it is not authority for holding that the State may not include a minimum wage provision in its road contracts.

Section 20 of Article 9 of the Constitution of Missouri provides that the city charter of the City of St. Louis when adopted shall become the "organic law of the city". Pursuant to the same, the present charter of St. Louis was adopted in 1914 and contains the above noted provision that all public work shall be let by contract to the lowest responsible bidder.

The holding of the Supreme Court in the Hillig case was that the city charter, insofar as the board of aldermen was concerned, was in the nature of a limitation of their power analogous to the constitutional restriction with reference to the legislative powers of the state. In that case it is stated:

> "In general the charter of a city bears the same relation to the ordinances that the constitution of a state bears to its statutes."

If our Constitution contained a provision that all public work should be let by contract to the lowest responsible bidder, or a provision of similar import, then the Hillig case would be authority against the Highway Commission letting public work projects by contracts that contain the minimum wage

provision. However, we are not aware of any constitutional inhibition.

It has been decided in this state that an act which embraces all persons who are or who may come into like situations and circumstances is not a special act. State ex rel. Martin v. Wofford, 121 Mo. 61; Elting v. Hickman, 172 Mo. 237; State ex rel. Applegate v. Taylor, 224 Mo. 393.

In the case of Elting v. Hickman, supra, the matter there considered was a law which provided for the organization of special road districts, in which is located a city of the third or fourth class, except certain cities of the third class, and providing it should take effect only in such places as the county court shall, by record, declare the same to be the law in such prescribed territory where adopted by the legal voters thereof. It was attacked as unconstitutional and as special legislation. The court said:

> "In Lynch v. Murphy, 119 Mo. l. c. 172, it was said: 'It is also insisted by counsel for plaintiffs that said acts are in conflict with section 53 of article 4 of the Constitution; that it is a special law; that it regulates the affairs of townships; creates new offices, refunds moneys legally paid into the treasury and grants special privileges. In support of this contention, he relies upon State ex rel. v. Herman (75 Mo. 346); but in that case it was expressly said "that a statute which relates to persons or things, as a class, is a general law, while a statute which relates to particular persons or things of a class, is special." The statute now under consideration refers to all of the road districts in all the counties in the State where there are dramshops, and to all townships that are indebted and that have compromised, or that may hereafter compromise their indebtedness. It does not refer or have reference to any particular county, road district or township and is not local or special in its application.'

"To the same effect is the case of State ex rel. v. County Court, 128 Mo. 427.

"It is well-settled that a law which includes all persons who are in or who may come into like situations and circumstances is not special legislation. (State ex rel. v. Wofford, 121 Mo. 61; State ex rel. v. Yancy, 123 Mo. 391; Spaulding v. Brady, 128 Mo. 653; State ex rel. v. Higgins, 125 Mo. 364.)

"A further contention is that the act is violative of section 3, article 10, of the Constitution, in that it appropriates public revenue to a private purpose.

"We are unable to see the force of this contention, for certainly the appropriation of moneys to the construction, repairment and maintenance of public roads which are for the use and benefit of the public, can in no sense be considered as an appropriation of moneys for a private purpose.

* * * *

"A final contention upon this theory of the case is, that the act violates section 10, article 10, of the Constitution, in that it attempts to appropriate money levied and collected by city authorities to uses and purposes outside of such cities. Cities are practically as much interested in public roads beyond their corporate limits which lead into and enter them as they are in their own streets, and have heretofore been taxed to keep up such roads. (Secs. 4575 and 7663, par. 2, R. S. 1889.) And they had the power to appropriate a sum of money not to exceed ten per cent of the annual general revenue for that purpose. (Sec. 7922,

> R. S. 1889.) It must follow that if the Legislature had the power to permit cities and towns to improve roads beyond their limits, it possesses the power to direct it to be done. In State ex rel. v. Owsley, 122 Mo. l. c. 78, it was said: 'The purposes for which such local taxes have always been imposed are not alone the support of the local government, but the support of many other public burdens, among which may be mentioned maintaining public schools, making and keeping in repair the public roads and bridges.'"

See also State ex rel. v. Burton, 266 Mo. 711, 182 S. W. 746, that the section prohibiting granting of public money is not violated.

Likewise, Sec. 8106, supra, applies to all contracts of a given class, to-wit, those that are in part paid for from the federal funds.

It does not appear that there is any constitutional limitation against the enactment by the Missouri Legislature of Sections 8106 and 8116, supra.

The Hillig case is ruled on an essentially different state of facts from those under consideration. The difference is that the ordinance there providing for the minimum wage schedule was counter to the organic law of the city, i. e., the city charter that was adopted by the people of St. Louis in 1914, as Section 20 of Article 9 of the Missouri Constitution authorized them to do, and in that charter they prohibited the letting of public contracts except to the low bidder, and the charter could not be changed by a city ordinance, while in the present case there is no organic or constitutional bar to the state legislature enacting laws relative to the letting of such contracts. It then becomes a question of statutory construction for us to determine the meaning of the statutes as written by the Legislature. It is a cardinal rule of statutory construction that statutes must be construed to give effect to the intent of the Legislature and if possible each section of an act must be construed to have effect.

Guided by that beacon, our view is that Section 8116, R. S. Mo. 1929, in the letting of all contracts for highway

projects (where the provisions of Section 8106 are not applicable and where another course is not required in order that Missouri avail itself of the federal aid) must be followed and the contracts for highway projects should be let to the lowest responsible bidder as set forth in said Section 8116, but Section 8106 was enacted to meet such unforeseen contingencies as might after its enactment arise with respect to federal requirements and authorizes the letting of contracts for the highway projects in such a way, within constitutional limitations, as may be necessary in order to comply with the provisions of the Acts of Congress and the rules and regulations as set forth in said Section 8106.

The reasonable view is that it was the intent of the Legislature in enacting Section 8106 that Missouri should never be denied the benefits of the federal aid road money by reason of some restriction in the written law which would bar or prevent her from qualifying therefor; that the Legislature had this intent in enacting Section 8106. To so hold gives meaning and life to said section and is consistent with the operative life and controlling force of Section 8116 except as to the federal aid money. To hold otherwise, we think, would lead necessarily to the conclusion that said Section 8116 should be given unwarranted force and effect and that Section 8106 should be in effect nullified. Evidently the Legislature did not intend the latter.

CONCLUSION

We are of the opinion that the Missouri State Highway Commission has the authority

> "to comply with the provisions of any act of congress providing for the distribution and expenditure of funds of the United States appropriated by congress for highway construction, and to comply with any of the rules or conditions made by the bureau of public roads of the department of agriculture, or other branch of the United States government, acting

under the provisions of federal law in order to secure to the state of Missouri funds allotted to this state by the United States government for highway construction,"

and if the federal authorities have made a requirement that your Commission shall insert a minimum wage scale provision in your contracts for construction of highway projects in order to receive federal aid thereon, then your Commission has the legal right to so insert said minimum wage scale in such contracts, but not in any others.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

MOTOR VEHICLES: Persons hauling property or passengers for hire must have a chauffeur's license; An individual under private contract to the government to haul its mail from one point to another must also have a chauffeur's license if said person is not a government employe.

September 20, 1935.

9-21

FILED

Miss Gertrude H. Stokely
Automobile Department
Office of Secretary of State
Jefferson City, Missouri

Dear Miss Stokely:

This is to acknowledge your letter dated September 19, 1935, as follows:

> "This morning a Mr. J. R. Grisso, who has a contract to haul mail between Columbia and Jefferson City, asked at our office if he should have a Chauffeur's license in order to haul this mail.
>
> It seems as if there were several government employees faced with this same question and we would like to have an opinion from your department as to whether these persons should purchase a Chauffeur's license or not. They are operating their own cars, are permitted to haul up to five passengers and a certain amount of freight."

Section 7765, R. S. Mo. 1929, in part provides as follows:

> "(a) Every person desiring to operate a motor vehicle as a chauffeur shall file in the office of the commissioner a statement containing * *

> "(b) Upon the filing of such statement and photographs, if the commissioner is satisfied as to the competency * * *, he shall assign to him a number and upon the payment of a fee of $3.00 he shall issue and deliver to such applicant a certificate of registration which shall contain * * "

Section 7783, R. S. Mo. 1929, provides in part as follows:

> "(a) * * *: Chauffeurs and registered operators shall at all times carry, subject to inspection, the registration certificate furnished by the commissioner."

Section 7786, R. S. Mo. 1929, provides penalties for violation of the motor vehicle laws, and paragraph "(d)" provides as follows:

> "Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars ($5.00) or more than five hundred dollars ($500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

Section 7759, R. S. Mo. 1929, defines the word "Chauffeur" as follows:

> "'Chauffeur.' An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employe operates a motor vehicle carrying passengers or property for hire."

From the above it is seen that every person who operates a motor vehicle as a "chauffeur," defined above, must be registered.

You state that certain persons holding contracts to haul mail for the government "are operating their own cars, are permitted to haul up to five passengers and a certain amount of freight", and desire to know if such persons must have a chauffeur's license. We are of the opinion that a chauffeur's license is required for persons hauling passengers or freight for hire or compensation. Please do not confuse a government employe engaged solely in handling the mail for the government with a private individual under contract. A government employe delivering mail in a government owned truck does not have to have a chauffeur's license (Johnson v. State of Maryland, 65 L. Ed. 126 (Supreme Court of the United States)) for the reason that the state cannot impose upon a Federal agency any requirements or restrictions that would tend to interfere with that governmental function. For a discussion of this see our opinion dated September 18, 1934, to Mr. J. Ernest Douglass, Acting Postmaster, Warrensburg, Missouri; copy of which is attached hereto.

The facts in your case, however, show that a private individual not only hauls government mail but also freight and passengers, and applying the definition of "chauffeur" it is seen that said persons are owners operating "a motor vehicle carrying passengers or property for hire." The hauling of the passengers or freight for hire by an owner of a motor vehicle under contract with the government to haul its mail, does not, in our opinion, make such person a government employe as to relief of the necessity to secure a chauffeur's license.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

TAXATION: County Court cannot compromise delinquent taxes owed a City of the Fourth Class.

9-26

September 25, 1935.

FILED
88

Mr. Huldah C. Storey
City Collector
Senath, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "Will you kindly advise whether or not the Board of Aldermen or myself as city collector are required by law to reduce or compromise city taxes when the Court has compromised. In other words after the board of equalization has acted and our city tax list is made up from the county records, and said taxes have become delinquent, taxpayer then proceeds to the county court and obtains a compromise, certified by the State Auditor, is the city bound by the action of the county court and required to accept city taxes on the same basis as the compromise figure set by the court."

Senath being a city of the fourth class we quote the statutes applicable to said cities, which we deem necessary to answer your question.

Section 6894 R. S. Missouri 1929, provides in part:

> "In assessing property, both real and personal, in cities of the fourth class, the city assessor shall jointly, with the county assessor, assess all property in such cities, and such assessment, as made by the city assessor and county assessor jointly and after the same has been passed upon by the board of equalization, shall be taken as a basis from

> which the board of aldermen shall make the levy for city purposes. The assessment of the city property, as made by the city and county assessor, shall conform to each other, and after such board of equalization has passed upon such assessment and equalized the same, the city assessor's books shall be corrected in red ink in accordance with the changes made by the board of equalization, and so certified by said board, and then returned to the board of aldermen:" * * * "A lien is hereby created in favor of such city against any lot or lots or tract of land for any such tract assessed by such city against the same, which said lien shall be superior to all other liens or encumbrances except the lien of the state for state, county or school taxes."

In the above section it is plain that the assessment of city property made by the city assessor must conform to the assessment made by the county assessor as equalized by the board of equalization. After the property has been so assessed and equalized, a lien is created in favor of the city against the lands so assessed, which is superior to all other liens except the lien of the State for state, county and school taxes.

Sections 6995 and 6996 R. S. Missouri 1929, provide for the collection of delinquent taxes in cities of the fourth class.

Section 6995 reads as follows:

> "Upon the first day of January of each year all unpaid city taxes shall become delinquent, and the taxes upon real property are hereby made a lien thereon. The enforcement of all taxes authorized by this article shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure and sale of goods and chattels, both before and after said taxes shall become delinquent: Provided, that all suits for the collection of city

taxes shall be brought in the name of the state, at the relation and to the use of the city collector."

Section 6996 provides:

"It shall be the duty of the board of aldermen to require the collector, annually, on the first meeting of the board of aldermen in April of each year, or as soon thereafter as may be, to make out, under oath, lists of delinquent taxes remaining due and uncollected for each year, to be known as the 'land and lot delinquent list' and the 'personal delinquent list.' It shall be the duty of the board of aldermen, at the meeting at which said delinquent list shall be returned, or as soon as may be thereafter, to carefully examine the same; and if it shall appear that all property and taxes contained in said lists are properly returned as delinquent, the board of aldermen shall approve the same and cause a record thereof to be entered on the journal, and cause the amount thereof to be credited to the account of the city collector. The board of aldermen shall cause the land and lot delinquent list and the personal delinquent list to be returned to the city collector, who shall be charged therewith, and who shall proceed to collect the same, in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal taxes for state and county purposes: Provided, that all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector."

This Department in an opinion rendered to the State Tax Commission under date of August 8, 1933, in passing upon the question of whether delinquent taxes of a city of the fourth class were to be collected by the city collector or by the county collector under the provisions of Senate Bill 94 as found on pages 425 to 449, Laws of Missouri 1933, ruled as follows:

> "It is therefore the opinion of the office that Senate Bill 94 is applicable to Cities of the Third and Fourth Classes insofar as it prescribes the method and manner of the collection and enforcement of the payment of the taxes, but any proceedings had relating thereto are to be conducted by the city collector consistent with the requirements of Articles 4 and 8 of Chapter 38, 1929 Revision."

From the above it is clear that after the city taxes have been assessed in conformity to the state assessment that such city assessment is a lien against the property so assessed and it is the duty of the city collector and not the county collector to collect the delinquent taxes of a city of the fourth class.

The authority of the County Court to compromise back taxes is found in Section 9950 Laws of Missouri 1933, page 427, which reads as follows:

> "Whenever it shall appear to any county court, or if in such cities the register, city clerk or other proper officer, that any tract of land or town lot contained in said 'back tax book' or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon, as charged in said 'back tax book' or recorded list of delinquent land and lots in the collector's office, or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the said court, or if in

> such cities the register, city clerk or other proper officer, to compromise said taxes with the owner of said tract or lot, and upon payment to the collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state and all taxes due thereon, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office; and in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot."

The term "such cities" as used in the above section, refers to the cities described in Section 9970 Laws of Missouri 1933, page 451, which reads as follows:

> "The collectors of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state shall, on or before the first Monday in March, annually, return to the county collector a list of lands and lots on which the taxes or special assessments levied by such city or incorporated town remain due and unpaid. The county collector shall receipt for the aggregate amount of such delinquent taxes, which receipt shall be held by the treasurer

> of the city or town, and shall stand as evidence of indebtedness upon the part of the county collector and his bondsmen to such city or town, until settlement in full has been made by payment to said treasurer or his successor of all taxes thus receipted for, or by a return of such part as is uncollectible."

This office in an opinion rendered to Minor C. Livesay, Prosecuting Attorney, Versailles, Missouri, under date of June 27, 1933, ruled that the above section does not govern the collection of delinquent taxes by a city of the fourth class. It should be noted that the power of a county court to compromise back taxes under Section 9950 supra, only refers to taxes found on the back tax book or recorded lists of delinquent lands and lots in the county collector's office. As the delinquent tax lists of cities of the fourth class are not found on said collector's tax book or delinquent land and lot lists, Section 9950 supra does not give the county court the right to compromise back taxes of a city of the fourth class.

CONCLUSION.

In view of the above it is the opinion of this Department that a County Court has no power to compromise delinquent taxes owed a city of the fourth class, and that such city is not bound by any compromise made by said court

Respectfully submitted,

J. E. TAYLOR,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General

JET:MM

INSTITUTIONS: Writ of Habeas Corpus may issue to bring prisoner from penal institution to answer and defend a criminal charged alleged to have been committed prior to incarceration.

10-10

October 9, 1935

FILED
88

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

Your request for an opinion dated September 20, 1935, is as follows:

"This office is confronted with a rather unusual question of proceeding and I would appreciate the suggestions of your office concerning the following situation.

Several months ago one Russell Storck was apprehended in this city in the act of burglarizing a large wholesale mercantile establishment. He had his preliminary hearing and was bound over to await the action of our local Court of Common Pleas. At the time the case was called in the Court of Common Pleas a change of venue was requested and granted by the Court, the cause being sent to the Circuit Court of Marion County at Palmyra. In the default of bond, Storck was committed to the Sheriff of this County. About a month ago a Habeas Corpus proceeding was filed in the Supreme Court for his release on bond and the Supreme Court ordered his release under a Five Thousand Dollar bond. At this hearing Your Mr. Nolen of your office handled

the matter. The application for bond was heard by Judge Alford and the sureties being sufficient, Storck was released and the case especially set for October 28th. Soon after his release Storck was apprehended at Poplar Bluff charged with burglary in the second degree. He was either convicted or entered a plea of guilty in the Circuit Court of Butler County, under the name of Jack Monroe, and was sentenced to serve a term of two years in the Missouri State penitentiary and at the present time is now an inmate in that institution. This office is particularly desirous of trying Storck, alias Monroe on October 28th and it is my opinion that our Circuit Judge is empowered, upon proper application, to issue a writ of Habeas Corpus Ad Testificandum directed to the warden of the penitentiary ordering Storck's release for the purpose of trial and requesting that he be delivered in person to the Sheriff of our County.

I have been unable to find any authorities pro or con on this particular point, but am advised by Warden Saunders of the penitentiary that such procedure has been followed on various occasions.

I am strongly of the opinion that Storck, alias Monroe purposely arranged the matter in Butler County so as to avoid trial in this court where he is charged with burglary and larceny under the habitual criminal act. I would deeply appreciate any suggestions your office might have as to the legality of removing him from the penitentiary for the purpose of trial and also as to your thoughts on my suggested procedure.

Thanking you and with sincere personal regards, I am."

In the case of State v. Rudolph, 17 S. W. (2d) 932, l. c. 933, our Supreme Court said:

"There is no constitutional or statutory provision prohibiting the trial of a defendant during the time of his incarceration in the penitentiary, and the guarantee by the Constitution of a speedy trial makes no exception of a defendant so incarcerated. Section 22, art. 2, Const. If Meininger could be tried after sentence and while under bond, there is no reason why the defendant, Stocks, cannot be tried after sentence and during the service of time in the penitentiary. On principle, there is no difference. Those interested will find this conclusion sustained by all the cases cited and reviewed in State ex rel. Meininger v. Breuer, supra, 304 Mo. loc. cit. 406-414, 264 S. W. 8. In the cases there reviewed, all the courts hold that a convict may be taken by the state from the penitentiary and tried for an offense committed prior to his incarceration. To hold otherwise would make of the penitentiary a shelter for criminals."

Again at 934, the Court said:

"The writ at common law includes several forms. Among the number: (a) Habeas corpus ad subjiciendum (you have the body to submit), (b) habeas corpus ad prosequendum (you have the body to prosecute). 21 Cyc. 353; Burrill, L. Dict.; 3 Blackstone, Comm. 129, 130.

Our Code only regulates the use of the principal writ (habeas corpus ad subjiciendum). The petition herein does not call for the principal writ but for a writ ad prosequendum; therefore, we are confronted with no statute."

CONCLUSION.

We are of the opinion that where one charged with burglary is out on bond, and while on bond convicted of an-

other crime and committed to the State Penitentiary, said convict can be brought from the Penitentiary to the county and jurisdiction of his original crime and can be prosecuted for the original crime upon the issuance of the Writ of Habeas Corpus ad prosequendum by the Circuit Judge having jurisdiction of the original crime. Said Writ should direct the Warden to give custody of the prisoner to your sheriff that he may be prosecuted as charged.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

INTOXICATING LIQUOR: Five per cent. beer may be sold in a place of business which operates a pool table.

11-13

November 13, 1935

FILED 88

Mr. William E. Stewart
Prosecuting Attorney
Knox County
Edina, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "I want to submit a question to your office.
>
> Where a person has a place of business and is selling five per cent beer and also operates therein a pool table, the pool table is not concealed by blinds or a partition but is in plain sight, is this a violation of the liquor laws?"

A careful review of the State Liquor Control Act fails to show any prohibition against the selling of five per cent. beer in a place of business wherein a pool table is operated. It is, therefore, the opinion of this department that the State Liquor Control Act does not prohibit the selling of five per cent. beer in a place of business in which a pool table is kept and operated.

Yours very truly,

APPROVED:

J. E. TAYLOR
Assistant Attorney General

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

CLERK OF CAPE GIRARDEAU COURT OF COMMON PLEAS: Compensation to be received after the first Monday in January, 1935.

January 25, 1935.

FILED 89

Hon. Elmer A. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

This will acknowledge receipt of a request for an opinion from Honorable S. P. Dalton, former Prosecuting Attorney of your county, which said request reads as follows:

> "The Judge of the Cape Girardeau Court of Common Pleas, as well as the newly elected Clerk of that Court, have requested me to secure your opinion with reference to the question of whether or not the Clerk of the Cape Girardeau Court of Common Pleas will be on a fee basis after January 1, 1935, or will continue on a salary basis as it has been in the past. Apparently, the statute putting all of the circuit clerks on a fee basis does not apply to the Clerk of the Cape Girardeau Court of Common Pleas; however, this court is a circuit court for all purposes except as to criminal jurisdiction.
>
> "All parties in interest desire the opinion of your office with reference to the matter at your earliest convenience."

Prior to the first Monday in January, 1935, the Clerk of the Circuit Court was paid a salary under the provisions

of Sections 11786 and 11813, R. S. Mo. 1929.

Section 11786, R. S. Mo. 1929, provides in part as follows:

> "The clerks of the Circuit Courts of this state shall receive for their services, annually, the following sums: **** Provided, that in any county wherein the clerk of the circuit court is ex officio recorder of deeds, said offices shall be considered as one, for the purpose of this section: Provided, further, the provisions of this section shall not apply to any county which now contains or may hereafter contain a city of 75,000 inhabitants or more, or to any county which now contains or may hereafter contain 80,000 inhabitants and less than 150,000 inhabitants, in which circuit court is held in two or more places in said county; for the purpose of this section the population of any county shall be determined by multiplying by five the total number of votes cast in such county at the last presidential election prior to the time of such determination: ****".

The Clerk of the Cape Girardeau Court of Common Pleas under the provisions of Section 14509, R. S. Mo. 1929, was paid the same salary as the Clerk of the Circuit Court of Cape Girardeau County was paid under the provisions of Section 11786, supra.

Section 14509, R. S. 1929, provides:

> "The clerk of the Cape Girardeau court of common pleas shall receive the same salary as is now or may hereafter be paid to the clerk of the circuit court of Cape Girardeau county; and said salary shall be paid out of the county treasury of Cape Girardeau county in monthly installments at the

> end of each month, in the same manner as the salary of the clerk of the circuit court of said county."

Section 11786, supra, was superseded by Section 11786, Laws of Mo. 1933, page 369, which new section reads in part as follows:

> "The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. ****; provided further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

This office doubts seriously whether the clerk of the Cape Girardeau Court of Common Pleas is entitled to any compensation under the law as it now stands. It is a fundamental principle of law that a public officer must point to some statute authorizing his compensation if he is to receive any. Under the provisions of Section 14509, supra, the Clerk of the Cape Girardeau Court of Common Pleas is to receive the same salary as the Circuit Clerk of Cape Girardeau County, to be paid out of the county treasury in monthly installments, in the same manner as the Clerk of the Circuit Court of said county. Under the provisions of Section 11786, Laws of Mo. 1933, supra, the Circuit Clerk is no longer paid a monthly salary out of the county treasury but retains fees up to a certain amount in lieu thereof.

In the case of King v. Riverland Levee District, 218 Mo. App. 481, l.c. 493, the Court said:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. (State ex rel. Evans v. Gordon, 245 Mo. 12, l. c. 27, 149 S. W. 468; Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504.) Furthermore our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. l.c. 565, to the effect that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. (State ex rel. Evans v. Gordon, supra.)****"

It is plain, however, from a careful reading of Section 14509, supra, that the Legislature intended that the Clerk of Cape Girardeau Court of Common Pleas was to receive the same compensation as the Circuit Clerk of said County now receives or may hereafter receive; said compensation to be paid in the same manner as that of the Circuit Clerk.

The terms "fees" and "salary" have been held to be synonymous with the term "compensation". Callaway Co. v. Henderson, 119 Mo. l.c. 39; and State v. Riedel, 46 S. W. (2d) l.c. 133.

In our opinion, the only statute that the Clerk of Cape Girardeau Court of Common Pleas can point to allowing him any compensation for performing the services of his of-

fice is Section 11786, Laws of 1933, page 369, supra.

It is, therefore, the opinion of this office that the Clerk of Cape Girardeau Court of Common Pleas shall since the first Monday in January, 1935, retain fees for his compensation not to exceed the amount the Circuit Clerk of Cape Girardeau County is allowed to retain under the provisions of Section 11786, Laws of Mo. 1933, page 369, and which fees shall be in lieu of the salary heretofore received.

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/JLH:j

COUNTY COURT:)
) Costs or expenses necessary to preserve county
SCHOOL FUNDS:) school fund to be borne from that fund.

June 28, 1935.

FILED
89

Hon. Paul C. Sutton
Clerk of the Iron County Court
Ironton, Missouri

Dear Sir:

This is to acknowledge your letter dated June 27, 1935, as follows:

> "The County Court has foreclosed on some School Fund Mortgages in this County and appointed me as agent to bid the land in for the protection of the School Funds.
>
> "Now the question arises in regard to, what fund the costs of these sales should be paid from, when I bid the property in for the Court."

It is our opinion that the costs incurred by reason of the sales mentioned in your letter (i. e., in which the county bids in the land), should be paid from the "County School Fund", and as authority we rely on Sections 9245, 9248 and 9254, R. S. Mo. 1929, and court decisions.

Section 9254, R. S. Mo. 1929, provides in part as follows:

> "Whenever the principal and interest, or any part thereof, secured by Mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest

> to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, * * * * ."

In Morrow v. Pike County, 189 Mo. 610, the Supreme Court of Missouri, in dealing with a similar question, said the following (l. c. 621-622):

> "The county court, however, did order that it should be paid out of the 'permanent school fund,' thereby meaning either the 'county public school fund,' referred to in Revised Statutes 1899, sec. 9824, or meaning the account which was carried on the county books as the 'permanent fund' of Watson Seminary. It matters little which fund was referred to, for they are precisely the same in contemplation of law, i. e., the permanent fund of Watson Seminary held by the county, which resulted from fines, penalties and forfeitures, since the repealing act of 1859, aforesaid, became ipso facto, and eo instanti by that repeal a part of the 'county public school fund.' The county court properly placed the burden of protecting this fund upon the fund itself and this arises from the following propositions: the public school fund does not belong to the county in a technical sense. It is a trust fund, and the county court is merely a trustee to carry out the policy defined by the lawmaking power in relation to the fund (Ray County to use v. Bentley, 49 Mo. l. c. 242); it may not divert the general county revenue to its protection, and, on the other hand, it can not apply the school fund to the payment of ordinary county debts. (Knox County v. Hunolt, 110 Mo. l. c. 75.) But it is fundamental

> that, conceding the right to make the contract in question, the burden of protecting the trust fund should fall upon the fund itself on well-recognized equitable principles. And so it has been held by this court. For example, Township Board of Education v. Boyd, 58 Mo. 279, was a case of this sort."

And further (l. c. 623):

> "Whereupon another suit was instituted in the name of Washington county to recover the sum of money so paid from the members of said county court (Washington County v. Boyd, 64 Mo. 179), and it was held that the plaintiff could not recover. It was said, among other things, that the court was a mere agent of the State for the management of a trust, and that, 'It is authorized to sell lands, to lease them, to receive and sue for the purchase money, and if there be danger of loss of a debt contracted for the purchase of these lands, the court, we think, might resort to those extraordinary remedies provided for creditors generally. * * *

of preserving the integrity of the school fund held in trust should be placed as a burden upon the fund itself, instead of making the contract illegal, in our opinion, placed the burden directly where it belonged, and had that provision been in the written memorandum signed by Morrow, it would not have rendered the contract invalid."

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

INTOXICATING LIQUORS(1) Cities cannot pass ordinances respecting searches and seizures - power reserved to State under Liquor Control Act. (2) Cities may pass ordinances similar to State Law where consistent.

8-26

August 2o, 1935.

FILED
89

Hon. Elmer A. Strom
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "An opinion is requested of your department pertaining to the following questions which have arisen under the Liquor Control Act as same applies to the power of Cities of the Third Class to include the provisions of the Act in its City ordinances.
>
> "Under the provision of the Act authorizing a municipality to pass such ordinances for the regulation and control of the sale of intoxicating liquor as it may seem fit so long as they are not inconsistent with the Act, has not the city the right to provide ordinances similar to the State law relative to the sale and possession of illegal liquor, i.e. bootleg liquor?
>
> "Also is it not within the power of the city to provide for a search and seizure ordinance within the limits of the city, the search warrants to be issued by the Police Judge, who is an ex officio justice of the peace within the limits of the city's jurisdiction.
>
> "The City of Cape Girardeau, a city of the third class, operating under the alternative form of government is now drafting its city ordinances and apparently expects to confine its regulations to the licensing and control of licensed places only and therefore an immediate opinion on the

> above questions will be helpful to determine if the City should not accept its portion of the load in the enforcement of the liquor laws within its city limits."

We point to applicable statutes and authorities relating to what cities may do to pass ordinances where not inconsistent with the provisions of the Liquor Control Act.

Section 25 of the Liquor Control Act provides in part as follows:

> "**** The Board of Aldermen, City Council or other proper authorities of incorporated cities, may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of such ordinances, where not inconsistent with the provisions of this act."

We direct your attention to Section 7289, R. S. Mo. 1929, applicable to municipalities enacting laws in conformity with State laws. Said section reads as follows:

> "Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the State, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

It is evident from a careful reading of the above section that municipalities must confine their ordinances to and in conformity with State laws upon the same subject.

In the case of State ex rel. v. McCammon, 111 Mo. App. loc. cit. pages 631 and 632, the Court quoted approvingly Black on "Intoxicating Liquor", Section 223, and said:

> "'The powers conferred upon a municipal corporation must be exercised in conformity to the general laws of the State, unless it is clear that the exclusive control of the subject is given to the municipality or that the general law is to be superseded or suspended by the charter. A statute granting authority to a city to pass ordinances in relation to the liquor traffic does not repeal the general laws on that subject. The rule is that the municipal ordinances cannot be set aside, limit or enlarge the statute law of the State, unless its power to do so can be shown in express terms or by necessary implication.' And again at section 224 the said author says:
>
> "'Whenever a change of policy takes place in the State on the subject of its liquor legislation, by the adoption of a different system -- as when general prohibition, or prohibition for particular localities is enacted by a constitutional amendment or general statute, or when the Legislature provides a uniform and general system for the licensing of the traffic -- this has the effect to repeal all inconsistent provisions in municipal charters and the ordinances adopted under them'."

In light of the foregoing, it is our opinion that cities may enact ordinances where similar to the State law regarding the sale and possession of illegal liquor and provide the penalties for violation of said ordinances in order to give effect to the regulation and control of the sale of intoxicating liquors within their limits.

The Legislature in passing Section 25, supra, of the Liquor Control Act had in mind that the General Assembly could not pass any laws levying a license tax for municipal purposes; therefore, enacted the above section giving the cities the right to enact ordinances providing for licenses, charge for

licenses and also regulate and control the sale of intoxicating liquors within their limits where not inconsistent with the provisions of the Act. This is the only power that has been expressly delegated to the cities. (Section 10, Article X of Missouri Constitution.)

There is no provision in the Liquor Control Act giving cities any right to pass ordinances respecting searches and seizures. We must necessarily conttrue that as meaning the power was reserved to the State itself.

The general proposition of law respecting what cities may do towards enacting ordinances providing for searches and seizures is found in 43 Corpus Juris, Section 271 at page 261, and Section 569 at page 431, as follows:

> "(Sec. 271) 9. Seizure and Forfeiture of Property. Neither seizure nor forfeiture of property may be made unless statutory power is given to the municipal corporation, whether it be forfeiture of property or of a license. But such power may exist by virtue of express grant. Such extraordinary power is least of all to be inferred where the legislature has provided other means for enforcing municipal regulations. And no forfeiture may be adjudged without due process of law."
>
> "(Sec. 569) 113. Searches and Seizures. A municipal corporation in the absence of express authority may not authorize the search for, and seizure of, property kept for unlawful use."

In light of the foregoing, it is the opinion of this department that cities cannot enact an ordinance providing for searches and seizures within the limits of the cities in view of the fact that that power has been reserved to the State.

Very truly yours,

APPROVED:

RUSSELL C. STONE
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General

RCS/afj

TAXATION: Fees and costs on delinquent taxes; contents of back tax book, seizure of personal property for taxes.

October 2, 1935.

10-17

FILED
89

Honorable T. S. Swicegood
County Collector
Hickory County
Hermitage, Missouri

Dear Sir:

Sometime ago this office received your request for an opinion reading as follows:

> "Find enclosed example of delinquent tax 1930 to 1934, inclusive. Will appreciate the proper interest cost and fees inserted as we should collect.
>
> Also will appreciate information regarding extension of interest fees and costs at time of making Back Tax Book, whether it should be or not.
>
> Also, how soon is it lawful to sell land after it becomes delinquent?
>
> Can a collector have personal property seized and sold for personal tax?"

I.

PROPER INTEREST, COSTS AND FEES ON DELINQUENT TAXES.

The 57th General Assembly enacted a new law for the collection of delinquent taxes, substantially changing the fees allowable on delinquent taxes. This tax law is found at page 425 et seq. Laws of Missouri 1933.

In the memorandum attached to your communication you have asked for the calculation of costs, interest and penalties on a 1930 tax bill. We assume that you mean such a tax bill as would be delinquent January 1, 1931, and the following schedule treats first a 1930 tax bill delinquent January 1, 1931, the second a 1931 tax bill delinquent January 1, 1932, third, a 1932 tax bill delinquent January 1, 1933, fourth, a 1933 tax bill delinquent January 1, 1934, fifth, a 1934 tax bill delinquent January 1, 1935. The penalties have been calculated on the basis of a payment of the taxes during the month of October and before any costs of advertising or sale have been incurred. The schedule as above referred to is as follows:

I.

		Int. 10%	Fees Co. Clks		Fees Co. Coll.	Comm. Co. Coll.
1930 tax	$70.18	7.02	1931	25		2%
			1932	10		of tax
			1933			and
			1934	5	25	interest
			1935	5	10	$1.54

II.

1931 tax	70.18	7.02	1932	25		2%
			1933	10		of tax
			1934	5	25	and
			1935	5	10	interest
						$1.54

III.

1932 tax	70.18	7.02	1933	25		2%
			1934	5	25	of tax and
			1935	5	10	interest
						$1.54.

IV.

1933 tax	70.18	7.02	1934	5	25	2%
			1935	5	10	$1.54

V.

1934 tax	70.18	7.02	1935	5	25	2%
						$1.54

It is to be noted that interest on these delinquent taxes are all the same, to-wit, 10%. This is brought about by reason of the enactment of Senate Bill 143 of the 58th General Assembly found at page 408, Laws of Missouri 1935.

The next item is the County clerks fees in the case of a 1930 tax bill delinquent January 1, 1931. The County collector's fees for 1931 and 1932 are governed by the provisions of Sections 9945 and 9969 R. S. Missouri 1929, while the county clerks fees on such taxes for 1934 and 1935 are governed by the provisions of Section 9945, page 426, Laws of Missouri 1933. As no delinquent list was made under the provisions of the new law in 1933, the county clerk is entitled to no fee during that year. The county collectors fees which are dealt with in the next column are as provided for in Sections 9969, page 429, Laws of Missouri 1933, and 9945, page 426, Laws of Missouri 1933, and apply only for the years 1934 and 1935. The county collectors commission dealt with in the next column is calculated at 2% of the sums collected as provided for in Section 9969, page 429, Laws of Missouri 1933. This 2% is to be calculated upon the amount of tax and interest collected and is therefore variable depending upon the amount of interest due and collected.

II.

FEES AND COSTS NOT REQUIRED TO BE PUT IN LISTS OF LANDS AND LOTS AT THE TIME OF MAKING.

Section 9952, page 428, Laws of Missouri 1933, provides for the making up of delinquent lists of lands and lots each year between the first of January and first of July. This section in part provides for

> "a list of lands and lots, returned and remaining delinquent for taxes* * * describing such lands and lots* * *and charging them with the amount of delinquent tax and naming the years delinquent, separately stated, and in addition thereto a penalty of ten per centum on such tax delinquent for the preceding year and an additional annual ten per centum on taxes for each year* * *provided however, if taxes are paid on land or lots delinquent

> for the preceding year at any time prior to sale thereof as in this act provided, the per centum of penalty added shall not exceed one per centum per month or fractional part thereof or ten per centum annually."

The aforementioned section has been modified by Senate Bill 143 of the 58th General Assembly hereinbefore referred to so that all delinquent taxes are to be treated as though they were taxes for the year 1934 insofar as the collection of penalty interest is concerned. No provision is made in this Section requiring that the costs, fees and commissions be placed on the delinquent lists of lands and lots at the time it is made up. However, it would appear that there is no prohibition against placing such items in the delinquent tax lists and if from an administrative view point it is desirable that such be done at the time the list is made, such acts would not be violative of the law.

III.

CERTIFICATES MAY BE SOLD THE NOVEMBER FOLLOWING THE DELINQUENCY OF THE TAX.

Section 9952a, page 430, Laws of Missouri 1933 provides:

> "All lands and lots on which taxes are delinquentand unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year,* * * *"

Section 9952b, page 403, Laws of Missouri 1935, provides for the advertising of such lands prior to the date of sale. Therefore, certificates of delinquent taxes may be sold the November following thedate of delinquency of the taxes. In other words, lands upon which taxes are delinquent for the year 1934 cannot be sold for such delinquent taxes prior to November of 1935.

IV.

THE COLLECTOR MAY SEIZE AND SELL PERSONAL PROPERTY FOR PERSONAL TAXES.

The law herein referred to known as the Jones-Munger Act applies only to the enforcement of the payment of taxes on real estate. The law respecting the collection of personal taxes is substantially the same as before the adoption of this act in 1933.

Section 9915 R. S. Missouri 1929, specifically authorizes the seizure and sale of personal property for personal taxes. This section among other things provides:

> "The collector shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property: Provided, that no such seizure or sale for taxes shall be made until after the first day of October of each year,* * * * *"

This statutory procedure has been unaffected by the recent changes in law hereinbefore referred to, and specifically authorizes the seizure and sale of personal property for personal taxes.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

CITIES - Assent of two-thirds of voters required to incur indebtedness in excess of annual income.

November 23, 1935

11-25

FILED
89

Honorable Roscoe C. Summers
Attorney and Counselor
Dallas Building
Pleasant Hill, Missouri

Dear Sir:

We have your request of October 31, 1935 for an opinion, which in part is as follows:

> "Will you let me know right away what your opinion is with reference to cities under Special charter, such as the City of Pleasant Hill, Missouri, purchasing real estate within the city limits for park purposes without a vote of the citizens, and without any annual tax for upkeep of the park, which is not necessary when the city has sufficient revenue annually to pay the purchase price, and upkeep, citing you Section 14238, Revised Statutes of Missouri, 1929, and also Article Ten, Section 12 and 12a, State Constitution, stating 10% of the taxable property values as ascertained by the assessment next before the last assessment for state and county purposes previous to incurring the indebtedness."

From your letter, we assume that the city does not have sufficient cash in its surplus account to pay the entire purchase price of $4,000.00 for the desired park, but could, from the surplus city revenue, pay for such park over a period of

years. At the moment the city purchases the lot for $4,000.00, it would become indebted at that time to the extent of the purchase price, which, according to your letter, would be in excess of the current revenue for the year.

Section 7217, R. S. Mo. 1929, being applicable to all cities and towns, among other things, provides:

> "The various cities, towns and villages in this state, whether organized by special charter or under the general laws of the state, may contract a debt or debts in excess of the annual income and revenue for any such year * upon the assent of two-thirds of the legal voters of such city, town or village voting at an election held for that purpose: * * "

Article X, Section 12 of the Missouri Constitution prohibits any city or town from becoming indebted in any manner for an amount exceeding in any year the income of revenue provided for such year, without the consent of two-thirds of the voters thereof.

We quote from Ebert v. Jackson County (1934) 70 S. W. (2d) 918, l.c. 920, facts similar to the one involved, with the ruling of the court thereon:

> "In the instant case the contract was not executory and contingent. It purports to bind the county to pay plaintiff $4,320 for the use of the room for four years, beginning August 1, 1925, payable $90 on the first day of each month, in advance. These payments were to be paid from the income and revenue of future years as well as from the income and revenue provided for the year the contract be came effective. It was an unconditional

> promise made by the county on July 18, 1925, to pay the rent in advance on the first day of each month for four years. The payment of the rent was not contingent upon the occupancy of the room by the justice or on plaintiff's furnishing it to the county for that purpose.
>
> "The contract was an effort to anticipate the income and revenue of the county for several years following the year the contract became effective. It created a debt within the meaning of said section of the Constitution, and is void."

Whether the park is attempted to be purchased by a monthly rental or the payment of a sum by way of a lease, the entire purchase price becomes a debt of the city within the meaning of the above constitutional provision. In a recent case, Sager v. City of Stanberry, 78 S. W. (2d) 431, the city attempted to purchase generating equipment, the purchase price to be paid in installments, called rentals, the Supreme Court held that the total purchase price created an indebtedness which required the assent of two-thirds of the voters thereof.

It is, therefore, the opinion of this office that the city of Pleasant Hill is without authority to purchase the park in question on the installment plan, and that within the limitation of the indebtedness provisions of the Constitution, the city can only purchase the park with the assent of two-thirds of the voters.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:FR

Cities of 3rd Class may pass ordinances imposing license tax on wholesale merchants doing business within city limits under Section 6840.

11-25

November 25, 1935

FILED
89

Honorable Elmer A. Strom
Prosecuting Attorney
Cape Girardeau, Missouri

Dear Sir:

This Department is in receipt of your recent letter requesting an opinion regarding the following matter:

> "The matter of the right of a city of the 4th class and a city of the 3rd class to pass ordinances for the collection of an occupation tax on a concern selling or consigning its merchandise to retailers in such cities has been presented to me and request made for an opinion from your office.
>
> The exact question involved is whether a corporation organized in Missouri located in this city which sends out its driver and truck loaded with merchandise to cities in this county and surrounding counties to deliver its merchandise to merchants who have either previously ordered the goods or second who desire the goods by purchasing it directly from the truck or allow it to be consigned to them from the truck with a provision that if the consigned stock is not sold it will be picked up by the truck driver replaced with other merchandise or returned.
>
> It would seem that such a procedure would be a benefit to the local merchants and since no property is sold to the consumer would be the same as if the merchandise

was shipped to the retailer by express, parcel post or common carrier unless it would be the mere fact that the driver has the power to make a sale or consignment at the time he arrives at the merchants door and is not dependent on an order previously given.

For your information Section 7046 R. S. Mo. 1929, Section 6840 as amended, Laws 1931 page 276, Section 7287 R. S. Mo. 1929, together with the cases of City of Ozarks vs. Hammond 49 S. W. 2nd 129; City of Lebanon vs. Joslyn 58 S. W. 2nd 289 and City of Aurora vs. Stafford 51 S. W. 2nd 547 throw light on this subject.

Local cities and other cities have ordinances covering wholesale merchandizing agencies, peddlers, drummers and "other business trades and avocations" under which they seek a tax of $7.50 to $30.00 per year and the matter is becoming quite a problem as it is difficult and expensive to handle appeals in such cases because of the great number and because it is a continuing violation and the fines for violation run from $1.00 to $100.00 for each violation.

I would appreciate an opinion from your office on this subject as soon as possible."

You do not state in your letter the kind or substance of the proposed ordinance which would affect the firms or concerns doing business in the manner you have described in your letter. We conclude it is some form of occupation or license tax as contemplated by Section 6840 Laws of Missouri, 1931, page 277, wherein it is provided as follows:

"The council shall have power and authority to levy and collect license tax on wholesale houses, auctioneers, architects, druggists, grocers, banks, brokers, wholesale merchants, merchants of all kinds, * * *

glean your contention from your letter. We think it more than possible that you have in mind an ordinance somewhat similar as in the case of City of Sedalia v. Standard Oil Company of Indiana, 66 Fed. 2nd. 1. c. 760. All of the cases bearing on this question are contained in the decision which we herewith quote the pertinent part:

> "The trial court was also of the opinion that the ordinance was invalid for lack of uniformity in its operation because it omitted to impose a similar tax upon those who sold gasoline, but did not transport it, and upon those who transported it in containers of less capacity than five gallons, whereas section 3 of article 10 of the Constitution of Missouri requires that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Assuming that there may have been others who sold or transported this commodity under these circumstances, the requirement of uniformity is met if the tax falls alike on all persons who are in substantially the same situation. In illustrating this principle the court said in City of St. Charles v. Schulte, 305 Mo. 124, 264 S. W. 654, 655:
>
> 'The Legislature delegated to cities of the third class, as it was competent for it to do, authority to levy and collect a license tax on the vendors of soft drinks. Under the general power so delegated to it the City of St. Charles was not bound to levy the same amount upon all vendors of soft drinks. It could, in its discretion, divide them upon any reasonable basis into classes, as, for example, the volume of business done (City of Aurora v. McGannon (138 Mo. 38, 39 S. W. 469), supra), or the specific character of the drinks sold (In re Watson (17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321), supra), and fix a different tax for each class. (1 Cooley, Tax'n (4th Ed.) 353). Upon the same principle peddlers have long been classified in

this state for the purpose of taxation. Section 9259, R. S. 1919 (Mo. St. Ann. Sec. 13318).

There can be no doubt but that, under well-settled principles, respondent was not bound to levy and collect a license tax upon vendors of all kinds of soft drinks, if it imposed a tax upon the vendors of any. It could in its discretion have imposed a tax upon those who engaged in selling near beers without imposing any at all upon the vendors of other soft drinks. Carroll v. Wright, 131 Ga. 728, 63 S. E. 260; Coca-Cola Co. v. Skillman, 91 Miss. 677, 44 So. 985.'

See also, Ex parte Asotsky, 319 Mo. 810, 5 S. W. (2d) 22; Automobile Gasoline Co. v. City of St. Louis, 326 Mo. 435, 32 S. W. (2d) 281.

On this record it is not made to appear that there was not a reasonable basis for the classification adopted. The suggestion that the classification adopted offends also against the Fourteenth Amendment to the Constitution of the United States is sufficiently met by what was said on that subject in Campbell Baking Co. v. City of Harrisonville, Mo. (C. C. A.) 50 F. (2d) 670.

There is a further suggestion that the ordinance is invalid because it undertook to impose a tax upon a business conducted outside of the territorial limits of the city. The bill alleges that defendant was engaged in the city of Sedalia in conducting the business of selling and transporting gasoline, but it also alleges that it was the defendant's duty to account for all gasoline sold by it, under the terms of the ordinance, within the state of Missouri. Considering the title of the ordinance, the general purpose expressed in it, and the limitation stated in section 6, exempting from its operation gasoline shipped from Sedalia to other cities, towns,

and villages, it is a reasonable interpretation of the ordinance in question that it included a tax upon dealers who, in the city of Sedalia, conducted the business of both selling gasoline and transporting it within the city, in the manner mentioned, and also upon dealers who in the city of Sedalia conducted the business of both selling gasoline and transporting it from within the city to points within the state of Missouri. No challenge has been made of the territorial authority of the city to impose the tax upon the first class, but it is asserted that the city may not impose the tax upon the second class, because of the delivery of the gasoline outside of the city. The ordinance does not undertake to measure the tax by the transportation outside of the city of Sedalia. The right of a municipal corporation to impose a tax of this kind upon an occupation or business which is conducted within the city limits, although a portion of the business was carried on outside of the city, is generally recognized. Postal Telegraph Cable Co. v. City Council of Charleston, 153 U. S. 692, 14 S. Ct. 1094, 38 L. Ed. 871; Western Union Tel. Co. v. City of Fremont, 39 Neb. 692, 58 N. W. 415, 26 L. R. A. 698; 37 Corp. Jur. 181; American Union Express Co. v. City of St. Joseph, 66 Mo. 675, 27 Am. Rep. 382; City of Carterville v. Blystone, 160 Mo. App. 191, 141 S. W. 701; American Mfg. Co. v. City of St. Louis, 270 Mo. 40, 192 S. W. 402. The delivery outside of the city of gasoline sold within the city did not invalidate that ordinance."

CONCLUSION

We are of the opinion that an ordinance could be passed by your city council which would impose a license tax on wholesale merchants or firms dealing in the manner in which you have described in your letter.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN Jr. (Acting) Attorney General

TAXATION: Senate Bill 94 not applicable to collection of levee district assessments.

3-22

March 22, 1935.

FILED 90

Hon. J. S. Taylor
Treasurer and Ex-Officio
Collector of Bates County
Butler, Missouri

Dear Mr. Taylor:

Acknowledgment is herewith made of your request for an opinion of this office reading as follows:

> "Since I did not receive your opinion on the advertising of drainage land in the Grand River Drainage District until too late to sell land on the first Monday in November, I am wanting to know if land advertised since that time can be sold now, or will it have to go over until November next."

I have made diligent search of the records of this office but fail to find any opinion directed to you respecting the advertisement of drainage land in the Grand River District for delinquent taxes. I assume from your inquiry that it respects the collection of taxes or more properly speaking, benefit assessments due the Grand River Drainage District.

I.

DRAINAGE ASSESSMENTS NOT COLLECTIBLE UNDER PROVISIONS OF SENATE BILL 94, PAGE 425 LAWS OF MISSOURI, 1933.

Senate Bill 94 as above cited was not intended to change or vary the means of collecting delinquent drainage assessments. Section 9963d, page 448, Laws of Missouri 1933, provides as follows:

> "Nothing in this act contained shall be construed to authorize a personal judgment against any owner of any land or lot, or of any interest therein, for any real estate tax levied and/or assessed against such land or lot, nor shall this act be so construed as to change in any manner whatsoever the method of mode now or that may hereafter be provided by law for the collection of drainage and/or levee assessments, or other special assessments."

By the provisions of this section the Legislature has specifically stated that this law was not to effect the mode of collecting delinquent levee and drainage assessments as existed at the time of the adoption of this law, therefore, these assessments are to be collected by suit as heretofore.

The Supreme Court of Missouri has passed upon this feature of the Jones Munger Law in the case of St. John Levee and Drainage District vs. Pillman, 76 S. W. (2d) 1095. In this case Judge Westhues, speaking for the Court stated, l. c. 1096:

> "In the act of 1933, no reference whatever was made to section 10927 or its various provisions. It will, therefore, be presumed that section 10927 was not repealed, unless we are authorized to say that the Legislature meant to repeal the provisions of this section by implication. We find nothing in the act which indicates that the Legislature intended to change the precedure for the enforcement of levee and drainage taxes. On the contrary, the act itself in specific terms specifies that the provisions thereof shall not apply to the enforcement of such taxes. Note the reading of the latter part of the section 9963d, page 448, Laws 1933 (Mo. St. Ann. Sec. 9963d, p.8007): '* * *nor shall this act be so construed as to change in any manner whatsoever the method or mode now or that may hereafter be provided by law for the collection of drainage and/or levee assessments, or other special assessments.'
>
> So we have here a specific direction, by the lawmaking body, that the act changing the procedure with reference to the enforcement of state

> taxes shall not be so construed as to apply to the enforcement of drainage and levee taxes. The Legislature evidently had in mind that section 10927 and other sections prescribed certain procedure for the enforcement of these taxes, and that by reference a part only of the provisions of the general revenue act had been made a part of the levee district and other acts. So, in order to avoid confusion on the subject, the Legislature left the procedure of the enforcement of levee taxes the same as before, and a reading of the new law clearly indicates that the Legislature intended its provisions to apply only to the state and county revenue."

In view of the foregoing decision there can be little doubt as to the proper method of your procedure.

CONCLUSION.

It is therefore the opinion of this office that drainage assessments of the Grand River Drainage District cannot be enforced under the provisions of Senate Bill 94 and that the provisions of that law are not applicable to the collection of such assessments, but are to be collected under the provisions of the law as existed prior to the adoption of Senate Bill 94.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

TAXATION AND REVENUE: Disposition of surplus proceeds of tax sale.

April 5, 1935.

FILED 10

Hon. Joseph T. Tate,
Prosecuting Attorney,
Gasconade County,
Owensville, Mo.

Dear Sir:

A request for an opinion has been received from you under date of November 17, 1934, such request being in the following terms:

> "The County Collector has requested that I secure an opinion from you regarding the disposition of surplus money collected on sale of real estate for taxes where there was a mortgage on said premises at the time of said tax sale.
>
> In the event that you have already rendered an opinion on the subject I will appreciate receiving a copy of same."

The question presented by your letter has not been squarely settled in this State either by statute or judicial precedent, and we have only been able to discover a few cases in other states on the subject.

The only relavant statute which we have been able to discover is R. S. Missouri, 1929, Section 9959, as amended by Laws of 1933, page 425, 428, which provides as follows:

> "When real estate has been sold for taxes or other debt by the sheriff or collector of any county within the state of Missouri, and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff or collector of the county, when such sale has been or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the debt or taxes and all costs in the case, and for which no owner or owners, agent or agents can be found, together

> with the amount of surplus money in each case, which statement shall be subscribed and sworn to by the sheriff or collector making the same before some officer competent to administer oaths within this state, and then presented to the county court of the county where such sale has been or may hereafter be made; and on the approval of the statement by the court, the sheriff or collector making the same shall pay the said surplus money into the county treasury, take the receipt in duplicate of said treasurer for said overplus of money and retain one of the said duplicate receipts himself and file the other with the county court, and thereupon the court shall charge said treasurer with said amount. And said treasurer shall place such moneys to the credit of the school fund of the county, to be held in trust for the term of twenty years for the owner or owners or their legal representatives. And at the end of twenty years, if such fund shall not be called for, then it shall become a permanent school fund of the county. County courts shall compel owners or agents to make satisfactory proof of their claims before receiving their money: Provided, that no county shall pay interest to the claimant of any such fund."

You will observe that this section, although it does not expressly provide for payment to the owner of the surplus, it nevertheless seems reasonably clear that such payment is contemplated. Furthermore, this section makes no attempt to define the term "owner".

In the case of McDuffie v. Collins, 117 Ala. 497, 23 So. 45 (1898), a statute generally similar to the Missouri statute above quoted was involved in a suit brought by a mortgagee whose mortgage was recorded but unmatured against the mortgagor, to whom payment of the surplus proceeds of a tax sale had been paid by the collector. The mortgage provided that the mortgagee could take possession before maturity of the debt if he deemed it necessary to protect his interests. The court held that such payment was improper and said:

> "We think it clear that the plaintiffs were entitled to the money. They were the legal owners * * with the right to its immediate possession, subject to the superior right of the tax collector to seize and sell for taxes. * * The surplus proceeds in the hands of the collector represented the property. The right of the mortgagees to the property, as against Cannon (the mortgagor), at the time of the seizure and sale, attached to the surplus; and they were entitled, on demand, to receive it, as they would have been entitled to demand and receive the property itself, had there been no conversion of it into money through the processes of a paramount lien."

The court then referred to the statutory provision comparable to the Missouri statute above quoted and said that the provision "that 'any balance remaining shall be paid to the owner of the property' is merely declaratory of the law as it already existed. The gist of that section is the succeeding authority given to the collector to deposit the balance with the county treasurer, * * if the owner is not present at the sale, or, if present, refuses to receive it. The purpose was to relieve the collector of the duty of seeking the owner and paying him the balance, or of retaining it in his hands if the owner should refuse to receive it. It does not undertake to define what relation to the property a person must bear, in order to be its 'owner', within the terms of the section. That is left to be controlled by the general principles of law applicable to the case. If no superior claimant had made known his claim, and demanded the money, the collector would have been authorized to pay the surplus to the taxpayer from whom he obtained possession of the property; but, a claimant appearing and asserting his right, the collector, like any other holder of funds to which there are known rival claimants, necessarily, if he paid to either, took upon himself the peril of seeing that the payment was made to the party lawfully entitled."

The case just considered would seem to be a reasonable and proper construction to be placed upon a statute like the Missouri statute. The right of the mortgagee to the surplus was confirmed in the case of Brockway v. Humphrey, 4 Neb. (Unoff.) 403, 94 N.W. 625 (1903) in which the court said:

> "Plainly, the first mortgagee was entitled to a lien on the surplus."

Further, in the case of Farmer v. Ward, 75 N.J.Eq. 33, 71 Atl. 401 (1908), the court said:

> "Under what I think is a well-settled rule, the mortgagee prior to sale may pay the taxes which the owner of the equity of redemption was primarily liable to pay, and thereby acquire by a species of subrogation a lien for the amount so paid which in respect of priority occupies the same position as the tax lien. * * After sale, and before redemption, the mortgagee's interest stands practically transferred to the fund."

See also Worcester v. Boston, 179 Mass. 41, 60 N.E. 410; Sutherland v. City of Brooklyn, 156 N.Y. 605, 51 N.E. 433.

Hon. Joseph T. Tate,
Prosecuting Attorney,
Gasconade County,
Owensville, Mo.
April 5, 1938.

In conclusion, it is our opinion that where a surplus exists after the sale of real estate for taxes, such surplus should be paid to the owner of the property, if only one person has any interest therein; that if the collector is satisfied that there is a valid recorded unsatisfied mortgage against the property, payment to the extent of the then mortgage debt could be made to the mortgagee and should not be paid to the mortgagor, and that if there is any doubt about the person to whom payment should be made, the safest procedure for the collector would be to turn the money into the county treasury under R. S. Missouri, 1929, Section 9959, as amended by Laws of 1933, page 425, 428, leaving proof of ownership to be made to the county court under that section.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TAXATION: The tax lien for State and County taxes, in Missouri, is fixed on June 1st on all land in the State not exempt on that date, and subsequent purchase in the name of the United States does not exempt the land from the lien, by reasnn of the Missouri Constitution exempting property of the United States from taxation.

June 19, 1935.

Supplemental opinion 2-14-38. A. G. Landis #51

FILED 90

Honorable William H. Tandy
Attorney, U. S. D. A.
Rolla, Missouri

Dear Sir:

We acknowledge your request for an opinion dated May 25, 1935, which is as follows:

"In connection with the purchase of lands by the United States for forestry purposes in Missouri, this department has been with-holding taxes for the year 1935 which became a lien by statute June 1, 1934. On and after June 1, 1935 additional taxes will be with-held for the year 1936 if the same procedure is followed. This will result after June 1, 1935 in the with-holding of amounts sufficient to pay the 1935 and 1936 taxes which under the statute cannot be paid until after final adjustments have been made and the books turned over to the Collector.

"I would appreciate your decision as to the date of liability for taxation when land is sold to the government. In this connection your attention is respectfully directed to the following cases:

United States vs. City of Buffalo 54 Fed. 2nd 471

United States vs. Pierce County, et al 193 Fed. 529

Bannon vs. Burns, 39 Fed. 892.

> "Your attention is respectfully called to the urgent need of this opinion inasmuch as it affects numerous vendors who have optioned their lands and are now conveying to the United States and those whose cases are now pending."

House Bill No. 19 authorizing the United States to purchase reforestation land in Missouri, which was passed with an emergency clause by the 58th General Assembly of the 1935 Missouri Legislature, and was signed by the Governor, provides in Section 11702 as follows:

> "The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the the purpose of establishing and maintaining postoffices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, game and bird preserves and land for reforestation, recreational and agricultural uses."

In case of United States v. City of Buffalo 54 Fed. 2d, 471, l. c. 473, the majority of the Court said:

> "No time need be spent to show that property purchased by the United States with the consent of the state in which it is located is beyond the reach of state or municipal taxation unless the United States consents. U. S. Const. art. 1, Sec. 8. No claim is made that it is. Moreover, property of the United States is expressly made exempt in New York by section 4 of the Tax Law of that state."

Article XIV, Section 1, Missouri Constitution, exempts land in Missouri, the property of the United States, from taxation, and provides in part:

> "No tax shall be imposed on lands the property of the United States;* * * *"

Pursuant to the above Missouri Constitution exemption, Section 9743 R. S. Mo. 1929, provides in part as follows:

> "The following subjects are exempt from taxation: * * * * second, lands and loss, public buildings and structures with their furniture and equipments, belonging to the United States; * * * *."

The Supreme Court said in Deickhart v. Rutgers, 45 Mo. 130 at l. c. 132:

> "This equitable rule is recognized in Blossom v. Van Court, and that case, as already observed decides that the tax lien takes effect and becomes an encumbrance from the inception of the assessment."

Under the Constitution of Missouri, Article X, Section 4, all land in Missouri must be assessed according to its true value and said section provides in part:

> "All property subject to taxation shall be taxed in proportion to its value: * * * *"

Under the tax statues of Missouri all taxes on real estate which became delinquent on January 1, 1935 were upon lands which were assessed June 1, 1933, and the Rutgers case holds that State and County lien for taxes which became delinquent on January 1, 1935 attached on assessment. Your statement in your request for an opinion is true, that is, State and County tax cannot be paid until the tax books have been turned over to the County Collector, but that does not mean that the lien for said tax does not precede the Collector receiving the tax books, nor does it mean that the tax lien does not become fixed at true value at assessment.

In order to determine when the lien for taxes establishes itself in Missouri, we have but to look to the tax scheme which the Legislature has provided in Missouri as

the same relates to the establishment of the tax lien.

Section 9756 R. S. Mo. 1929, provides the time and manner that the Assessor must follow in making land assessments in Missouri. Said Section reads in part:

> "The assessor or his deputy or deputies shall between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof, in the manner following towit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter, and the person listing the property shall enter a true and correct statement of such property in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this chapter by the person listing the property and delivered to the assessor. Such lists shall contain; first, a list of all the real estate and its value, to be listed and assessed on the first of June, 1893, and every year thereafter, anything in this or any other section to the contrary, * * * *."

Section 9759 R. S. Mo. 1929 provides in part as follows:

"The oath to be signed and sworn to by each person making the statement of property required by this chapter shall be as follows:

"I_____, do solemnly swear, or affirm, that the foregoing list contains a true and correct statement of all the property made taxable by the laws of the State of Missouri, * * * * and all other property, and its value which I owned on the first day of June, 19__,* * * * *."

Section 9746 R. S. Mo. 1929, provides:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

Section 9747 R. S. Mo. 1929, provides:

"Government lands entered or located on prior to the first day of June shall be taxable for that year and every year thereafter; school and swamp lands and lots shall become taxable whenever the county sells, conveys or agrees to convey its title; real property shall in all cases be liable for the taxes thereon, and a lien is hereby vested in favor of the state in all real property for all taxes thereon, which lien shall be enforced as hereinafter provided in this chapter; said lien shall continue and be in force until all taxes, forfeitures, back taxes and costs shall be fully paid or the land sold or released, as provided in this chapter."

Section 9779 R. S. Mo. 1929, provides:

> "Real estate shall be assessed at the assessment which shall commence on the first day of June, 1893, and shall be required to be assessed every year thereafter."

Section 9793 R. S. Mo. 1929, provides:

> "Each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed. The assessment of land or lots in numerical order, or by plats and a 'land list' in alphabetical order, as provided by sections 9780 and 9781, shall be deemed and taken in all courts and places to impart notice to the owner or owners thereof, whoever or whatever they may be, that it is assessed and liable to be sold for taxes, interest and costs chargeable thereon; and no error or omission in regard to the name of any person with reference to any tract of land or lot, shall in anywise impair the validity of the assessment thereof for taxes."

All of the above sections establish that the assessment for taxation in Missouri begins June 1st and is on property owned by taxable persons on that date, as per its true value. The last four quoted sections establish that the fiscal year for purposes of taxation begins June 1st, in each calendar year, and that the tax lien based on true value establishes itself on the first day of the fiscal years, that is to say, on June 1st of calendar years. The last quoted section establishes that the tracts of land assessed are chargeable with the tax lien. Construing Section 9793, supra, the Supreme Court said in State ex rel. McKee v. Clements, 219 S. W. 900; 281 Mo. 195, at l. c. 200:

> "By said Section 11385 each tract of land is chargeable with its own taxes no matter who the owner is or in whose name assessed. The assessment of land or lots in numerical order, or by plats

> and a 'land list' in alphabetical order, as provided by preceding sections, imparts notice to the owner that it is assessed and liable to be sold for the taxes chargeable thereon. This and related sections make the taxes a charge on the land under all circumstances, regardless of who the owner or prior lienors may be, regardless of the name or names in which it is assessed, and regardless of any error or omission in that respect."

In the Missouri case of DeGiverville v. Legg, 48 Mo. App. 573, the Appellate Court, in passing on statutes similar to the ones now in force, and heretofore quoted, said at l. c. 576:

> "There is such a thing in this state as a taxable year, about which there can be no controversy, when the statutes concerning the assessment and collection of the public revenue are considered. Section 7569, Revised Statutes of 1889, reads: 'Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year.' Section 7552. 'Real estate shall be assessed at the assessment, which shall commence on the first day of June, 1881, and shall only be required to be assessed every two years thereafter. Each assessment of real estate so made shall be the basis of taxation on the same for two year next succeeding.' These sections clearly establish what may be designated as a taxable or fiscal year, beginning on the first day of June in each year. The supreme court of the state has recognized this in several decisions."

State and County taxes in Missouri become delinquent on January 1st, at a subsequent time in the tax scheme when the State's lien has become fixed, and Section 9936,

R. S. Mo. 1929 provides:

> "All real estate upon which the taxes remain unpaid on the first day of January, annually, shall be deemed delinquent, and the said county collector shall proceed to enforce the lien of the state thereon, as required by this chapter; and any failure to properly return the delinquent list, as required by this chapter, shall in no way affect the validity of the assessment and levy of taxes, nor of the judgment and sale by which the collection of the same may be enforced, nor in any manner to affect the lien of the state on such delinquent real estate for the taxes unpaid thereon."

The State tax lien on delinquent taxes must be foreclosed upon the first Monday in November, following the January delinquency, under the provisions of the Jones Munger Tax Law, and at the sale a successful bidder may interpose a cloud upon the title in favor of holders of tax certificates to land which the United States Department of Forestry has contracted to purchase.

The Jones Munger Tax Law appears in the Missouri Laws of 1933. Without quoting the whole act we call you attention to the provisions of Section 9952a appearing at page 430:

> "All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale; provided, however, delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor.

"The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

CONCLUSION.

Notwithstanding contracts of purchase now held by the United States Department of Forestry, referred to in your request, this department is of the opinion that the State and County tax lien in favor of the State of Missouri becomes fixed on June 1st, of each year, which date is the first date of the fiscal tax year. On June 1st, of any year, real property, the title to which was at that time vested in any person, natural or artificial, where that person is not exempted under the provisions of the Constitution and exemption statutes pursuant thereto, on the first minute of that day become subject to the State and County tax lien and it is then attached and becomes final, and the fact that the United States Department of Forestry thereafter purchases the land in the name of the United States of America, pursuant to a contract of purchase entered into prior to June 1st, does not preclude existence of the tax lien which came into force during the pendency of said purchase contract, although the amount of the lien, which became fixed on true value, cannot be computed until other State taxing agencies act.

It is true that the Constitution and Statutes of Missouri exempt land purchased by the United States for reforestation, but this exemption does not extend to United States' lands which are subject to a fixed tax lien at the date the title passes to the United States Government, and valid tax certificates issued or outstanding pursuant to the statutory enforcement of State and County tax liens should be given sanction by the Courts even against federal ownership of the land. We admit that the United States cannot be sued except with its consent, but that fact does not mean that the obligation to pay the State's lien does not exist against the United States when they purchase reforestation land.

None of the cases cited in the request for an opinion can be taken for authority for the legal proposition that the lien for State and County taxes in Missouri, which the Legislature has established to take affect on June 1st, of each fiscal year, the date of the annual assessment on property, is not final as a charge against property acquired by the United States or any other person on or after June 1st, of said fiscal year.

The statutory liens which the Federal Court construed in the three Federal cases cited in the request for an opinion were given a retrospective operation because the lien statutes under consideration, by their terms, required a retrospective construction. The Missouri Statutes establishing a tax lien on real estate owned on June 1st, are clearly prospective, not possible of retrospective construction applied in the Federal cases cited. In Missouri the State's tax lien falls within the enforceable liens described in the concurring opinion of Judge Hand in United States v. City of Buffalo, 54 Fed. 2d, 471, where at l. c. 474, the Judge said:

> "I agree in the result but for other reasons than my brothers. The question appears to me wholly one of state law, with which the sovereignty of the United States has nothing to do, although of course I agree that no state may tax property of the United States. On the other hand I do not understand it to be disputed that when the United States takes over property, it takes it subject to whatever liens are upon it, tax liens like the rest. If the law of a state were that all taxes should be liens as of March first, the time of the assessment, but might be computed, levied and extended on the rolls before July first, I see no reason why they should not be a lien upon land conveyed to the United States on March second. The act of liquidating and formally imposing the tax would not in my judgment be in defeasance of the sovereignty of the United States. I cannot agree with the contrary ruling in U. S. v. Pierce County (D. C.) 193 F. 529.

> Bannon v. Burnes (C. C.) 39 F. 892, contains a dictum in accord, but it was altogether unnecessary to the result. The levy and extension on the rolls are not adversary proceedings against the United States, like an arrest or seizure of its property; they do no more than fix the amount of a charge already imposed, and the liquidation does not depend upon questions in which the United States is interested except as all other owners of property. They are not directed against it individually, as is a suit, or a condemnation."

The above concurring opinion, we believe, properly classifies the propositions of law accredited to the Pierce and Burns cases, cited in the request for an opinion as dictum. This holding in the concurring opinion has been quoted and followed in later Federal cases. None of the later cases overrule outright the majority opinion in the Buffalo case, but on the other hand all late Rederal and all United States cases citing the Buffalo case as authority use the logic of Judge Hand in his concurring opinion, some even quoting him, in coming to their conclusion, that immunity of the United States from local taxation includes freedom from all taxes not final as charged against property at the time the United States acquired it.

We are of the opinion that since in Missouri the Supreme Court has held that the tax lien is final on June 1st, of each year, as the Statutes provide, the fact that the assessment, computation, levy and extension on the tax books follow later in the tax scheme does not change the effective statutory date of this fixed statutory lien to some other date, merely because the United States is the purchaser with prospective constitutional tax exemptions o on said land. The sovereignty of the State of Missouri to make and enforce its fixed statutory tax lien as of the date fixed should be respected in the Federal Courts, and the three cases cited do not indicate that the tax lien for State taxes will not be respected when the Missouri Tax scheme be under consideration.

There can be no doubt but that the United States is authorized to purchase reforestation land in Missouri,

and that under the Missouri Constitution reforestation land purchased by the United States in Missouri is exempt from taxation, and this is constitutionally true, any act of the Missouri Legislature taxing lands of the United States to the contrary notwithstanding. The fact that the United States Government, in the exercise of its powers to carry out its functions finds it necessary and convenient to contract the purchase of reforestation land in Missouri from owners, is no legal justification for holding that the owner, during the contractual period and prior to the transfer of title, can give a deed to the United States, thereby defeating a fixed tax lien then existing against the real estate. The United States Government purchasing real estate, purchases the same subject to valid existing tax liens the same as a private owner, and the constitutional tax exemption in favor of the United States Government is not retroactive in its operation, extinguishing tax liens against the land that became fixed prior to United States ownership. In Missouri taxes are properly assessed against all lands, except where at the time of the accrual of statutory lien, (June 1st, of the year the Assessor lists the land) the land be legally exempt because the real owner appears to be one of those privileged few named in the Constitution whose land holdings on June 1st, are exempt. The United States Government, with contractual right to buy land in Missouri, is not the legal owner until it receives the title, and the fixed tax liens existing against the land which it gets title to are not reasonably to be defeated by subsequent government ownership exempting the land from taxation under the Missouri Constitution. We do not understand that the Government option, referred to in the request, is any more than a contract to purchase. We do not understand that the Government considers itself a vendee in possession, under the option which it holds, or that the United States took title to the land at the time of entering into the option.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN Jr.
(Acting) Attorney General.

WOS:H

INTOXICATING LIQUORS: Sales of intoxicating liquor may be before prohibited hour or delivery after prohibited hour would be unlawful.

June 19, 1935.

FILED 10

Tavern Talk
910-12 Central Street
Kansas City, Missouri

Gentlemen:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "I have before me a copy of the story which appeared in the Kansas City Journal Post, Thursday, June 6.
>
> "Could we have:
>
> (1) A copy of the Attorney-General's opinion interpreting the newly enacted liquor and beer laws.
>
> (2) May a guest in a hotel order and pay for drinks at 11:55 p.m. Saturday night or 1:25 a.m. Tuesday morning and then have those drinks served by the hotel after 12:01 a.m. Sunday morning or 1:31 a.m. Tuesday morning.
>
> (3) It is our understanding that drinks purchased before the legal closing hour may be consumed on the premises after the legal closing hour."

As soon as copies of the opinion, interpreting the newly enacted liquor laws are available, we shall be glad to send you a copy of the same.

We direct your attention to Section 15-a of the Liquor Control Act regarding the hours of sale which reads as follows:

> "No person having a license under the provisions of this act shall sell, give away, or otherwise dispose of, or suffer the same to be done, upon or about his premises, any intoxicating liquor in any quantity between the hours of 1:30 o'clock A. M. and 6:00 o'clock A.M., and any person violating any provision of this section shall be deemed guilty of a misdemeanor."

It is plain from reading the above section that the sale of intoxicating liquors is prohibited between hours of 1:30 o'clock and 6:00 o'clock A. M., and that said liquors shall not be given away or otherwise disposed of on or about the premises between those hours.

In light of the foregoing, it is the opinion of this department that if a person order and pay for intoxicating liquor at 11:55 P.M., Saturday night or 1:25 A. M., Tuesday morning for delivery after 12:01 o'clock Sunday morning or 1:31 o'clock Tuesday morning, and if the licensee supply said person intoxicating liquors by delivery after the hours aforementioned, that it would be in violation of Section 15-a, supra. Inasmuch as the delivery of intoxicating liquor is necessary to consummate the sale thereof, if the delivery be made after the prohibited hour, the sale would come within the purview of the Act and therefore would be unlawful.

Respectfully submitted,

APPROVED:

RUSSELL C. STONE
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

COUNTY ASSESSOR:) Not required to designate school district on land
County Clerk) tax book--Duty on County Clerk.

December 17, 1935. 12-18

FILED
90

Honorable Peyton Tabb
Assessor of Lafayette County
Lexington, Missouri

Dear Mr. Tabb:

Acknowledgment is herewith made of your letter of December 7, 1935, requesting an opinion of this office on the following matter:

> "I am writing for your opinion as to whose duty it is to designate the school districts on the land tax books, I am unable to find any statute that seems to cover this point and find different counties following various plans.
>
> Sec. 9261 Provides for assessor putting school district on list and Personal Book.
>
> Sec. 9780 Gives minute details as to division and arrangement of assessor's books, but makes no provision for school districts, but does provide for road districts.
>
> Sec. 9315 Provides that if any change of boundary lines is made, the county clerk shall be officially notified; (He being official custodian of the school records and maps.)
>
> Sec. 9252 Provides county clerk shall receive compensation for figures in school tax column."

To arrive at a correct decision respecting the above inquiry it is necessary for us to understand the manner in which the assessment of taxes for school purposes was handled at the time our present Section 9261 R. S. Missouri 1929 developed into its present form. Prior to 1899 school taxes were extended in a separate book called the "School Tax Book", which tax book was divided into the various columns and it was also separated into the various school districts. It was the duty of the County Clerk to list the taxpayers in their respective school districts under this law. Section 8067 R. S. Missouri 1889.

The Supreme Court of the State of Missouri had occasion to pass upon the relative duties of the County Collector, the County Assessor and the County Clerk under the law as then existed. In the case of State ex rel. Hamiltonvvs. Brown, Collector, 72 S. W. 640, 172 Missouri 374, the Court approved the opinion of the trial court which stated among other things as follows, l. c. 379:

> "The duty of making the 'school tax book' devolves upon the county clerk, which book shall be subdivided, corresponding to the districts in the county and numbered accordingly, and he shall place in the proper subdivisions: first, a list of the names, alphabetically arranged, of all persons owning any personal property in the districts, total value thereof and the amount of school tax assessed thereon; second, a list of all the lands and town lots, etc. (Sec. 8067, R. S. 1889.) The enumeration lists inform the county clerk of the amount required and the rate of taxation in each district and also the names of the resident taxpayers in such district, while the assessment of the county assessor, as returned in his lists, informs the clerk of the property owned by such resident taxpayer. From these two sources of information he is enabled to make up the 'school tax book.' The county clerk of Lincoln county in making up the school tax book containing the assessment complained of proceeded in the manner above indicated. The plaintiff as curator of Hamilton was returned by the district clerk as being

> in District No. 4, and the county clerk, without ignoring the enumeration lists, could not have placed him elsewhere. The assessor is not required or authorized to determine the school district of a taxpayer; the 'assessor's book' which he makes up--legally made up--contains no such information. The assessor has to do with no particular tax, but his duty is ended when he has ascertained and listed all the taxable real and personal property in his county, with the name of the respective taxpayer (sec. 7531, R. S. 1889; amended, Laws 1893, p. 216), and made his assessment book therefrom.
>
> 'The assessor's book when turned over to the county court would not contain the number of the school district of any taxpayer, and hence the equalization board could not remedy any such wrong as ishere complained of. The alleged wrong first arises, when the county clerk, after the assessor's books are corrected and adjusted, makes out the school tax book, and then fails to proceed in so doing as the law directs.* * * *"

This decision handed down February 24, 1903, construed the law as existed in 1898. As heretofore stated, in 1899 the law was materially changed in that the "School Tax Book" was done away with and the information theretofore contained in such was directed to be "extended by the county clerk upon the general tax books of the county." A proviso was then added to Section 8067 R. S. Missouri 1889 reading as follows:

> "And it shall be the duty of the county assessor in listing property to take the number of the school district in which said taxpayer resides at the time of making his list, to be by him marked on said list and also on the personal assessment book, in columns provided for that purpose."

By these amendments of 1899 it was the purpose of the Legislature to do two things, first, to abolish the expensive "School Tax Book" and consolidate it with the general tax books of the County, and second, to supply the County Clerk with some additional information which might be valuable to him in making out the tax books. The Legislature was careful to direct the places in which it was the duty of the county assessor to designate the school district of the taxpayer. The Legislature by its terms required the assessor to designate on the list the school district and to also place that designation in an appropriate column upon the personal assessment book. We cannot assume that the Legislature by using these distinct and specific terms in placing additional duties upon the county assessor which did not theretofore exist, intended that the duties should be by implication and construction extended to include further and additional duties which, had the Legislature so desired, they could have specifically provided for. We must remember that heretofore the entire duty and responsibility in designating school districts rested solely upon the county clerk and that by amendment certain specific duties have been placed upon the assessor which lighten the burden theretofore resting upon the county clerk. In view of these facts it would be substituting our own judgment for the judgment and discretion of the Legislature to hold that the county assessor was not only required to place that designation upon the list and the personal assessment book but was also required to place the designation of school districts upon the real estate assessment book.

CONCLUSION.

It is therefore the opinion of this office that the duty to designate school districts on the land tax books rests upon the county clerk and that the duty of the county assessor in this respect ends when he has made such designation upon the assessment list and upon the personal assessment book.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

1. A newspaper,in order to publish the financial statement of a county, must be qualified under Section 13775 Laws 1931, page 103, and the question as to whether or not the newspaper possesses the qualifications, is one of fact.

2. County Budget Act. The county court may pay a sum in excess of the amount estimated in the budget out of the funds of Class 5,provided it does not jeopardize the priorities of the four prior classes, or the same may be paid from the funds of class 6.

May 11, 1935

5-20

FILED

Honorable Hampton Tisdale
Prosecuting Attorney
Cooper County
Boonville,Missouri

Dear Sir:

This Department is in receipt of your letter of May 3, 1935 wherein you request an opinion on two questions now under consideration in your county. The letter is as follows:

> "I was informed by the Presiding Judge of the County Court of Cooper County that he had discussed with you the legality of publishing the Cooper County financial statement in the Otterville Review, a newspaper published in Otterville, Missouri.
>
> In the Session Laws of 1933, page 353, Section 12165 the publication of a county financial statement is made mandatory in some newspaper of general circulation published within the county.
>
> Section 13775 of the Laws of 1931, page 303 provides:
>
> 'All public advertisements and orders of publication required by law to be made, and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general

circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of one year; shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for a subscription for a definite period of time. . . . '

The County Court asked me for an opinion on the advisability of publishing the statement in The Otterville Review and I advised them that this paper was not a legal publication since it did not meet the requirements of the foregoing Section.

I am enclosing herewith a copy of The Otterville Review dated April 26,1935, for your examination. You will note that this paper is not entered as second class matter in the Post Office at Otterville,Missouri, which seems to be an essential requirement for a legal publication. It was in existence a year on April 5, 1935, but had not been in existence a year at the time the statement was required by law to be published. Furthermore, this paper does not state whether it is a weekly, semi-weekly, tri-weekly or a daily. Its circulation is confined for the most part to Otterville Township, with no general circulation in Cooper County. With these facts in mind, I advised the County Court that The Otterville Review did not meet the necessary legal requirements.

The County Court is desirous of my getting an opinion from you on this question. They desire to know (1) Is the Otterville Review of Otterville, Missouri, a newspaper legally

qualified to print the Cooper County financial statement?

The County Court set up the sum of $750.00 to pay the cost of printing the financial statement. (2) The Court also desires to know in the event the $750.00, as set up in Class 5 of the budget for the printing of the financial statement is inadequate, can the Court add to this sum of $750.00 an additional amount out of Class 5 so long as the total amount set up in Class 5 will allow them to do so without taking any funds from any other class, and provided there is a surplus in Class 5 at the end of the year after all disbursements are made?

I would appreciate your advising me with reference to this matter as soon as possible."

I.

A NEWSPAPER, IN ORDER TO PUBLISH THE FINANCIAL STATEMENT OF A COUNTY, MUST BE QUALIFIED UNDER SECTION 13775 LAWS 1931, page 303, AND THE QUESTION AS TO WHETHER OR NOT THE NEWSPAPER POSSESSES THE QUALIFICATIONS, IS ONE OF FACT.

Your question in regard to the Otterville Review, ostensibly a newspaper published in your county, involves a question of fact. Section 13775 Laws of 1931, page 303, as contained in your letter, sets forth the qualifications of a newspaper which, in our opinion, includes the publication of the county financial statement. Whether or not the Otterville Review has been admitted to the post office as second class matter is a question of fact which may or may not be true, although we frankly admit that from our cursory examination of the inclosed copy we see nothing to indicate that it has been admitted to the post office as second class matter. It may or may not be a weekly, tri-

weekly or semi-weekly newspaper of general circulation in the county. The copy itself does not indicate at what intervals it is published. The question of general circulation is discussed in an opinion which was rendered by this department on September 27, 1934 to Honorable James H. Rooney, Liberty, Missouri, a copy of which is herewith inclosed. The question of the length of time a newspaper should be published in the county is contained in an opinion to Hon. W. H. Holmes, Prosecuting Attorney Maries County, Vienna, Missouri, a copy of which is herewith inclosed. The county court has jurisdiction and is the proper tribunal to pass upon the facts and apply the law,and determine the question whether the paper is such a publication as is required by the statutes.

II.

COUNTY BUDGET ACT. THE COUNTY COURT MAY PAY A SUM IN EXCESS OF THE AMOUNT ESTIMATED IN THE BUDGET OUT OF THE FUNDS OF CLASS 5,PROVIDED IT DOES NOT JEOPARDIZE THE PRIORITIES OF THE FOUR PRIOR CLASSES, OR THE SAME MAY BE PAID FROM THE FUNDS OF CLASS 6.

The county court is required to, by Section 8 page 345 Laws of Missouri 1933, at the regular February term, go over the estimates and revise and amend the same in such a way as to promote the efficiency and economy in the county government; there is also a provision for altering or changing the amount. Within five days after the date of the approval of the budget estimate it is necessary to file a certified copy with the county treasurer. There is no other provision in counties containing the population of Cooper for the further revision, altering or changing of the budget, after it has been filed. Class 5 as contained in

Section 2 page 342 Laws of Missouri 1933, is as follows:

> "The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service. (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

The printing of the financial statement is a mandatory duty upon the county court and likewise the payment of the same. The exact amount can not be estimated, it will probably vary in amount from year to year. We are, therefore, of the opinion that if the cost of printing the county financial statement exceeds the estimate and if there are funds remaining in class 5 not appropriated such funds may be used for the additional cost of printing the financial statement.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

Inclosures

COUNTY TREASURER: County Treasurer must give bond under Section 10969 R.S.Mo.1929 for funds of Drainage District when organized by county court and his compensation shall not exceed more than one-half of one per cent of the funds handled.

6-19

June 18, 1935

FILED
91

Mr. C. C. Thompson
Secretary
Harrison and Mercer County Drainage District
Cainsville , Missouri

Dear Sir:

This Department is in receipt of your recent letter wherein you make the following inquiry:

"In regard to the County Treasurer Bond. Do their bonds cover the Drainage Money or do they have to give a separate bond to the drainage district for taxes collected.

We have a County Treasurer, Mr. Cliff George of Mercer County who refuses to give bond for the Drainage tax collected, claims that his bond to the state covers all money collected by him. But if I interpret the law right he is supposed to give bond to the Drainage District for the taxes collected for them as it is a special tax.

Also how much commission is the county Treasurer allowed to collect? They are now collecting a 2% Commission from the taxpayer and when they turn the money over they charge another 2%."

We assume that the Harrison and Mercer County Drainage District was organized under the provisions of Chapter 64 Article VII, relating to levee districts by county courts, although the same is not stated in your letter. As this is evident, the Treasurer does not control the funds of districts organized under the

direction of the circuit court. Section 10969 Revised Statutes Missouri 1929, relates to the county treasurer as treasurer of the board as follows:

> " The county treasurer of the county in which the greater part of any organized levee district lies shall be the treasurer of the levee fund of the district, until paid out upon the warrants issued by order of the board of directors of the levee district. Before receiving any funds belonging to the levee district, the treasurer shall give a separate bond, with sufficient security, in double the probable amount of the levee fund that shall come into his hands, payable to the state of Missouri, to be approved by the board of directors, conditioned for the faithful disbursement, according to law, of all such moneys as shall, from time to time, come into his hands to the credit of the levee fund of the levee district of which the county of which he is treasurer is part; and such bond shall be filed in the office of the clerk of the county court of the county in which said treasurer is appointed or elected. On the forfeiture of such bond, it shall be the duty of the clerk of the county court in whose office said bond is filed to collect the same for the use of the levee district. If such clerk shall neglect or refuse to prosecute, any freeholder of the district may cause prosecution to be instituted. It shall be the duty of the board of directors in no case to permit the county treasurer having the custody of the levee funds of the district to have in his possession at any one time an amount of levee funds over one-half the amount of the security available in the bond. Such treasurer shall be allowed such compensation for his services as the board of directors

> deem advisable, not to exceed one-half of one per cent. of all levee funds disbursed by him, and to be paid out of the levee funds."

The above section, quoted supra, is specific and definite in its terms. It states that the treasurer, before receiving the levee district funds, shall give a bond in twice the amount of the levee.

We are, therefore, of the opinion that such bond is mandatory on the county treasurer, and that the same is in addition to the regular bond given by the county treasurer to the State of Missouri.

With reference to the amount of commission the treasurer shall receive, we are inclosing an opinion rendered this department on May 21, 1935 to Honorable Charles Young, Treasurer, Livingston County, Missouri, and we believe the same properly answers your question with respect to fees of the treasurer.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

OWN:LC

Inclosure

OLD AGE PENSION: Qualifications as to "residence" under Old Age Assistance Act.

10-V

September 28, 1935.

FILED
11

Colonel Allen M. Thompson
Commissioner
Old Age Assistance Division
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "Please give us an opinion as to whether or not the persons in the following hypothetical cases are entitled to apply for assistance under the residence requirements set forth in Section 6 of the Missouri Old Age Assistance Law:
>
> "1. John Jones has lived in Missouri for many years. He went to Arkansas two years ago to live with a daughter because she can give him a home.
>
> "2. John Jones has lived in St. Louis for fifty years. Five years ago it was discovered he could no longer live in this climate, therefore he went to Denver to live, and has remained there ever since. His wife, however, remained in St. Louis. John Jones did not enter a hospital or sanatorium.

"3. Mrs. John Jones has lived in Kansas City for many years. Three years ago she went to Colorado to visit a daughter; while there, she decided to enter the Masonic Home at Monte Vista and has lived there ever since. She has no relatives remaining in Kansas City. "

Section 6 of the Old Age Assistance Act, found in the Laws of Missouri, 1935, page 310, reads as follows:

"Old age assistance may be granted only to an applicant who, has attained the age of 70 years or upwards, is incapacitated from earning a livelihood and is without adequate means of support, is a citizen of the United States, has resided in the State for 5 years or more within the 9 years immediately preceding application for assistance and for the one year next preceding the date of application for assistance (absence in the service of the State or of the United States shall not be deemed to interrupt residence in the state if domicile be not acquired outside of the state), is not at the date of making application or of receiving aid an inmate of any prison, jail, insane asylum, or any other public reform or correctional institution, and has no child or other person responsible under the law of this state and found by the state board or by the county board able to support him."

It is plain from the above section that an applicant for assistance under the Old Age Assistance Act must have resided in the State for five years or more within the nine

years preceding application for assistance and for one year next preceding the date of application. In order to answer your questions it is necessary to contrue the underlined portion of Section 6, supra.

54 C. J., Sections 1, 2 and 3, pages 702, 703, defines the word "reside" in the following language:

> "In General. An elastic words, often defined and construed by the courts; it is employed in a wide variety of significations, and its meaning has been variously shaded according to the variant conditions of its application, for it is capable of different meanings, and may receive a different meaning according to the connection in which it is found. Specifically, the word is used in two senses, the one, constructive, technical, legal, the other denoting the personal habitual habitation of individuals.
>
> "In the Ordinary Sense. To abide continuously, to sojourn, to dwell permanently or for a length of time; to be present; to be settled as in a home; to have a settled abode for a time, or a dwelling, a home; to have one's dwelling or home; to live in a place; to make an abode for a considerable time; to remain for a long time; to stay. Also to be in official residence; to continue to sit; to exist as an attribute of, inhere.
>
> "In Legal Sense. While the word does not necessarily apply to a legal residence, still it may refer to a person's legal residence and mean an established place of abode, adopted with no present intention of moving elsewhere, being synonymous with

> 'domicile' in its strict legal sense; and although it means something different from being bodily present, yet in statutes it may be used as meaning actually to occupy, or to live, or it may be employed as synonymous with being a 'citizen' or an 'inhabitant.'"

Section 4 of the same volume in regard to "Continuity and Permanency" states the following:

> "While it is said that the word may signify a temporary abiding, the word in its ordinary sense carries with it the idea of permanence, as well as continuity, and embraces the idea of fixed or permanent residence, to be construed as excluding the mere casual presence of a transient, and implying a permanent abode as contradistinguished from a mere temporary locality of existence. Furthermore it imports a habitation of some degree of permanency, coupled with the home thought."

The word "resided" is defined in Section 7, page 704, as follows:

> "Domiciled; lived; the term is said to be interchangeable or synonymous with 'residence.' It may be used, not in the sense of actual pedal presence, but rather of legal residence. It ordinarily refers to a fixed, permanent, and established residence, one's home, as distinguished from a mere stopping place for the transaction of either business or pleasure."

Section 1, pages 705-706, gives the following definition of "residence":

> "An ambiguous, elastic, flexible, or relative term, which, notwithstanding numerous definitions are to be found in the books, is difficult of precise definition, as it has no fixed meaning applicable alike to all cases, but instead is used in different and various senses and has a great variety of meanings and significations, because its meaning is variously shaded according to the variant conditions of its application. Also, its meaning often depends upon the subject matter and connection in which it is used, and the sense in which it should be used is controlled by reference to the object; hence it may be given a restricted or enlarged meaning, considering the connection in which it is used."

From the above it is plain that the words "reside," "resided" and "residence" have no fixed and definite meaning and are used in a wide variety of senses.

48 C. J., Sections 91 and 92, pages 471, 472, has the following to say in regard to the necessity of continuous personal presence in order to maintain a continuous residence:

> "The residence for the required length of time must be continuous, and many of the pauper statutes expressly so provide. Separate periods of residence cannot be added together to make up the statutory time. But where a residence has once been established by the concurrence of intention and personal presence, continuous personal presence thereafter is not essential to a continuous residence, especially when he whose residence is in question has a family between whom and him mutual family relations are in full force.
> "An intention to remove in the future, without an actual removal, will not break the continuity of the residence.

"The continuity of a residence within the contemplation of the pauper laws is not broken by a mere temporary absence with the intention of returning, or without any definite intention of abandoning such residence, in the absence of statute to the contrary. Thus continuity is not broken by an absence while temporarily employed or while seeking employment, or while serving a term of enlistment in the army, unless the statute so provides. So where a person, living in a town in which he had not a settlement, removed to another town, by direction of the overseers of the poor, solely to prevent his gaining a settlement in the former town, and with the intention to return at the expiration of a few weeks, it was held that the continuity of his residence was not broken.

"In some jurisdictions it has been held that an absence may be animo revertendi, although during the person's absence he does not retain in the place any house over which he has legal control, or to which he may resort as a matter of right; but in others the contrary has been held.

"The question whether animus revertendi exists is one of fact to be determined by the jury."

Section 655, R. S. Mo. 1929, gives the following definition of "residence":

"The place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally

> lodge, shall be deemed the place of residence of such person or persons respectively;"

Section 6 of the Old Age Assistance Act uses both the word "residence" and the word "domicile." We think it plain that they did not intend to use the words interchangeably.

19 C. J., Section 2, page 395, distinguishes between "domicile" and"residence" as follows:

> "While the terms 'domicile' and 'residence' are frequently used synonymously, they are not, when accurately used, convertible terms. The former is of more extensive signification and includes, beyond mere physical presence at the particular locality, positive or presumptive proof of an intention to constitute it a permanent abiding place. 'Residence' is of a more temporary character than 'domicile.' 'Residence' simply indicates the place of abode, whether permanent or temporary; 'domicile' denotes a fixed, permanent residence, to which, when absent, one has the intention of returning. 'Residence' has a more limited, precise, and local application than 'domicile,' which is used more in reference to personal rights, duties, and obligations. That there is a difference in meaning between 'residence' and 'domicile,' is shown by the fact that a person may have his residence in one place while his domicile is in another. It has also been said that domicile and residence are not synonymous for the reason that a person may have more than one residence at the same time, but only one domicile."

The courts of this State have on many occasions defined the term "residence" as used in various statutes. A review of some of these decisions should help us to determine what construction to place upon the word "residence" as used in the statute under consideration.

In the case of In Re Langford's Estate, 197 S. W., l. c. 148, the court said:

> "Residence is largely a matter of intention. Langford v. Gebhart, 130 Mo. 621, 32 S. W. 1127, 51 Am. St. Rep. 585. This intention is to be deduced from the acts and utterances of the person whose residence is in issue."

In the case of Adams, Administrator, v. Abernathy et al., 37 Mo., l. c. 198, the court stated:

> "Where a man makes provision for his family, and leaves them at his residence, although he may be personally absent an indefinite period of time, attending to his business, no attachment will lie, because the law has pointed out a mode by which service can be had. But where he leaves the country, and permits his family to sojourn with a relative, the presumption is that they are merely staying with the latter, and that he has no fixed or permanent place of abode. Upon the circumstances of this case, whether the defendant had such a permanent residence as to make it his usual place of abode, within the meaning of the law, was a question of fact and intent, and as the triers of the fact have found that he did not, we see no sufficient reason for disturbing the verdict. With this view of the case, we have found it unnecessary to examine the instructions in detail."

In the case of Greene et al., v. Beckwith, 38 Mo., l. c. 387, it was said:

> "A man's residence, like his domicil, or usual place of abode, means his home, to and from which he goes and returns, daily, weekly or habitually, from his ordinary avocations and business, wherever carried on--Chaine v. Wilson, 1 Bosw. (N. Y.) 673. In the sense of the attachment law, a man's residence is his home or habitation fixed in any place, without any present intention of removing therefrom--Stratton v. Bingham, 2 Sneed, 420, Sto. Confl. L. Sec. 43. A mere residence of a temporary nature is not enough to constitute a man a resident of this State. It has been said that inhabitancy or residence does not mean precisely the same thing as domicil, but that they mean a fixed and permanent abode, or dwelling place for the time being, as contra-distinguished from a mere temporary locality of existence--Matter of Wrigley, 4 Wend. 602; S. C. 8 Wend. 134. The evidence all tended to show that the defendant's domicil and permanent place of abode or residence of himself and family was in the State of Illinois, and that his business and residence in this State were altogether of a casual and temporary character. This was not enough to constitute him a resident of this State within the meaning of the attachment act, and to negative the other direct testimony that his actual residence and domicil were in the State of Illinois; that is to say, he was not a resident of this State, but a non-resident."

In State ex rel. v. Smith, 64 Mo. App., l. c. 320, the court stated the law as follows:

> "In determining who resides in its district, the school board, or the person by it engaged to make the enumeration, must necessarily be guided by the usual and ordinary indicia of residence, or absence of such indications; and the enumeration is not to be condemned because of certain secret mental resolves, or concealed intentions of persons living or having lived, in the district. These remarks apply to the facts of this case. On the face of things, Rhodes had left the school district; had taken his family and household goods and moved to another; and for what length of time he was to remain, if, indeed, he was ever to return, was not known to the school board, or to the enumerator. The board had the clear right, it was its duty, to act on these manifest appearances and treat Rhodes and his children as non-residents of that school district."

In the case of Reger v. Reger, 293 S. W., l. c. 420, it was said:

> "The place of residence of a person is specifically defined by statute of this state (section 7058, R. S. 1919) as follows:
>
> > 'The place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively.'
>
> "It has been judicially ruled in this state that the intention, or mental determination, of a party is largely determinative of his place of residence."

In the case of Venuci, et al v. Dademartori, 59 Mo. l. c. 353, 354, the court declared the law to be as follows:

> "The only question presented by the record, is, whether the statute of limitations constituted a defense. The case was tried on an agreed statement of facts, and it shows that on the 1st of August, 1859, defendant made his promissory note for the sum of $278, payable to one of the plaintiffs one year after the date thereof; that at the time of the execution of the note defendant resided in the city of St. Louis with his family, and that in the spring of 1861, he went to Italy, leaving his wife and family at his residence in the said city, and that he remained absent till the year 1872, when he returned; that at the time he left for Italy, he left his family, consisting of his wife and children, at his residence, where they remained during the whole time, and provided for their support until his return;
>
> * * * * *
>
> "The language of the statute is, where a person 'departs from and resides out of the State.' This contemplates that he should change his residence so that the process of the law cannot be served upon him. Where this happens then the creditor is remediless, and the debtor by his act has prevented the creditor from proceeding to obtain satisfaction. But if the residence is not changed, and under the provisions of the law service can be had which will authorize a personal or general judgment, then the statute continues to run, and cannot be arrested in its course.

> "Under our statute a summons may be served by leaving a copy of the petition and writ at defendant's usual place of abode, with some white person of the family, over the age of fifteen years. (Wagn. Stat., 1007, Sec. 7.) And the place where a person's family permanently resides is deemed in this State his place of abode. (Wagn. Stat., 599, Sec. 60.)
>
> "The defendant's family had a permanent residence in the State. He left them at his residence, where they continued all the time that he was gone and until his return. He supported them all that time, and his property was left here. From these circumstances the presumption is, that he intended to return, and he actually did return. As his place of abode under the law was here, and service of summons there was entirely good at any time, there was nothing to prevent the plaintiff from bringing an action and obtaining a personal judgment, and prosecuting it to satisfaction. Under such circumstances, we can see no obstacle to the statute's running."

" In view of the above authorities we think we can safely draw the following conclusions: That the word "residence" as used in Section 6 of the Old Age Assistance Act, means the place where the family of any person shall permanently reside in this State, or, if such person has no family, where he or she shall generally lodge; that while the term "domicile" and "residence" are not synonymous that "residence" does mean a fixed and determined home rather than a transient or temporary abode; that where a residence has been established, continuous personal presence thereafter is not essential to a continuous residence, expecially when the person, whose residence is in question, has a family with whom he carries on family relations; that

the continuity of a residence is not broken by a mere temporary absence with the intention of returning or without a definite intention of abandoning such residence; that if a person leaves his residence, and while absent forms the intent of not returning, the continuity of his residence is broken as though he had formed the intent at the time of removing. We call your attention to the fact that the question of "residence" is a question of fact that must be determined in each individual case from all the facts and surrounding circumstances. "

Bearing in mind all of the above, we now answer your questions in the order in which they were asked:

> "1. John Jones has lived in Missouri for many years. He went to Arkansas two years ago to live with a daughter because she can give him a home."

From the limited facts given in the above case we think it plain that John Jones abandoned his residence in this State two years ago when he went to make his home with his daughter, and is therefore not entitled to assistance under the Old Age Assistance Act for the reason that he has not resided within this State one year next preceding the date of application for assistance.

> "2. John Jones has lived in St. Louis for fifty years. Five years ago it was discovered he could no longer live in this climate, therefore he went to Denver to live, and has remained there ever since. His wife, however, remained in St. Louis. John Jones did not enter a hospital or sanatorium."

Under the above state of facts it is our opinion that John Jones still has a legal residence in St. Louis, Missouri, in view of the definition of "residence" contained in Section 655, R. S. Mo. 1929. Of course, if the

said John Jones had established a domicile in Denver, he would have lost his residence in St. Louis by so doing.

> "3. Mrs. John Jones has lived in Kansas City for many years. Three years ago she went to Colorado to visit a daughter; while there, she decided to enter the Masonic Home at Monte Vista and has lived there ever since. She has no relatives remaining in Kansas City."

It is our opinion that Mrs. John Jones, under the above state of facts, is not entitled to assistance under the Act for the reason that she has not resided within this State one year next preceding the date of application for assistance;although she did not necessarily give up her residence when she left to visit her daughter, still when she decided to enter the Masonic Home, after visiting her daughter, she did abandon her residence in Missouri.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, JR.
(Acting) Attorney General.

JET:EG

SHERIFF'S FEES - Entitled to no fees for attempting to serve capias.

November 14, 1935

11-15

FILED
92

Honorable E. A. Tucker
Sheriff of Pike County
Bowling Green, Missouri

Dear Sir:

We have your request of October 23, 1935 for an opinion, which request is as follows:

"I would like to have your opinion in regard to Sheriff's mileage, for example I refer you to cost bill #13792 State -vs- Bernard McLain, my Prosecuting Attorney gave me a Capias on McLain at that time in St. Louis, Mo., at police station, I made trip to St. Louis for him but he was released to Sheriff of Macon County, Macon, Missouri. Then I made trip to Macon for him and brought to my county, Bowling Green, Mo. I returned my Capias 388 miles traveled which is correct. I received $15.00 mileage, State allowing me 200 miles at .05 per mile and prisoners mileage of 100 miles at .05. Now, I don't think a sheriff is supposed to work and drive all time apprehending prisoners and not be paid for same, if State is not liable for it, is our County? This is an important matter with the Sheriff, as it is impossible to keep up unless he can collect his fees. Please let me hear from you. Our county can take care of things of this kind if I have your opinion as such."

The fees of a sheriff are set out in Section 11791, R. S. Mo. 1929, which, among other things, provides as follows:

> "Sheriffs, * shall be allowed fees for their services in criminal cases * as follows:
>
> For serving and returning each capias, for each defendant . . $1.00
>
> * * * * * * *
>
> The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, * shall be allowed * one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and five cents per mile for every mile necessarily traveled in going to and returning from one county to another, * * "

We find no statute in this state which authorizes the payment of mileage or compensation for an unsuccessful attempt to serve a capias.

We quote the general rule from Section 1195, 57 C. J.,p. 1130:

> "In a majority of jurisdictions a sheriff is not entitled to, as a matter of right, and cannot recover, mileage for travel in attempting to serve process or make an arrest which was not actually or lawfully served or made, and even though he ultimately served the process or made the arrest, he cannot charge mileage for previous unsuccessful attempts; * "

Such is the well settled rule in this state. We quote from a case involving compensation of a sheriff, State ex rel. v. Brown, 146 Mo. 401, l.c. 406:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

When the words of a statute are construed in the plain and ordinary sense, as is required by Section 655, R. S. Mo. 1929, and salary and fee statutes are strictly construed, then it becomes apparent in this case that the sheriff is not entitled to mileage at the rate of 5¢ per mile for attempting to serve the capias on a prisoner in another county, and it is the opinion of this office that before the sheriff can recover such compensation, he must actually serve the capias and remove the prisoner from the county in which he was arrested to the county in which he is to be tried.

Respectfully submitted,

APPROVED: FRANKLIN E. RHAGAN
Assistant Attorney General

JOHN W. HOFFMAN, JR.
(Acting) Attorney General

SHERIFF: Fee for committing a person to jail

6-29

FILED
93

June 29, 1935

Mr. Roy Uhrmacher
Sheriff Livingston County
Chillicothe, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion, which reads as follows:

> "I would like to get an opinion on the sheriff's fees for committing or taking to jail. Under Section 11791 R. S. Mo. 1929. Fees of sheriffs, marshals and other officers. It states that the sheriff's fees for committing any person to jail are $1.00, and in all cases that have been paid by the state this fee has been deducted."

Under the provisions of Section 11791 R. S. Missouri 1929, it is plain that a sheriff is entitled to a fee of one dollar for committing any person to jail. In the case of Thomas v. County of St. Louis 61 Mo. l. c. 548, the court defines 'committing any person to jail' as follows:

> "The words,'committing any person to jail,' relate to the execution by the sheriff of an order or warrant of committment made or issued by some officer exercising judicial functions."

In view of the above, it is the opinion of this office that a sheriff is entitled to a fee of one dollar for committing any person to jail, on order or warrant of committment made or issued by some officer exercising judicial functions.

Very truly yours,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

LAW PRACTICE: What constitutes practice of law without a license and for a valuable consideration under Sections 11692 and 11693 R. S. Mo. 1929

5-J

FILED
94

April 18, 1935

Mr. Ralph Varble
Notary Public
Leora, Missouri

Dear Sir:

We wish to acknowledge your letter and enclosure of April 11. Your letter reads as follows:

"Please send me information on the following questions. Can a Notary Public write Mortgages, Deeds, Wills and other legal documents and charge a minimum charge for his or her services in addition to his or her charge for taking acknowledgement of same?

Can a Notary Public write the above and not make charges?

Please give me the desired information as soon as possible."

Your enclosure reads as follows:

" STODDARD COUNTY BAR ASSOCIATION

April 11, 1935

To all Justices of the Peace and Notaries Public in Stoddard County:

Gentlemen:

This is a formal letter being written

to all Justices of the Peace and Notaries Public in Stoddard County.

Herewith we are enclosing a copy of an article which recently appeared in all of the newspapers in Stoddard County. We wish to call your attention to this article and trust that you will comply with it.

A nation wide and state wide effort is being made to prohibit the practice of law by all persons not admitted to the bar.

We call your attention to the fact that the writing of a mortgage,deed, or any other legal document and charging only the fee authorized by statute for a Justice of the Peace or a Notary Public for taking an acknowledgement is a subterfuge,because the consideration received is earned not only by taking the acknowledgement but by performing the legal services. If any such instance is called to the attention of the Bar Committee, proceedings will be filed in accordance with the provisions of the two sections of the revised statutes referred to in the enclosed notice.

We trust that you will abide by the statutes and that it will not be necessary to take any action for violation of the statutes.

It is our duty as members of the Bar Committee appointed by the Supreme Court to address you in this manner, and wish to inform you that every lawyer in Stoddard County has endorsed this action.

Very truly yours,

(signed) C. A. Powell

R. Kip Briney
Members of Bar
Committee. "

This Department has recently received many letters from notaries public, justices of the peace, and laymen inquiring as to their rights to draw mortgages, deeds, wills, and other legal instruments for a valuable consideration, and hence it will be our object to answer all such individuals in this one opinion.

In no instance has the Legislature ever attempted to provide that notaries public, justices of the peace or laymen could draw, procure, or assist in the drawing of deeds, mortgages, wills, or other legal documents.

Section 11692 Revised Statutes Missouri 1929, defines the term 'practice of law' and 'law business', thus:

> "The 'practice of the law' is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies. The 'law business' is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring or of assisting in the drawing for a valuable

consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

Section 11693 Revised Statutes Missouri 1929, sets out the penalty for persons engaging in the 'practice of law' or doing a 'law business,' thus:

"No person shall engage in the 'practice of law' or do 'law business,' as defined in section 11692, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association or corporation engage in the 'practice of the law' or do 'law business' as defined in section 11692, or both. Any person, association or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and

> recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri. It is hereby made the duty of the attorney-general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name and on behalf of the State."

Under Section 11692, supra, any person drawing, procuring or assisting in the drawing, for a valuable consideration, of any paper, document or instrument affecting or relating to secular rights, may be said to be engaged in the 'law business.' In the case of Allen v. Deming 14 New Hamp. 133, l. c. 139, the court, in defining the term 'secular,' said:

> "The word 'secular' means 'temporal, pertaining to temporal things, things of the world, worldly; also, opposed to spiritual, holy,' and Richardson's English Dictionary, the giving a note certainly pertains to things of this world and is a matter of secular business. The most latitudinarian would scarcely consider it as having a spiritual character. ' "

A deed, which is an instrument conveying real property, (8 R. C. L. 922) or a mortgage, which is a conveyance of property to secure the performance of some obligation, the conveyance to be void on the due performance thereof, (19 R. C. L. 243) or a will, whereby a person makes a disposition of his property to take effect after his death, (28 R. C. L. 58) may be said to be instruments affecting or relating to secular rights.

In the case of People v. Alfani 227 N. Y. 334, 125 N. E. 671, l. c. 673, the question presented was whether the things done by Alfani were open to the public generally, or whether they required a license from the state before a person could perform them for compensation, and as an occupation, the facts in the case were these: - In the basement Alfani had an office in which he carried on a real estate and insurance business; distinct from such work he also drew legal papers, contracts for real estate, deeds, mortgages, bills of sales and wills. A large sign placed over his dining room or basement window bore the words

'NOTARY PUBLIC - REDACTION OF ALL LEGAL PAPERS'.

The defendant said 'redaction' meant the drawing of legal papers. The court, in an elaborate and well-reasoned opinion, in which numerous cases from all parts of the country are reviewed, said:

> "In Matter of Duncan, 83 S. W. 186, 189, 65 S. E. 210, 211, 24 L.R. A. (N.S.) 750, 18 Ann. Cas. 657, it is said:
>
> 'It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law.'
>
> Thornton on Attorneys at Law, in section 69, defines the practice of law in the same terms.

In Eley v. Miller, 7 Ind. App. 529,535, 34 N. E. 836, 837, the court stated:

'As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various states, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.'

To the same effect are Barr v. Cardell, 173 Iowa, 18, at page 31, 155 N. W. 312, and Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621. See, also, People v. Schreiber, 250 Ill. 345, 95 N. E. 189; People v. Taylor, 56 Colo. 441, 138 Pac. 762.

To make it a business to practice as an attorney at law, not being a lawyer, is the crime. Therefore to prepare as a business legal instruments and contracts by which legal rights are secured, and to hold oneself out as entitled to draw and prepare such as a business, is a violation of the law."

* *

"It is common knowledge, for which the above authorities were hardly necessary, that a large, if not the greater, part of the work of the bar today is out of court or office work. Counsel and advice, the drawing of agreements, the organization of corporations and preparing papers connected therewith, the drafting of legal documents of all kinds, including wills,

are activities which have long been classed as law practice."

* *

"The reason why preparatory study, educational qualifications, experience, examination, and license by the courts are required, is not to protect the bar, as stated in the opinion below, but to protect the public. Similar preparation and license are now demanded for the practice of medicine, surgery, dentistry, and other callings, and the list is constantly increasing as the danger to the citizen becomes manifest, and knowledge reveals how it may be avoided.

Why have we in this state such strict requirements for admission to the bar? A regents' certificate or college degree, followed by three years in a law school or an equivalent study in a law office, marks the course to a bar examination, which must finally be passed to entitle the applicant to practice as an attorney. Recognizing that knowledge and ability alone are insufficient for the standards of the profession, a character committee also investigates and reports upon the honesty and integrity of the man, and all of this with but one purpose in view, and that to protect the public from ignorance, inexperience, and unscrupulousness.

Is it only in court or in legal proceedings that danger lies from such evils? On the contrary, the danger there is at a minimum, for a very little can go wrong in a court where the proceedings are public, and the presiding officer is generally a man of judgment and experience. Any judge of much active work on the bench has

> had frequent occasion to guide the young practitioner, or protect the client from the haste or folly of an older one. Not so in the office. Here the client is with his attorney alone, without the impartial supervision of a judge. Ignorance and stupidity may here create damage which the courts of the land cannot thereafter undo. Did the Legislature mean to leave this field to any person out of which to make a living? Reason says no. Practicing law as an attorney likewise covers the drawing of legal instruments as a business."

In the case of People v. People's Trust Company 167 N. Y. S. 767, the court, in holding that the drafting and supervising of the execution of wills constituted the practice of law, said:

> "See, also, Matter of Pace, 170 App.Div, 818, 156 N. Y. Supp. 641; Matter of Duncan, 83 S. C. 186, 65 S. E. 210, 24 L. R. A. (N.S.) 750, 18 Ann. Cas. 657; Savings Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621; Matter of the City of New York (Avenue A.etc.), 144 App. Div. 107, 128 N. Y. Supp. 999.
>
> Under these decisions, as well as in the common understanding of the business world, the drafting and supervising the execution of wills is practicing law. By them legal rights are secured. In giving instructions, confidential communications regarding family relations are often necessary. There is no province of the law requiring deeper learning on the subject of trusts, powers, legal and equitable estates, and perpetuities."

In the case of People v. Title Guaranty & Trust Company, 168 N. Y. S. 278, l. c. 281-282, the court, in holding that the practice of law, as the term is now commonly used, embraces much more than the conduct of litigation, said:

"The 'practice of the law,' as the term is now commonly used, embraces much more than the conduct of litigation. The greater, more responsible, and delicate part of a lawyer's work is in other directions. Drafting instruments creating trusts, formulating contracts, drawing wills and negotiations, all require legal knowledge and power of adaptation of the highest order. Beside these employments, mere skill in trying lawsuits, where ready wit and natural resources often prevail against profound knowledge of the law, is a relatively unimportant part of a lawyer's work."

* *

"In the case at bar, a bill of sale of a store and a chattel mortgage thereon for part of the purchase price were drawn. This is work which is usually done by lawyers. It may not require as deep legal knowledge as the organization of a corporation, although both are sometimes done by the use of printed blanks which can be bought at a stationery shop; but there are questions of law which surround passing title to property and securing rights under a chattel mortgage. Advice as to change of possession of the chattels and filing of the mortgage should be given, and if it were not given in this case it furnishes another illustration of the reason why such work should not be done by employes of a corporation."

In the case of State v. St. Louis Union Trust Company 74 S. W. (2nd) (Mo.) 348, l. c. 357, the court had the following to say with reference to sections 11692 and 11693, supra,

> "It must be remembered that we are construing a statute enacted under the police power and primarily intended to protect the public from the rendition of certain services, deemed to require special fitness and training on the part of those performing the same, by persons not lawfully held to possess the requisite qualifications. While its penal provisions should be strictly construed, the statute as a whole should be interpreted, if possible, so as to effectuate the legislative intent. If the words 'valuable consideration' should be given the narrow meaning sought by respondent, then any act designated in the statute as constituting 'law business' might be performed with impunity by any person, though wholly unqualified or unfit to render the service, for the valuable consideration of advancing a business whatever its nature might be. Such an interpretation would entirely thwart the plain intent and purpose of this part of the statute. For the reasons hereinabove stated, we think that nomination of a trust company as an executor or trustee constitutes a valuable consideration within the meaning of Section 11692, R. S. 1929 (Mo. St. Ann. Sec.11692,p. 621.)."

From the foregoing cases, we are of the opinion that the practice of law is not limited to the preparation of pleadings and other papers incident to actions, and special pleadings, and the management of such actions and proceedings on behalf of clients before judges and courts. The person practicing today spends the greater part of his time in his office counseling and advising, drawing agreements, organizing corporations and preparing papers connected therewith, drafting of legal instruments of all kinds, including contracts for real estate, deeds, mortgages, bills of sale and wills. The courts have recognized the

need of training and special fitness for those persons practicing law and each year finds stricter requirements for admission to the bar, and all of this is with but one purpose in view, protection of the public.

The drawing of instruments affecting secular rights not only requires legal knowledge and power of adaptation of the highest order, but also advice on questions of law involved. Where such is not given the person having the instrument drawn may be very materially damaged. Our statute was enacted under the police power (State v. St. Louis Union Trust Company, supra,) for the protection of the public, and the State is an interested party.

The facts, as set out in the case of People v. Alfani, supra, are familiar to those licensed to practice law. Persons carrying on real estate and insurance business, however, are not the only guilty parties illegally practicing law but often include such office holders as notaries public and justices of the peace. Many of these individuals, distinct from their work, draw legal papers, contracts for real estate, deeds, mortgages, bills of sale and wills, all affecting secular rights, and many advertise themselves as engaged in such business. We are of the opinion that such practice is clearly in violation of Section 11692, supra, relating to the 'practice of law' and is subject to the penalties as set out by Section 11693, supra, relating to the 'practice of law without a license.' Our statutes set out specifically the powers and duties of justices and notaries public, and in no instance are they permitted to draft, procure or assist in procuring, any instrument affecting or relating to secular rights, nor are they permitted to practice law unless duly licensed in the manner as provided by statute.

Section 11692, supra, states however, that the drawing, procuring or assisting in procuring, of any paper, document or instrument affecting or relating to secular rights must be for a valuable consideration. The court, in the case of State v. St. Louis Union Trust Company 74 S. W. (2nd) (Mo.) 348, l. c. 355, in construing the above section as it relates to 'valuable consideration,' held that the statute was not limited to cases wherein there was a monetary consideration or a consideration that may

be definitely measured in money, and that a nomination of a trust company as an executor or trustee constituted valuable consideration within the meaning of the statute.

The court said:

"Furthermore, we have approved a more comprehensive definition than the one here proposed by respondent. In the early case of Mullanphy v. Riley, 10 Mo. 309, 311, we said: 'A valuable consideration is one, that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. 2 Kent's Com. 465.' In Green v. Higham, 161 Mo. 333, 337, 338, 61 S. W. 798, 799, we said that a valuable consideration is ' a benefit to the party promising, or to a third person at his request, or an inconvenience, loss, or injury, or the risk of it to the party injured.' 4 Minor, Inst. pt. 1, p. 16; 2 Bl. Comm. 445, note; 19 Smith, Cont. 141.' Also in Strode v. St. Louis Transit Co., 197 Mo. 616, 623, 95 S. W. 851, 853, 7 Ann. Cas. 1084, we quoted with approval as follows from 6 Am. and Eng. Ency. Law (2d) 703; ' A valuable consideration consists either in some right, interest, profit, or benefit accruing to the party, who makes the promise, or some forbearance, detriment, loss, responsibility, act, labor, or service given, suffered or undertaken by the party to whom it is made.' Abundant authority for such definitions is indicated in note 12, sec. 67, p. 654, 6 R. C. L., where the text states that 'a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other. ' "

From the foregoing, we are of the opinion that whenever a person draws, procures, or assists in the drawing of a deed, mortgage, will or other instrument affecting or relating to secular rights and makes a charge for same without having been first duly licensed, he may be punished in the manner as provided for in Section 11692, supra. We have seen that "valuable consideration" is not limited to cases where there is a monetary consideration that may be definitely measured in money. If notaries public, justices of the peace, or laymen hold themselves out as able or willing to draw legal instruments, and do so, in order to earn the fees entitled to them under the statute, or for the purpose of furthering their business interests, whichever the case may be, they come within the terms of Sections 11692 and 11693, supra, relating to the practice of law, without a license and for a valuable consideration.

Respectfully submitted,

Wm. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:
MW:LC

CONSTABLE--FEES: Constable of Audrain County not entitled to fee for attending Justice Court.

5-18

May 16, 1935.

FILED 95

Mr. David W. Walker
Constable, Saling Township
Audrain County
Centralia, Missouri

Dear Sir:

Your request for an opinion dated May 3, 1935, is as follows:

> "As Constable of Saling Township in Audrain County, I would like to know if I am entitled to mileage when I attend Justice Court.
>
> "There seems to be a difference of opinion among the Justices here.
>
> "Will you please let me hear from you at your earliest convenience."

The population of Audrain County is 22,077 as of the last census. We will confine our opinion to the law regulating fees of constables in townships having a population of less than 75,000 inhabitants.

When and how a constable can collect fees is provided for generally in Section 11776 R. S. Mo. 1929. Said Section reads:

> "The several officers hereinafter named, and jurors and witnesses, shall be allowed such fees for their services rendered in discharging the duties imposed upon them by law as are hereinafter provided, and the clerks of the courts of record and the presiding officers of courts of inferior jurisdiction shall strictly examine the accounts of all fees accruing during the progress of any civil suit pending in their said courts,

and shall correct the same if wrong in any manner, and shall thereupon enter the amount thereof upon their fee books, and the said clerk and the other officers before mentioned shall, after the term of the court at or before which the services were rendered, if required by the party entitled to fees, certify a fee bill of such services and deliver the same to the sheriff or other officer of the proper county charged by law with the service of executions, who shall proceed forthwith to collect the same; and if the person or persons and their sureties for costs properly chargeable with such fees shall neglect or refuse to pay the amount thereof, and costs for issuing and serving the same, within thirty days after demand of said sheriff or other officer aforesaid, the same shall be levied of the goods and chattels, moneys and effects of such persons or their sureties, in the same manner and with like effect as on an execution; and if any such officer shall neglect or refuse to levy and collect such fees, or to pay over the money collected thereon to the person entitled thereto, within three months after such fee bill shall have been delivered to him, the court wherein such fees accrued shall, upon ten days' previous notice given to such officer, on motion, enter up judgment against him and his sureties for the amount of the fee bill, interest and costs thereon. All provisions of this section concerning the collection of fee bills shall also apply to fee bills issued by justices of the peace."

Section 11777 R.S. Mo. 1929, provides mileage as a fee as follows:

"Constables shall be allowed fees for their servides as follows:

* *
"And for every mile traveled in taking a criminal to jail and returning therefrom, provided the distance so traveled be more than five miles, the sum of, per mile. . .10
* *
For each mile actually traveled in serving any process. . . . . .10."

In addition to the general Statute above quoted there are a couple of special Statutes providing mileage for a particular official service rendered by constables.

Section 12801 R. S. Mo. 1929, provides for a constable's mileage fee when he restrains animals running at large, and reads:

"The justice of the peace shall be allowed a fee of fifty cents for issuing the notice and swearing the appraisers, and the constable or person serving the notice shall be allowed a fee of thirty-five cents for each appraiser notified and three cents per mile as mileage to and from the place of service, and each appraiser shall be allowed a fee of fifty cents, which shall be paid by the owner of such stock before he shall be entitled to take such stock away: Provided, that if said appraisers assess the amount of damages and compensation for taking up, keeping and feeding said animal or animals, at a less amount than the amount claimed by the taker-up on the written statement delivered to the owner, it shall be the duty of the taker-up of said animals to pay said costs."

Section 12532 R. S. Mo. 1929, provides for a constable's mileage fee in diseased live stock proceedings, and says:

> "Sheriffs, constables county judges, or other county or city officers, shall receive such fees and mileage for the performance of their duties under this article as are allowed by law, to be paid by the county. The expenses of the agents of said board shall be paid by the said board."

The above Sections are the only Sections of law which provide a mileage fee to constables while performing the duties of office.

In the case of State ex rel. Troll v. Brown, 146 Mo. 401,l. c. 406; 47 S. W. 504, the sheriff of St. Louis brought an action of mandamus to compel the City treasurer to pay him a fee for attending Court as the Statutes and Constitution require. The Court audited and allowed the fee, but the treasurer refused to pay it on the grounds that nothing in the Statutes authorized the fee. The Trial Court issued the mandamus and the Supreme Court in reversing the action of the Trial Court said:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed."

CONCLUSION

We have been unable to find any Statute allowing a Constable in Audrain County a fee for mileage when attending Justice Court.

We are of the opinion that the allowance of a mileage fee to the constable for attendance to official duties in the Justice Court above mentioned would be illegal and void. To be entitled to this mileage fee for attendance there must exist a Statute supporting the fee, in the absence of which the presumption must be indulged that the servide are gratuitous.

Yours very truly

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

ROY McKITTRICK
Attorney General

SALES TAX ACT: Sales of electricity, gas and water to cities for street lighting, white way system, traffic signal lights,etc., are not subject to the tax.

8-30

August 27, 1935

FILED
97

Hon. Fred F. Wesner
City Counselor
Sedalia,Missouri

Dear Sir:

This department is in receipt of your letter of August 23 requesting an opinion as to the electric light and water sold by the City of Sedalia as a municipal corporation being subject to the sales tax which becomes effective August 27. Your letter is as follows:

> "The question has arisen as to the liability of the City of Sedalia in connection with its liability to pay the one (1) per cent sales tax on its current electric light and water bill as a municipal corporation, under subdivision (c) of Section 2 of said Act.
>
> I thought perhaps that some prosecuting attorney may have raised the question with your office as to the liability of a county or other municipalities in the county and that you may have rendered an opinion in this connection. If so, I would appreciate receiving a copy of same.
>
> It is my understanding that Kansas City and perhaps St. Louis are disputing their liability to pay this tax. Will appreciate any information that you have in hand that might enlighten us in this connection."

We are also in receipt of your supplemental letter of August 28, which contains the following supplementary paragraph:

> "The City carries a general account, due and payable monthly, with each the City Light & Traction Company, and the Sedalia Water Company, for electrical current used generally by the City for street lighting,white way system, traffic signal lights,and so on, and the Water Company for water used at the City Hall, City Parks, and fire hydrant rentals. Subdivision (c) of Section 2 of the Sales Tax Act,Laws of Missouri, 1935, Page 415 provides, 'A tax equivalent to one (1) per cent of amounts paid or charged on all sales of electricity or electrical current, water and gas (natural or artificial), to domestic, commercial or industrial consumers.' "

The original Occupation or Privilege Tax Act,under Section 2a, page 157 of the Extra Session Acts of 1933-1934, sub-section (b), in imposing a tax of one-half of one per cent on the gross receipts for the furnishing of services, substances and things, states:

> "Sales of electricity or electrical current, water, sewer service, gas (natural or artificial), to domestic, commercial or industrial consumers,"

while the new Sales Tax Act which became effective August 27, page 415 Laws of Missouri 1935, under Section 2, sub-section (c) states,

> "A tax equivalent to one per cent. of amounts paid or charged on all sales of electricity or electrical current, water and gas (natural or artificial), to domestic, commercial or industrial consumers."

While the wording of the two acts differs slightly, we think that there is no change or modification of the meaning and the construction to be placed on the liability of those coming within its terms. Under Section 2, page 415, the Legislature saw fit to place the tax of one per cent of the amounts paid or charged for the services definitely mentioned containing sub-sections (b) to (i), inclusive. In only one sub-section, that being the one relating to sales of electricity, water and gas, did the Legislature see fit to limit the class of purchasers, and if the electricity consumed by the streets, white way system, traffic signal lights, etc., of the City of Sedalia, and likewise the water so consumed, is subject to the tax, the light and water so consumed must come within one of the divisions or classes of consumers, namely, domestic, commercial or industrial.

Webster's Dictionary defines "domestic consumers" as "those who consume electricity or electrical current for household or domestic purposes."

In the case of Railroad v. United States 249 Fed. 822, "commercial consumers" are defined as "those who use electricity or electrical current for trade or commercial purposes."

In the case of Wells Fargo v. Railroad 23 Fed. 469, an "industrial consumer" is defined as "One who uses electricity or electrical current for manufacturing power and like purposes."

At the very outset we are eliminating commercial and industrial consumers, as,by the terms of the definitions given above, and by our ordinary conception of those terms, the water and light used by the city itself, as mentioned in your letter, could not be classed as industrial or commercial consumer. Having eliminated those two classes we are concerned with the question of whether or not the water and lights so used by the city could be classed as domestic consumption.

In the case of Henderson v. Shreveport Gas, Electric Light and Power Company 63 So. 616, l. c. 618, the word "domestic" is defined as meaning "a thing of or pertaining to one's house or home, or one's household or family, and excludes the idea of business; unless one pursues his vocation

or calling within his home."

In the case of Catto v. Plant 106 Conn. 236, the term "domestic" is defined as having a widely varied meaning, and, while its primary significance relates to the house or home, it is often used in a vastly broader sense and its significance is determinable with reference to the subject matter and the relation in which it appears.

A decision relating to domestic purposes broadens the field in the case of Erir v. Gas Company 78 Kans. l.c. 354, in the following language:

> "In presenting its estimates for the computation of profits counsel for the plaintiff deduct from the amount of sales within the city the amount received from sales to manufacturers. The defendant now contends that there should also be a reduction for gas sold to churches, the opera-house, stores, and offices - that these are not 'domestic purposes.' The term was probably used with reference to the ordinary distinction usually made in the sale of gas for light and heat for the comfort and convenience of individuals in their homes, offices, stores,churches and the like, and sales made to manufacturers to generate power. Usually, reductions are made for the latter purpose from the schedule of prices for the former. The term 'domestic' has a widely varying meaning, and, while its primary significance relates to the house or home, it is often used in a vastly broader sense. Its significance must always be determined with reference to the subject-matter and the relation in which it appears. In this contract, and with reference to this subject, the more reasonable view is that it applies not only to the homes of the city but to other places named where its principal use is for heating and lighting, and not for power. It appears that the parties construed the term to exclude only manufacturing

purposes. The secretary and manager of the company, after stating as a witness the amount of sales for all purposes, and deducting the amount of sales for manufacturing purposes in the city, and giving the balance, was asked: * * * * * * * *"

CONCLUSION

We cannot determine from the reading of the whole act the intention of the Legislature with reference to the section under discussion, but we construe that it was the intention of the Legislature to exempt from the tax all users and consumers of electricity, gas and water, if said users and consumers did not come within the meaning of domestic consumers or industrial consumers; on the other hand, it may have been the intention of the Legislature, in designating three classes, that by common usage the three terms were broad enough to include every kind and type of consumer or user. We are inclined to accept the first statement as the intention of the Legislature, namely, to exclude from liability of the tax all who do not come within the class of industrial, commercial or domestic consumers.

We are of the opinion that electrical current and water supplied to a city for street lighting, white way system, traffic signal lights, city administration buildings, court houses and county buildings, churches, city auditoriums (when not used for commercial purposes) and city parks, likewise, water and gas when so used and consumed, do not constitute domestic consumption within the meaning of the act, and, therefore, such sales are not liable for the tax.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

OWN:LC

CITIES OF THIRD CLASS: Power to contract for sewers outside of corporate limits.

9-17

September 16, 1935.

FILED
97

Mr. Fred F. Wesner,
City Counselor,
Sedalia, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "As City Counselor I have been requested to give an opinion as to whether or not the State of Missouri could connect its State Fair Grounds Sewerage system to the Southwest Sewerage District of the City of Sedalia by authority of proper ordinance and contract with the City of Sedalia.
>
> "My understanding is that the State has its sewerage system at the Fair Grounds complete with the exception of disposal or incinerating plant for the final disposition of sewerage.
>
> "This being true, at the present time sewerage from the Fair Grounds is thrown out upon the top of the earth and causes a very unsightly and filthy condition which I am told is very injurious to the public health of the citizens of Sedalia and the surrounding vicinity of the Fair Grounds, especially immediately after the holding of the annual fair.
>
> "My understanding is that through the Director of the W. P. A., Mr. Green, Secy' of the Fair and the Commissioner of Agriculture of Missouri propose to carry out

this project as a W. P. A. project without cost to the City of Sedalia, provided the City of Sedalia can legally give the State the authority to connect to the city sewer at the proposed point, to-wit: 'The intersection of West Third Street with the Missouri Pacific Railroad Fairgrounds Spur'.

"I assume that if it is possible at all for the City to carry out its part of the proposed project that it would be necessary to pass an Ordinance authorizing the Mayor of the City of Sedalia and the Commissioner of Agriculture to enter into a suitable contract therefor. I have prepared such an ordinance and am handing you a copy of the same herewith.

"In writing you, I am assuming that your office should be equally as well interested in this matter as myself and I will appreciate any opinion or suggestion that you may have in the premises.

"For your information the sewerage district which it is proposed that the State connect to is a general Sewerage District within the City of Sedalia, constructed and paid for by tax-bills in the usual manner, the General Revenue Funds of the City, and operated and maintained by the General Revenue Funds of the City.

"For your further information I have expressed an opinion to the Council that it is my belief that in view of the fact that it is the State of Missouri that desires to make this connection and that in view of the fact that the proposed connection could be made upon the theory that it was for the general welfare and public health of the citizens of said City and the surrounding community at the Fair Grounds, that said proposed connection might upon this theory be authorized by the Council under proper contract and agreement as being a public health measure and a reasonable regulation.

"Would appreciate your views in the matter at your most early convenience in view of the fact that the Council as well as Mr. Green, Secy' of the State Fair and Judge Monroe, Director of W. P. A., would like to arrive at some definite conclusion by next Tuesday, September 3rd."

You also attach a copy of a proposed ordinance of your city.

Replying thereto, Sedalia is a city of the third class. Section 6719, R. S. Mo. 1929, provides that such cities "may purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire."

Section 6727 provides that the mayor shall communicate to the council such measures as may, in his opinion, tend to the improvement of the health, comfort, general prosperity, etc., of the city.

Section 6803 empowers the mayor and city council to enact ordinances they deem for "the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect," etc.

Section 6807 empowers the council, among other things, to "purchase or condemn and hold for the city, within or without the city limits, within ten miles therefrom, all necessary lands for hospital purposes, waterworks, sewer carriage and outfall, * * * and make regulations to secure the general health of the city."

Section 6822 provides for establishing four classes of sewers and defines the methods as to public sewers.

Section 6823 deals with district sewers, Section 6824 deals with joint sewers, and Section 6825 deals with private sewers.

Section 6824 provides that as to joint district sewers the cost of construction thereof, except such sum as the city directs by order to be paid by the city, "shall be assessed and paid in special tax bills against the property included in the joint sewer district," etc. It further provides that "the action

of the council creating the joint sewer district shall be conclusive as to the necessity therefor," etc.

Section 6868, inter alia, provides that the council "shall have the power to enact and make all such ordinances and rules, not inconsistent with the laws of the state, as may be expedient for maintaining the peace and good government and welfare of the city and its trade and commerce."

Section 6875 provides that sewers "partly in one or more districts and partly beyond the territorial boundaries of such city, as may be determined by ordinance" may be constructed.

Section 6883 provides that the cost of acquiring the right-of-way, "including the land for the erection and maintenance of disposal plants," shall be a lien on the lands.

Section 6885 provides that the cost of constructing such sewers shall be paid for by special tax bills.

In 1 Dillon on Municipal Corporations, (2 Ed.) Par. 196, it is said:

> " * * * The establishment and maintenance of sewers and drains have been held matters of local and municipal concern, but construction of storm sewers extending beyond the municipal area into unincorporated territory, not concerning alone or specially the inhabitants or property owners of any one city or town, are state affairs."

In the case of Churchill v. Grants Pass, 70 Ore. 283, the court in speaking of the power of a municipal corporation beyond the city limits, stated the following, l. c. 288:

> "That the construction of a railroad by the state or by a municipality is a public purpose seems to be settled by the reasoning of the court in Olcott v. Supervisors, 16 Wall 678 (21 L. Ed. 382). The reasoning in that case would seem to cover all cases of railroad construction by municipalities, whether wholly within the boundaries of such municipality or not, if the purpose

> of such improvement is for the general welfare, convenience, health, or comfort of its citizens."

In the case of Muir v. Murray City, 55 Utah 368, the court had under consideration the authority of the city to construct power lines beyond the limits of the city and to sell power over such line supplying another city therewith, and held that such power existed. In that case the city borrowed money to construct said line and was sued for the same and recovery was had. The court said, l. c. 374:

> "If it became necessary to furnish power, instead of payment in cash, as shown by the record in the present case, then it had the right to deliver that power at the point agreed upon in the contract, whether that point be within or without the city. In constructing its works and obtaining its power, it was its duty to pay due regard to the future, and provide for the probable necessities of a rapidly increasing population. In such case it could not but happen, as it did happen in the present case, that when the works were completed and put into operation the city found it had a large surplus of power over and above all present demands, or probable demands for many years to come."

The court there held that while cities are not organized primarily as profit-making concerns,

> "yet when it is incidental, as in the instant case, to a proper exercise of its legitimate powers, the making of the enterprise a profitable one was highly commendable." (Citing a number of cases in support thereof.)

In the case of Skinner's Ex'r. v. Hutton, et al., 33 Mo. 244, speaking of the powers of a city, the Missouri Supreme Court said, l. c. 249:

> "In order, however, to settle the case finally, we add that the Legislature had power to authorize the City of Lagrange

> to expend money upon the improvement of roads outside of the limits of the city."

In the case of Haeussler et al. v. City of St. Louis, 205 Mo. 656, the court considered the power of the City of St. Louis to issue bonds and use the proceeds thereof in constructing a municipal bridge across the Mississippi River for public use by railroads and vehicles of other kinds and pedestrians, and to buy or condemn land on either side of said river to be used in providing approaches to said bridge, and held that the city had such power, including the power to spend city money for that part of the project located outside of the city.

In the case of Land and Improvement Co. v. St. Louis, 257 Mo. 291, the court considered the validity of an ordinance providing for the construction of a district sewer to drain lands lying within and without the city limits, and held that the city had authority to so construct. At page 301 the court says:

> "It has been uniformly held that the action of the city legislature in pursuance of charter powers, in establishing a district to be benefited by sewers or other public improvements so as to justify a special assessment against the property lying within the district, is conclusive, in the absence of any evidence that it was procured by fraud or proof that it is manifestly arbitrary or unreasonable, or that the assessment is palpably unjust and oppressive (Citing a list of cases.)"

Further:

> "The record in this case discloses that the watershed served by this sewer, laid partly outside the city limits, was traversed by the south fork of Gingrass Creek, which was a small stream practically dry except in wet weather. No sewer could be built of insufficient capacity to carry off the accumulation and drainage of this stream, without exposing the property owners to the dangers of an overflow of the creek at every rainfall.

> Necessarily the sewer, in order to accomplish its purpose, must be built big enough to enclose and carry off the polluted waters of Gingrass Creek. The existence of the stream was due to the topography of the watersheds, and that fact made it the duty of the city to provide a sewer adequate to the demands created by natural conditions in the locality to be drained. The lot purchased by the plaintiff was located in such surroundings as to make it a servient estate and was specially benefited in proportion to the protection which the sewer, thus constructed, gave it against the damage from the flowage from higher ground."

In the case of Joplin Consolidated Mining Co. v. City of Joplin, 124 Mo. 129, considering the question of the power of cities with reference to sewage, the court said, l. c. 138:

> "The question whether the contemplated use of the property is really a public use is a judicial question, and will be determined by the courts without any regard to any assertion of the city council that the proposed use is a public use. (Citing cases.) But it is for the city council to determine the question whether the public welfare requires or makes the sewer necessary or expedient. With that question the courts have nothing to do, for the law has confided it to the judgment of the city council."

It will be seen from the above noted authorities that cities have rather a wide field of authorized action extending beyond the limits of the city when the welfare of the city and the people therein are directly concerned, and that the proper party to express the will of the people of the city thereon is the city council. Under the statutes above quoted and referred to, cities of the third class in Missouri have the express authority delegated to them to enact such ordinances as they consider to be for "the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect," and to procure land within ten

miles of the city if they deem the same necessary for sewer carriage, and to make regulations to secure the general health of the city.

CONCLUSION

We are of the opinion that the City of Sedalia has the power and authority vested in it to enter into a contract whereby the sewer system of the State Fair Grounds will be connected up with the sewer system within said city, such contract to be spread upon the records of the city council and duly authorized and adopted by said city council.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

TAXATION: BOARD OF EQUALIZATION: PENALTIES AND INTEREST: RAILROADS:

Taxes on account of 5% increase ordered by Board of Equalization December 17,1934, not delinquent until levied by county courts and reasonable time given to pay.

January 21, 1935

FILED 98

Honorable Andy W. Wilcox
Chairman State Tax Commission
Jefferson City
Missouri

Dear Sir:

This Department acknowledges receipt of your inquiry dated January 18, 1935, as follows:

> "This Department is desirous of an opinion in the following matter:
>
> 'In the settlement of the railroad companies' injunction as of December 20,1934, some of the County Clerks and County Collectors insist that they should add the usual penalties. Should this be done? ' "

1.

In order to have a complete grasp of the question presented by you we state, in a general way, the facts leading up and giving rise to your inquiry.

On September 2, 1932, the then State Board of Equalization made a horizontal raise of ten per cent in the equalizing of the valuation of railroad properties in this state (not including locally assessed properties) above the valuation of such railroad properties theretofore fixed by the State Tax Commission. Thereafter,

twenty-four railroad corporations, affected by the order of the board of equalization, filed their separate suits in the United States District Court for the Western District of Missouri, seeking to set aside the order of the board of equalization on two grounds.

(a) That the action of the board of equalization amounted to an assessment of valuations against the railroad properties which was beyond the power of the board of equalization to make, it being claimed that that power was then vested in the State Tax Commission.

(b) That the action of the state board of equalization was arbitrary and discriminatory as against the railroads and their properties, as compared with the assessment valuations of other properties in the state.

After the bringing of the suits, and under the order of the District Judge, the railroad companies paid to the various taxing bodies of the state their taxes as based on the assessment valuations fixed by the State Tax Commission.

On appeal to the United States Circuit Court of Appeals, Eighth Circuit, 70 Fed. (2nd) 670, that court held the board of equalization of this state to have the power to make the ten per cent increase in valuations of railroad properties by way of equalizing values of properties among the counties of the state. On December 17, 1934 the then board of equalization modified the order of the board of equalization theretofore made on September 2,1932 and equalized the values of railroad properties with other property in the state by increasing the valuation of railroad properties five per cent. The purport of the order of the board of equalization made December 17, 1934 was embodied in a decree entered by the United States District Court for the Western District of Missouri December 20, 1934, and disposing of the above cases, it being provided in the decree that the respective defendant railroad companies should pay the taxes lawfully levied on account of such five per cent increase, within thirty days after the entry of the decree, to-wit, December 20, 1934. The order of the board of equalization made December 17, 1934 further provided for the certification out by the

Secretary of the State Board of Equalization and the Secretary of the State Tax Commission of the five per cent increase in valuations to the various county clerks and taxing bodies in the state. These certificates did not go forward from said secretary until some time after the first day of January, 1935.

2.

(a). Discussing subdivision 6 of Section 9854 Revised Statutes Missouri 1929, the court in Park v. Kansas City Southern Railway Company 70 Fed. (2nd) 670, 672, said:

> "It cannot be doubted that the clear and explicit language of subdivision 6 did divest the state board of equalization of the power of original assessment of railroads then possessed and exercised by it, and conferred those powers upon the state tax commission. But there is nothing in the language of the first sentence to indicate any intention to divest the state board of equalization of the power which it had had since 1879 to equalize by raising and lowering valuations of railroad property. The power there conferred on the tax commission is the power of original assessment; a power which is distinct and different from the power of equalization after original assessment and not to be confused therewith. They are dissimilar functions."

And further on page 673,

> "The conferring of the exclusive power of original assessment upon the state tax commission, where, at the same time, the statute confers the power of equalizing upon the state board of equalization, indicates that the two functions have been divided; the function of assessing now resting with the state tax commission and the different function of equalization remaining with the state board of equalization."

Section 9848 Revised Statutes Missouri 1929, provides for the employment of a secretary for the State Tax Commission. Section 9849, referring to such secretary, further provides that:

> "He shall also be the secretary of the state board of equalization, shall keep the records of said board and shall discharge such duties as the board may bequire."

Article 13, Chapter 59, Revised Statutes Missouri 1929, treats of the taxation of railroads. While the duty of the original assessment of railroad companies now devolves on the state tax commission, yet, such sections of said Article 13 as do not conflict with the duties of the state tax commission in making original assessments or railroads, may be treated as effective and controlling in the details of levying and collecting such railroad taxes.

Section 10013 requires the president or other chief officer of every railroad company in this state to furnish to the clerk of the county court of each and every county in the state in which said railroads are located, a statement of its property in such county, which statement shall be furnished on or before the first day of January in each and every year.

Section 10028 provides that,

> "The county court, upon the receipt * * * * of the certificate of the action of said board of assessment and equalization, the returns of the county assessor and the certificate of cities, towns and villages, made under the preceding section, shall, * * * * ascertain and levy the taxed for state, county, municipal township, city, incorporated town and village and school purposes, and for the erection of public buildings, and

for other purposes on the railroad and the property thereof,* * * * at the same rate as may be levied on other property * * * *."

Section 10030 provides that,

"Within ten days after the county court shall have levied the taxes on railroad property, as prescribed in the two preceding sections,the county clerk of such county shall extend the same on a separate tax book, to be known as the railroad tax book * * * as equalized and apportioned to such county by the state board of assessment and equalization* * *."

Section 10031 provides,

"It shall be the duty of the county clerk, as soon as said tax book is completed, to make out and certify to the secretary or chief managing officer in this state, of the proper railroad company, a statement of taxes levied on the property of such railroad company in his county* * * *."

Section 10032 provides,

"The county clerk shall, as soon as may be after the railroad tax book shall have been made out and adjusted as above provided, deliver the same to the proper collector of such county* * * * *."

Section 10033 provides,

"All taxes of whatever description,charged against any railroad company,according to the provisions of this article,due to any county, and all taxes due the state

> and collectible in said county,and all taxes due cities,incorporated towns, villages, municipal townships and school districts in such county, shall be due and payable to the county collector of such county on the first day of September of the year for which the same may be levied and charged as herein provided."

Section 10035, with reference to delinquent railroad taxes, is as follows:

> "If any railroad company shall fail to pay to the county collector of the proper county any taxes levied for state, county,city,town,village,school,or for the erection of public buildings,and for other purposes,on the property of such railroad company in said county, on or before the first day of January next after the same shall have been assessed and levied, the same shall then be,on and after that date, known and treated as delinquent railroad taxes;and the said company shall forfeit and pay, in addition to the taxes with which said company may stand charged on the tax books of such county, such penalty as is provided by law for the nonpayment of other delinquent taxes, which penalty shall be apportioned to the various funds respectively; and it shall be the duty of the collector to collect and account for, as other taxes, in addition to all taxes so charged against said company, the penalty aforesaid, on all such taxes after the first day of January, till the same shall be paid."

(b). At this point it is proper to state the limits of the duties of the taxing bodies, as well as the rules for the construction of taxation

> the counties are charged with whatever is done by the state affecting the rights of the taxpayer."

In State ex rel Union Electric Light & Power Company v. Baker 316 Mo. 853, discussing the question of revenue laws, the court at page 859 of the opinion said:

> "As a general rule revenue laws are to be strictly construed, but the doctrine of strict construction should be applied with due regard to the intention of the Legislature as expressed in the statute, and with a view to promoting the object of the statute. (36 Cyc.1189-1190.) It is the duty of the courts to endeavor by every rule of construction to ascertain the meaning of and give full force and effect to every legislative enactment not obnoxious to constitutional provisions, but the legislative intent must be intelligibly expressed. (State ex inf. v. Street Ry. Co., 146 Mo. l. c. 168.)."

On the question of the construction of penal statutes, the rule is stated in 61 C. J. page 1483, Section 2106, as follows:

> "Following the general rule, statutes imposing penalties for delinquencies in complying with the tax laws are subject to strict construction, and will not be extended by implication to any taxes or to any persons, not clearly within their terms; and where there is such an ambiguity in the statute as to leave reasonable doubt of its meaning, or it is doubtful whether the legislature intended that a tax should be paid on the property, it is the duty of the court not to inflict a penalty."

So that in determining whether or not there has been delinquency on the part of the railroad companies in paying

the taxes resulting from the order of the Board of Equalization made December 17, 1934, the statutes in that connection must be strictly construed and against the imposition of penalties and forfeitures, unless such was the manifest intention of the Legislature.

3.

(a). The situation in reference to the statutes of this state, as to the question presented, was and is as follows:

The Secretary of the Board of Equalization was required to certify out to each county clerk the equalized values as fixed by the State Board of Equalization on December 17, 1934. Section 9856. A railroad company is required, on or before the first day of January in each and every year, to furnish the clerk of the county court of each county a statement of its property in such county. Section 10013. On receipt of the certificate of the secretary of the board of equalization, the returns of the county assessor and the certificate of cities, towns and villages, the respective county courts in each county shall ascertain and levy taxes on account of such equalized value - in this case the five per cent increase. Section 10028. Within ten days after the levy of such railroad taxes by each county court, the clerk of such county court shall extend the same on a railroad tax book. Section 10030. The county clerk is required, as soon as said tax book is completed, to certify to the proper officer of the railroads a statement of the taxes so levied on such railroad property in his county. Section 10031. As soon as the county clerk shall have made out the railroad tax book the clerk shall deliver the same to the proper collector of such county. Section 10032. All taxes charged against any railroad company shall be due and payable on the first day of September of the year for which the same may be levied and charged as in the foregoing sections provided. Section 10033. If any railroad company fails to pay any taxes levied on the property of such railroad on or before the first day of January next after the same shall have been assessed and levied the same shall then be, on and after that date, known and treated as delinquent railroad taxes. Section 10035.

State ex rel. Hammer, Collector v. Vogelsang 183 Mo. 17, was a suit by a collector to collect taxes on certain

real estate for the years 1885 to 1890, both inclusive, which had been omitted from the current assessments of those years, and the omission discovered in 1896 and the assessments then made, pursuant to Section 7562 of the Revised Statutes of 1889. It was claimed that the collection of the taxes was barred by the statute of limitations. At page 24 of the opinion the court said:

> "The suit is not barred by the statute of limitations. No right of action accrued until the taxes were assessed and had become delinquent."

State ex rel. Blades, Collector v. Wabash Railroad 251 Mo. 134, is in point. That was an action to collect railroad taxes. In the year 1908 the county court of Montgomery County levied taxes, for county purposes, to the amount of fifty cents on the one hundred dollars valuation on the right-of-way and other taxable property of defendant in that county. Defendant contended that the county court was only authorized to levy forty cents on the one hundred dollars valuation because the total assessed valuation of all taxable property in the county for the year 1908 exceeded six million dollars. When the county court of Montgomery County held its regular May term in 1908, the general assessment books of the county were complete and had been corrected in conformity with the action of the county and the prior action of the state board of equalization, but the state board of equalization had not at that time assessed, equalized and fixed the final valuation of such railroad property in the county as it had the power to do. The assessments and returns of the railroad company, which were before the county court at its May term, indicated that all the taxable property in the county was less than six million dollars but on July 31, 1908 the State Board of Equalization having raised the valuation of railroad property assessable in that county, certified the result of its labors to the county court. After adding said increase in the valuation of railroad property as fixed by the State Board of Equalization to the then existing assessment of other property, the aggregate valuation of all property in Montgomery County for 1908 exceeded six million dollars. The county court met again in the month of September, 1908, and, notwithstanding the return or certificate as to increase in railroad assessments, it proceeded to levy upon defendant's property a tax of fifty cents on the one hundred dollars, instead of forty cents as required where the valuation was over six million dollars. The

decision is illuminating on the question at hand and we quote at length therefrom beginning on page 141:

> "The county court no doubt acted in good faith in levying upon the railroad property the same rate of taxes for county purposes which it had theretofore levied upon other property in the county. In fact, by section 9363, Revised Statutes 1899 (now section 11582, Revised Statutes 1909) it was required to levy the same rate of taxes upon railroads as other property. It is, therefore, apparent that this litigation grows out of the fact that the law does not require the assessment of railroad property to be completed at the same time as the assessment of other property; and if the county court violated the Constitution by levying upon defendant's property a tax for county purposes in excess of forty cents on the one hundred dollars valuation, it did so in an effort to obey section 11582, supra.
>
> Plaintiff's learned counsel assert that it was the duty of the county court to fix the rate of tax levies for county purposes at its May term, 1908; and while he does not call our attention to any mandatory statute prescribing that such taxes must be levied by county courts at their May terms, we think it was probably the legislative intent that the rate of tax levies should be fixed in May. (See Sec.9283, R.S.1899,now Sec.11423,R.S. 1909.)
>
> Plaintiff's counsel also assert that as the statute required tax levies to be made in May the county court possessed the right to rely upon the assessments of 1908 as they existed in said month of May, and was not required to await the action

of the State Board of Equalization to ascertain what the final assessed valuation of property in the county might be.

This contention seeks a construction of that part of section 11, article 10, of our Constitution which prescribes the method for ascertaining the assessed valuation of counties, and reads as follows:

'The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for State and county purposes.'

We are not aware that this particular clause of our Constitution has ever been before the appellate courts of this State. We are, therefore, justified in consulting the precedents announced by the appellate courts of other jurisdictions.

The Supreme Court of Illinois (Culbertson v. City of Fulton, 127 Ill.30), in construing a constitution which used the word 'last assessment,' held that said words meant the last completed assessment as corrected and approved by the State Board of Equalization, and not the assessment by the local assessor, whose work had not yet received the approval of said State Board of Equalization.

In the case of Wilkinson v. Van Orman, 70 Iowa, 230, a constitutional provision prohibiting school districts from becoming indebted in excess of five per cent of the taxable property therein 'to be ascertained by the last State and county tax lists' was construed to apply only to the completed tax lists, and not to the original assessment lists as prepared by the assessor before the taxes were equalized and levied.

In the case of Chicago,Burlington & Quincy Railroad Co.v.Village of Wilber, 63 Neb.624, the Supreme Court of Nebraska construed the words 'last preceeding assessment' to mean an assessment which had been completed by receiving the approval of all the agencies through which it was required to pass.

We find the reasoning of the foregoing cases is sound, and that the county court of Montgomery county could not base its tax levies upon returns made by the officers of railroad companies,which returns had not been passed upon by the State Board of Equalization.

It is not contended by respondent that the tax levies in controversy were based upon the assessment of property in that county made during the year 1907 (which were doubtless completed), but they are admittedly based upon assessment books and returns of railroad officials made in 1908. There was no attempt in this case to show what the assessment of the county amounted to as made in 1907.

It is, however, admitted that in the month of September, 1908, when most of the taxes sued for were levied upon defendant's roadbed, etc.,the county court had before it the result of the work of the State Board of Equalization, which showed conclusively that the aggregate and final assessment of all property in the county exceeded six million dollars for the year 1908.

At its September meeting the county court found itself in a very unfortunate position. It was required by section 11582, Revised Statutes 1909, to levy upon the railroad property of defendant as assessed by the State Board of Equalization the same rate of taxes for county purposes that it had theretofore levied upon other property of the county,which in this case was fifty cents on the one

hundred dollars valuation, and at the same time it was prohibited by the Constitution from levying upon said property more than forty cents on the one hundred dollars valuation for county purposes.

In this dilemma said county court elected to obey said section 11582,supra,and let the Constitution shift for itself.

In thus ignoring the Constitution the county court committed an error fatal to plaintiff's cause of action in this case. Whenever there is an irreconcilable conflict between the Constitution and the statutes, the latter must yield.

In the case of Kansas City, Fort Scott & Memphis Railroad Co. v. Thornton, 152 Mo. l.c.575, this rule was stated by Marshall, J.,in the following language:

'It is the duty of the courts to enforce the organic law and to brush aside any statute which conflicts with it,whether it was passed before or after the Constitution was adopted.'

It is doubtless the purpose of our revenue laws to have tax levies based upon the assessment books made and returned during the years when such taxes were levied. County courts must necessarily take into consideration the current assessments in order to ascertain how large or how small the levies should be. The rate for county levies is not arbitrarily fixed by the law. They may equal the amount limited by the Constitution, or they may be lower if the county court believes that a lower rate of levy will supply the county with all the funds it needs.

We see no escape from the defendant's

contention that in levying the taxes of 1908 the county court acted upon the assessment of that year, and having disregarded the plain mandate of the Constitution the county taxes levied on defendant's property in excess of forty cents on the one hundred dollars valuation are illegal.

We are not unmindful of the hardships which this rule will entail in this case, and possibly in others. The spirit, possibly the letter, of the law, requires county courts to make their tax levies at the annual May terms thereof, at which time they cannot know what the action of the State Board of Equalization will be in assessing railroad property. Consequently, it is impossible for them to determine with certainty what the aggregate assessed valuation of the county will be in the month of May.

Section 11, article 10, of our Constitution divides counties into four classes for purposes of taxation; such classes to be ascertained by their total assessed valuation. In two of those classes county courts are permitted to levy fifty cents on the one hundred dollars valuation for county purposes; in one class forty cents on the one hundred dollars valuation, and in the remaining class thirty-five cents on the one hundred dollars valuation.

It follows that when the assessed valuation of a county is such that it is likely to pass from one class to another through the final action of the State Board of Equalization in raising or lowering values, county courts cannot safely make their levies until the State Board of Equalization has completed its work and certified the result thereof to the county clerks.

> If this rule works an inconvenience or loss in specific cases, the evil must be borne until the General Assembly in its wisdom shall see fit to enact laws requiring all assessments to be made at the same time, and that taxes be levied only after all assessments are completed and finally corrected and approved by the State Board of Equalization.
>
> Much as we dislike to announce a rule which may cause loss or inconvenience to the citizens of the State, and possibly nullify some of our statutes relating to the assessment and collection of public revenues, it is our paramount duty to uphold and support the Constitution; and we cannot warp or twist its words or place a strained construction upon its provision, however great may be the demand that we do so. (State ex rel. Burns v. Gibson, 195 Mo. 251.) It follows that we must deny recovery to plaintiff for the county taxes sued for in this case."

The case last quoted from, in connection with the sections of the statute above referred to, clearly show, in the present situation, there was no liability on the part of the railroad companies to pay the tax, growing out of the five per cent increase in equalized values, until after the equalized values had been certified to the various county clerks, and certainly not until the increased valuations had been levied against by the respective county courts for taxes for the year 1932.

The case of Railroad Company v. People 9 N.W. 249, was a suit for railroad taxes. On the question of the right to recover interest the court at page 251 of the opinion said:

> "The court below permitted the state to recover interest and this I think was erroneous. Whether the reports made by the company were correct or not, until an assessment or charge

> was made by the auditor general and notice thereof given the company, it was not in fault for not paying. Some act by the auditor general was necessary before the tax became due and payable."

Section 10031 requires notice to railroads of the taxes levied.

State v. Hughes Bros. Timber Co. 203 N. W. 436, was an action by the State of Minnesota to recover certain taxes assessed against logs floated from the State of Minnesota into another state. The defendant disputed the right of the state to impose the tax on the ground that the assessment and levying of the tax was an interference with or burden on interstate commerce. The Supreme Court of Minnesota upheld the tax. On the question of interest and penalties, at page 438 of the opinion the court said:

> "The original assessment was on 10,000 cords, but in fact there were only 8,367 cords. The tax was reduced accordingly by the decision below, but, notwithstanding, the statutory interest and penalties were sustained as to the reduced amount. In that we think there was error. Under the principle of County of Redwood v. Winona & St. Peter Land Co., 40 Minn. 512, 41 N. W. 465, 42 N. W. 473, neither interest nor penalties can be imposed upon the taxpayer until he defaults in payment. Defendants had no opportunity to pay the correct amount of the tax until it was determined. Until then they were not in default, so all they can be held for is interest on the tax from the time it was so determined."

The latter case was reversed by the Supreme Court of the United States on the ground that the tax was a burden on interstate commerce, but the holding set out above as to penalties and interest is not affected and is authority for the position that the railroad companies in the present case are not required to pay the tax represented by the five per cent increase in the valuations, until the tax rate in the respective counties has been applied thereto and

levied thereon. Until such time the railroad companies would not know what sum of money was due from them on account of such increase, and they could not be guilty of delinquency until they knew what they were to pay and until required by the statute to pay the same.

The case of Louisville & Nashville Railroad Co. v. Commonwealth 94 S. W. 655, is applicable. The board of valuation in Kentucky fixed a certain value on the railroad franchises of the plaintiff. The railroad company disputed the justness of the value so fixed and procured an injunction in Federal Court which was afterwards dismissed by the United States Supreme Court, and the railroad companies were held to pay on the entire valuation so fixed, which was done. The suit was instituted to collect penalty and interest for failure to pay the taxes at the time required by law. The finding in that regard was for the railroad Company. In the course of the opinion it is said:

> "* * * * it was not contemplated that the taxpayer was guilty of the act of refusing to pay taxes, until there was a legal liability fixed by the assessment, and a notice of the amount of taxes had been given."

In the present case the railroad companies paid, under order of the United States District Court, the amount of tax based on the assessment of the state tax commission. As shown by the statutes above quoted from and referred to, there were many things to be done by the taxing officials before the railroad companies were required to pay the taxes accruing because of the five per cent increase in equalized value. None of such acts could be done or completed by the taxing officials or taxing bodies until the final action of the state board of equalization and certified out by the secretary of the board, which was not done until after January 1, 1935.

(b). There are certain cases cited in the footnotes to 61 C. J. pp. 1490 and 1518, which may be contended are in conflict with the foregoing views, but those are

cases from foreign jurisdictions not controlled by the statutes of this state and in most instances there are peculiar statutory provisions in effect in the states where the decisions were rendered so as to render the decisions in those cases not persuasive here.

(c). We might say in this connection that, in the litigation herein referred to, the five per cent increase in valuations did not involve and does not include locally assessed property belonging to railroad companies.

While we do not think it necessary to a conclusion in this matter, yet, we may mention that the United States District Court in its decree directed the railroad companies to pay the taxes within thirty days after the rendition of the decree. Nothing was said about penalties and interest in the decree, and, ordinarily, penalties and interest are not considered as a part of a tax.

State ex rel. McKittrick v. Bair 63 S.W.(2nd) 64.

The respective railroad companies involved are entitled to a reasonable time, after the taxes on account of such five per cent increase in equalized valuations are levied by the respective taxing bodies, in which to pay the tax so levied.

CONCLUSION.

It is the opinion of this department that the respective railroad companies in this state, liable to pay taxes on account of the five per cent increase in valuations made by the State Board of Equalization December 17, 1934, will not be delinquent in the payment of such taxes until such respective valuations have been certified to the county clerks of the respective counties of the state where taxable railroad property is located and taxes have been legally levied thereon by the taxing bodies and, at least, until the respective railroad companies have

a reasonable time thereafter in which to pay such taxes.

Yours very truly,

GILBERT LAMB
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

GL:LC

HIGHWAYS - Right of action against operators of trucks for heavy use of highways.

2-2

January 28, 1955.

Hon. Mark M. Wilson,
Prosecuting Attorney,
Henry County,
Clinton, Missouri.

FILED

Dear Sir:

A request for an opinion has been received from you under date of January 10, 1955, such request being in the following terms:

> "I would appreciate your opinion upon a question that has come before me in this County. That is what action can be taken where the coal trucks of a coal company, by their excessive use, are tearing up a road. The road is neither a highway nor a farm to market road. The expenses of the reconstruction and the upkeep of this road has been shared by the township and the adjacent land-owners.
>
> I will appreciate your reply upon this question as soon as possible."

As a general proposition, a public highway is from its very nature open to members of the public to use either for business or pleasure. Consequently, the basis of any action taken by you would need to be some statute or principle of common law which is being violated by the operators of the coal trucks referred to in your letter.

1. Public Service Commission Law. From the information given in your letter, it does not appear whether the trucks are hauling coal belonging to the owners of such trucks, or whether this coal is being hauled for someone else. If the latter situation exists, the Public Service Commission Law (Art. 8, Chap. 33, Laws of 1931, page 304) imposes certain license and other requirements, and if the operators of the trucks are not complying with all the provisions of this Public Service Commission law, a remedy under it would be available.

2. Weight and Dimensions Law. R. S. Missouri, 1929, Sections 7787-7792, as amended by Laws of 1931, page 265, impose certain restrictions on the weight and dimensions of vehicles operated on the highways of this State, and if these provisions are not being complied with, this would furnish a basis for action. We call your attention especially to Section 7789 which is as follows:

> "Whenever by reason of thawing of frost, or rains, or due to new construction the roads are in a soft condition, the maximum weights on all vehicles mentioned in the preceding section, including trucks, tractors, trailers and semi-trailers and other vehicles therein mentioned may be limited by the state highway commission to such an amount and in such manner as will preserve the road under such conditions; and said commission shall give due notice thereof by posting notices at convenient and public places along said road or roads or parts thereof which are subject to said regulations and reduction of weights."

3. Mutilation of Roads. We assume from your letter that the damage being done to your highways as described is not wilful or malicious, but in this connection we call to your attention R. S. Missouri, 1929, Section 7936, which is as follows:

> "Every person who shall willfully and maliciously break or destroy or remove any mile post, mile stone, guideboard or marker erected by authority of law on any public highway, plank road or turnpike road, or shall willfully and maliciously deface or alter any inscription on any such post, stone, board or marker, or shall plow up, tear up, or injure by rough locking of wheels of any vehicle, or in any other manner mutilate or injure any public road or highway, shall be deemed guilty of a misdemeanor."

In conclusion, it is our opinion that if operators of coal trucks are using the highways of this State in violation of any provision of the Public Service Commission Law, or the Weight and Dimensions Law, or any other law of this State, that legal action may be instituted against such operators for such violation, but that unless some such law is being violated no right of action would exist against such operators merely by virtue of the fact that in the course of their business they are using the highways more than other persons, with the consequently greater wear and tear on such highways than would be occasioned by more infre-

quent use.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

BANKS & BANKING: (1) Taxation of Banks and Trust Companies;
(2) Preferred Stock;
TAXATION: (3) Capital Notes;
(4) Stock owned by Reconstruction Finance Corporation not taxable.

February 19, 1935

FILED 98

Wilcox

State Tax Commission
of Missouri
Jefferson City, Missouri



Gentlemen:

This is to acknowledge your letter as follows:

"The assessment of bank stock as provided for in Section 9765 as amended at the '31 Session at page 357, Session Acts, authorizes the assessment of bank stock, and provides among other things that the chief officer of the bank shall deliver to the assessor 'a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, company, institution or association; and such shares, reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money."

The last two or three years a new development in the capital structure of banks and trust companies has been the issuance of preferred stock and issuance of capital notes divided into two classes, A notes and B notes.

"The question now arises as to whether or not preferred stock and capital notes are to be considered as capital stock of the banking or trust company for the purpose of assessment.

We would like your opinion as to whether or not preferred stock and capital notes are to be treated as capital stock in making assessment for Ad Valorem tax.

In some cases these notes are owned by the Reconstruction Finance Commission, a Federal department.

After a study of these new methods of finance by banks and trust companies, we are inclined to believe that capital notes, when held by a department of the Federal Government, may be excluded from the capital structure of the bank, but if held by an individual they are assessable at their par value for Ad Valorem tax. The assessment to be against the owner and the tax to be paid by the bank, the same as other bank stock, and that all surplus values above preferred stock be attached to the common stock of the bank."

Before proceeding to answer the questions contained in your letter we shall first summarize the method of taxing banks and trust companies.

I.

TAXATION OF BANKS AND TRUST COMPANIES.

Laws of Missouri, 1931, page 357, Section 9765, relating to assessments of banks and trust companies, provides in the part material as follows:

"Persons owning shares of stock in banks, or in joint stock institutions or

"associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, company, institution or association; and such shares, reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock, less, also, the value of stock in other corporations held by such bank or joint stock institution or association doing a banking business: Provided, however, that no deduction shall be allowed on account of stock in any one manufacturing or business company in excess of forty per cent. of the capital, surplus and undivided profits of such bank or joint stock institution or association doing a banking business. Private bankers, brokers, money brokers and exchange dealers shall make like returns and be assessed and taxed thereon in like manner as hereinbefore provided:"

Assessment of taxes on the capital stock of a banking corporation is made against the shareholder and not the bank. The assessment on shares of stock issued by a bank is assessed against the owners. However, the bank pays the tax as fixed by the assessor and recovers same against the shareholders. In other words, the bank is more or less an agent for the shareholders.

In State ex rel. v. Cantley, 26 S. W. (2d) 976, the Supreme Court of Missouri, en Banc, (l. c. 979) said the following:

> "Whether or not, as between the bank and its shareholders, the bank is their mere agent for the payment of their taxes, the statute in plain terms makes the bank directly responsible for the payment of the taxes assessed against the shareholders. The duty of the bank to pay the tax, if it has assets with which to pay it, is a personal liability of the bank to the tax collector. State ex rel. Bay v. Citizens' State Bank, supra, 274 Mo. pages 68 to 71, 202 S. W. 382."

In State ex rel. United States Bank et al. v. Gehner, 5 S. W. (2d) 40, l. c. 43-44, the Supreme Court of Missouri said:

> "In State ex rel. Miller v. Shryack, supra, Marshall, J., speaking for this division of this court, in discussing the purpose and intent of our state statute aforesaid, said (179 Mo. loc. cit. 440 (78 S. W. 312)):
>
> 'The conclusion is inevitable that the true meaning of the act of 1895 (now section 12775, R. S. Mo. 1919) is, that the real estate shall be assessed against the (bank) corporation, the personal property of the corporation shall not be assessed at all, and the shares of stock shall be assessed in the names of the shareholders. Thus the domestic (bank) corporations and the national banks are put on the same basis, there is no discrimination and the letter and form and substance of the power conferred by the federal

"statute are observed. The bank in question is a domestic bank, but the law is the same as to it that it is as to national banks. After the assessment is thus made against the shares of stock in the names of the shareholders, it is legal to make the bank pay the tax and recover it from the stockholders. Section 9155, R. S. 1899; First National Bank v. Commonwealth, 9 Wall, 353 (19 L. Ed. 701); Aberdeen Bank (First Nat. Bank) v. Chehalis Co., 166 U. S. 440, 17 S. Ct. 629, 41 L. Ed. 1069).' (Parenthoses ours.)"

In State ex rel. v. Buder, 242 S. W. 979, the Supreme Court of Missouri, en Banc, page 980 et seq., said:

"The shares of stock represent the value of all the assets of the corporation. 14 C. J. 385.

* * * * * * * * *

It is apparent that the purpose of the enactment of section 12775, R. S. 1919 (Section 9765) was to provide a scheme for taxing state and national banks to conform to section 5219, R. S. U. S. (U. S. Comp. St. Sec. 9784) * * * * * How is the value of the stock which represents all the corporate assets to be ascertained? The real and personal property constitute its assets; all represented by shares of stock. It is too clear for argument that from the total value of the assets there must be deducted the corporate liabilities because these affect the value of the stock. Unless this deduction is made, the value of the stock will be, to that extent, inflated and fictitious."

And further,

> "This is precisely what the trust company did. It deducted its liabilities from the gross value of its assets. That determined the value of its stock."

The value of the shares are computed according to Section 9765, supra, namely:

> "deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, * * * ; and such shares, reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money, * * *."

Above we have shown that the shares of stock represent the value of all the net assets of the corporation assessable to bank and/or shareholder. Thus, in determining the value of shares of stock certain liabilities should be deducted therefrom, to-wit: deposits; accrued interest and taxes; in fact, all liabilities otherwise assessed.

In State ex rel. v. Buder, supra, the court said:

> "This indebtedness of $1,725,000, being a liability of the trust company, it thus appears that the sole question for

> "consideration is whether in determining the value of the stock this liability should be deducted from the amount of the capital, surplus, and undivided profits of the company, as stated by respondents."

And further,

> "The objection to the deduction of this particular liability is that it is secured by a mortgage on the real estate of the trust company and is not an investment of its funds. It is still a corporate liability which affects the value of the shares of stock."

And further,

> "It is too clear for argument that from the total value of the assets there must be deducted the corporate liabilities because these affect the value of the stock. Unless this deduction is made, the value of the stock will be, to that extent, inflated and fictitious."

And further,

> "It follows that the action of the board of equalization on March 30, 1922, increasing the assessment against the shares of stock of the Liberty Central Trust Company, from $1,730,570 to $3,415,570, for the taxes for the year 1922, was illegal, and the record of the board making said increase is quashed."

Above it is seen that certain liabilities are deductible in arriving at the net assets of the corporation. However, all liabilities are not deductible, for example, "Capital Stock", because of Section 9765, supra, which provides in part:

> "deliver to the assessor the list of all shares of stock held therein, and the face value thereof."

Your letter uses the words "preferred stock and capital notes." We herewith call your attention to the fact that such are separate and distinct.

II.

PREFERRED STOCK

Laws of Missouri, 1933, pages 406-408, provides that a bank, trust company or other financial institution may issue and sell preferred stock (Section 1). Preferred stock is a liability but not a deductible liability (except when owned by a Federal agency -- hereinafter discussed).

Section 4, Laws of Missouri, 1933, page 407, provides:

> "No shares of preferred stock having a par value of less than Twenty Dollars ($20.00) nor more than One Hundred Dollars ($100.00) shall be issued by any corporation to which this act applies; and, no such shares shall be sold under authority of this act for less than one hundred cents on the dollar of the par value thereof net to the issuing corporation; and, no such shares shall be valid until one hundred per cent (100%) of the par value thereof in lawful money of the United States has been paid into the treasury of the issuing corporation."

In our opinion, preferred stock is part of the capital stock and is not a deductible liability and should be assessed at its par value (exception -- when owned by a Government agency) because of its preferences and priorities and the return on same being fixed. Section 5, Laws of Missouri, 1933, pages 407-408.

III.

CAPITAL NOTES

Laws of Missouri, Extra Session, 1933-34, pages 144-147, provides that capital notes may be issued and sold by banks and trust companies (Section 5312).

Section 5312, in part provides as follows:

> "Such capital notes may be sold for cash or, with the written consent and approval of the commissioner of finance, for property and they shall be of a nature specified in, and conform to, the requirements of the several provisions of Sections 5312 to 5315 inclusive."

Section 5313, Paragraph "A", provides:

> "Such capital notes shall be in such denominations and the holders thereof shall be entitled to such annual return thereon not exceeding 6% as the Board of Directors of such bank or trust company may determine. Such capital notes shall provide that they may be retired at such time or times and in such manner as may be fixed by the board of directors of the bank or trust company, but in no event later than twenty years after the date of their authorization; provided, however, that no bank or trust company shall retire such capital notes if by such retirement an impairment of its capital will be created."

Paragraph "C" provides:

> "If an impairment of capital exists in whole or in part by reason of the fact,

> "as determined by the commissioner of finance, that certain assets of such bank or trust company have depreciated in value, in that event said bank or trust company may issue to the holders of said capital notes a right of participation to such extent as may be agreed upon in any increase in the value of such assets."

Having ruled above that preferred stock is a part of the capital stock it now devolves upon us to determine whether or not capital notes are part of the capital stock as far as assessment purposes are concerned. It must be borne in mind that the 1933 Legislature authorized banks and trust companies to issue preferred stock for the purpose of increasing their capital structure. The 1933-34 Legislature in Extra Session, no doubt, were apprised that the issuance of preferred stock did not (or would not) fully bring enough capital into the banks. Consequently, provision was made for the issuance of capital notes. The only purpose that capital notes serve is to furnish new capital to the banks. The issuing of capital notes in reality is the same as selling capital stock without giving the purchaser a voice in the affairs of the bank. Holders of capital notes are nothing more than limited stockholders. A holder of capital notes cannot sue the bank in event of defalcation; and receives no profit unless the bank makes it; there is no liability on the bank if it does not earn the six per cent. provided by Section 5313, supra. In the event of dissolution the status of the holders of capital notes are not that of common creditors. In other words, the issuance of capital notes was a scheme to increase the capital structure of a bank without increasing its capital stock.

In our opinion, holders of capital notes are in the same class as stockholders (as far as assessment purposes are concerned), and the capital notes are not deductible from the assets of the corporation. If capital notes were deducted from the assets, then such would have to be assessed to the individual owners. To hold that such are deductible liabilities would, in our opinion, upset the whole arrangement now provided for the assessment of bank stock in this State. The capital notes are not deductible liabilities for assessment purposes.

IV.

PREFERRED STOCK AND CAPITAL NOTES OWNED BY RECONSTRUCTION FINANCE CORPORATION

The Reconstruction Finance Corporation was organized January 22, 1932, by Act of Congress, Title 15, Section 81 to end, U. S. C. A., page 69, 1934 Cumulative Annual Pocket Part.

Section 602 provides that the capital stock is owned by the United States.

Section 610 of the Reconstruction Finance Corporation Act, page 86, provides in part as follows:

> "The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, or by any Territory, dependency, or possession thereof, or by any State county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. (Jan. 22, 1932, c. 8, Sec. 10, 47 Stat. 9.)"

An instrumentality or agency of the United States being wholly owned by the United States is not subject to taxation without the consent or express legislation by Congress.

In United States v. Coghlan, 261 F. 425, the United States District Court of Maryland (page 426) said:

> "It was shown that all the stock of the Fleet Corporation was owned by the government, and that all it did was done for government account, and that all the

> "profits which it made would inure to the government, which would have to stand all the losses. Under such state of facts, it is unnecessary to inquire whether for all purposes the Fleet Corporation is the government. It suffices that it is a governmental agency, exclusively employed in governmental work, and as such its property is not liable to state taxation."

See also,

Clallam Co. v. United States, 263 U. S. 342, 18 L. Ed. 328.

Above we have shown that the assessment of taxes against bank stock is made against the owners of the shares and in the name of the owners but that the bank pays the tax as agent for the owner of the shares. If the Reconstruction Finance Corporation owns shares of stock (being not taxable) such should be deducted as a deductible liability of the bank. In our opinion preferred stock and capital notes owned by the Reconstruction Finance Corporation should be deducted from the capital structure of the bank for assessment purposes.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG

COUNT SUPERINTENDENT OF SCHOOLS: Candidate is at liberty to announce himse f on any platform he desires; tickets bearing words "Democratic ticket" would not invalidate the election providing no fraud existed and same were acceptable to persons in charge of the election.

March 8, 1935. 3-14

FILED 98

Hon. Mark Wilson,
Prosecuting Attorney,
Henry County,
Clinton, Missouri.

Dear Sir:

This department is in receipt of your letter of February 18 wherein you make the following inquiry:

> "****Is it illegal for a candidate for County Superintendent of Schools to announce as a Democratic candidate?
>
> Is it illegal for a candidate for County Superintendent of Schools to have tickets printed bearing the words 'Democratic Ticket'?"

Section 9454, R.S. Mo. 1929 is the only section relating to the election of a County Superintendent of Schools and provides as follows:

> "There is hereby created the office of county superintendent of public schools in each and every county in the state; the qualified voters of the county shall elect said county superintendent at the annual district school meeting held on the first Tuesday in April, 1923, and every four years thereafter; said county school superintendent shall be at least twenty-four years old, a citizen of the county, shall have taught or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment; or shall have spent the two years next preceding his election or appointment as a regular student in a state teachers'

college or university, and shall at the time of his election hold a diploma from one of the state teachers colleges or state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent; the person elected county school superintendent at the annual school meeting held the first Tuesday in April, 1923, shall immediately upon his election, qualify under this article as county superintendent of public schools, and shall serve as such until the first Monday in July, 1927, or until his successor is elected and qualified. All county school superintendents elected on the first Tuesday in April, 1927, and thereafter, shall hold said office for a term of four years from and after the first Monday in July following their election, or until their successor is elected and qualified, and all vacancies caused by death, resignation, refusal to serve, or removal from the county, shall be filled by the governor by appointment for the unexpired term; the county school superintendent shall turn over all books, papers, certificates, stub books and records, in his possession to his successor. All acts or parts of acts conflicting with this section are hereby repealed."

By the terms of the above section the County Superintendent of Schools is elected at the annual school district meeting held on the first Tuesday in April. The qualifications of the person to be elected or appointed are set forth.

Section 9455, R.S. Mo. 1929 sets forth the duties of the County Clerk and of the school district officers with respect to the election of a County Superintendent of Schools. It contains no provision for the printing of ballots, and in view of the fact that it contains no provision for candidates filing for this office within any specified time prior to the election, or any provision for a candidate expressing his party affiliations, it is the opinion of this department that any candidate is at liberty to announce himself as a candidate on any platform he may desire.

If he desires to stand on the principles of the Democratic Party as enunciated by Thomas Jefferson, we know of no provision of the statutes which would prevent him from doing so.

As to your second question, the same principle and logic would apply. We again call your attention to the fact that Section 9455, R.S. Mo. 1929 contains no provision for the printing of ballots. We are cognizant of the fact that in many of the dictricts, especially the cities, there are printed ballots. We consider this right to be optional with the district; therefore, as to whether or not a candidate may have tickets printed bearing the words "Democratic Ticket", it would be optional and discretionary with the persons in charge of the election. If the officials desire to adopt the tickets as presented by the candidate and no fraud resulted therefrom, we do not believe this would invalidate the election.

Section 9455 contains this provision "the voting for county superintendent shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is counted for the person receiving the same." Again, we repeat that it is the opinion of this department that it is optional and discretionary with the officers in charge of the election as to whether or not a candidate may have tickets printed bearing the words "Democratic Party".

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AH

PROBATE COURT: Probate Judge is within his rights in purchasing filing cabinets, etc. provided same can be classified as "other necessaries" but the expenditure must receive approval of county court as set forth in County Budget Act.

5-10

April 17, 1935.

FILED 98

Hon. S.F. Wier,
Judge of Probate Court,
Atchison County,
Rock Port, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of March 30 requesting an opinion regarding certain supplies for your office, the full contents of your letter being as follows:

> "Under the law as it formerly existed the county officers, including the probate judge, were permitted to order their own office supplies and equipment and submit the bill therefor to the county court for payment.
>
> Since the enactment of the county budget law as found on page 340, et seq., there is a question whether or not a probate judge, or any other officer, can now, of his own volition, order his supplies and equipment and submit the bill therefor to the county court for payment.
>
> This office, within the time required by law, submitted its estimate to the county court under said budget law for certain office equipment. The county court of Atchison County, upon consideration of the matter, struck such estimate and demand for office equipment from the list of demands made by the probate court of said county.
>
> Please advise me (1) whether, as probate judge of Atchison County, I can order my own filing cabinets and equipment (which are now, and have for a long time past been necessary) for the office of probate judge and submit the bill to the county court of Atchison County for payment; or whether

> I am compelled by the said county budget law to request said supplies, by estimate, under the provisions of said act. (2) Did the county court of Atchison County, Missouri, have the power to strike from the estimates submitted by the probate court of this county its requisition for filing cabinets and fixtures, and totally disregard the same?
>
> At the present time, and for a long time past, the probate court of this county has had to file its valuable records and books in wooden shelves in the vault provided for that purpose. It is imperative that the wooden shelves be supplanted by steel fixtures for the purpose of filing such records. Also, the vault is considered fire proof, however, a fire would, in my opinion, be disastrous to the records of this court on account of said wooden fixtures. Furthermore, the filing space is so inadequate that more than one hundred cases are piled upon the floor in said vault."

Your first inquiry deals with the question of purchasing filing cabinets and equipment for your office as Probate Judge of Atchison County, and your second question deals with the right of the county court to strike these items from your estimate. The conclusion of this opinion will be a manifest conflict in the answers to the two questions; we shall therefore treat them under separate headings.

I

The authority of the Probate Court to purchase such furniture as you mention in your letter is found in Section 2056, R.S. Mo. 1929, which provides:

> "Every probate court shall have a seal of office, of some suitable device, the expense of which, and the necessary expense incurred by said court for books, stationery, furniture, fuel and other necessaries, shall be paid by the county."

The leading decision as to the rights of a probate judge in purchasing furniture under this section is that of Gammon v. Lafayette County, 79 Mo. l.c. 226, wherein the Court said:

> "With respect to the other and only remaining question, section 1184 provides (and the law was the same when the furniture was purchased) that 'every probate court shall have a seal * * * the expense of which and the necessary expenses incurred by said court for books, stationery, furniture, etc. shall be paid by the county.' These necessary articles are to be procured by the probate judge, and he is not required first to get an order of the county court for their purchase. Whether the furniture in question was necessary for the office, was properly submitted to the jury, who found that it was. The County court refused to allow the account to the furniture dealers, and plaintiff paid it; and while it may be conceded that the Winklers could not have maintained a suit against plaintiff for the price of the furniture furnished for the county, yet the statute requires the county to pay for it, and it can make no difference that in the first instance it is paid for by the probate judge. If, for instance, he should need for his office, in vacation of court, a load of fuel and could not procure it, but by payment for it on delivery, must he freeze in the office or close its doors, or furnish the fuel at his own expense? We are not inclined to give the statute so narrow a construction."

Another pointed decision is that of Sayler v. Nodaway County, 159 Mo., l.c. 524-525, wherein the Court said:

> "By the same rule of interpretation the judgment of the circuit court herein must be reversed, for in this case it was agreed at the trial, that the stamps, for which the probate judge presented his bill to the county court for allowance, were used in the discharge of the official business of his office and that they were necessarily required in the performance of his official duty. While everything that an official may use to facilitate him in the accomplishment of the work he is directed by law to perform, may not be said to fall within the meaning of the term 'all other necessaries', as used in section 1726, supra, certainly everything that he is directed to use, or that must necessarily be used in the performance of a designated act or acts required to be performed by him, should be held to be included within the meaning of that term, unless something previously or subsequently used in the section or act so providing, should clearly indicate a contrary intention.
>
> To suggest that an officer is oftentimes called upon, and may be compelled, to perform certain services for which no compensation has been provided, and for which he can collect nothing is no answer to the proposition that an officer should not be compelled to directly contribute his own means for the public welfare without recompense."

All of the early authorities dealing with the question of an officer's right to purchase supplies for his office are contained in the decision of Ewing v. Vernon County, 216 Mo., 681. Reviewing the decision, the Court concludes in the following language:

"Finally, we shall assume that among civilized people approved advances and results in scientific research make janitor services in public offices (i.e., the prevention of the propagation and spread of disease from filth), a necessity, and that the Legislature knew and gave effect to that fact. Buildings, under Revised Statutes 1899, section 6710, for clerks' and recorders' offices, being for the preservation of the records of the county, how could this main idea have effect if those records are not to be kept and preserved free from deterioration from filth? Is the general public not interested in and benefited by clean windows, clean floors, clean furniture, clean spittoons, heat in winter and wholesome, healthy air at all times in public offices? It is useless to argue that question. It answers itself. And if the county court, as the agent of the general public in county affairs, without legal right or excuse, refuses to do that duty in the recorder's office, what is the recorder to do? His only sensible course is to do what this recorder did, viz., avoid an unseemly wrangle, pay it out of his own pocket and trust to the courts and the law to reimburse him. The judgment on the first count is affirmed."

Conclusion

In view of these decisions, we would unhesitatingly hold that you would be within your rights in purchasing certain filing cabinets and equipment, provided same could be classified as "other necessaries" as contemplated by the statute; however, there appears to be a conflict between the decisions quoted, the statute and the new County Budget Act passed by the Legislature in 1933.

A discussion of the County Budget Act in its applicability to the supplies in question will next be considered in answer to your question as to whether or not the county court has the power to strike the same from your estimate.

II

It was the purpose of the Legislature in passing the County Budget Act to promote efficiency and economy in county government. There are certain provisions of the Act which we shall consider as pertinent to your second question. Section 1, Laws of Missouri 1933, page 341 contains the sentence: "The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1 and ending December 31." The last sentence in said section is, "The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

Class 4 of the County Budget Act, Laws of Mo. 1933, p. 341 relates to the salaries of county officials and lists the supplies which can be placed in said class, definitely excluding equipment of the nature mentioned in your letter; however, the last sentence of said class says:

> "Furniture, office machines and equipment of whatever kind shall be listed under class six."

Class 6, being the last of the classes, is not definite as to the use of the funds which may be expended therefrom, being more or less of a hodgepodge class. Said section states:

> "After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose."

Section 3 of the County Budget Act, Laws of Mo. 1933, page 342, sets forth the manner in which the various officers shall make their requests for salary and office supplies, and contains the following:

> "* * * also, he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class 4 and class 6. * * *"

After the officers have made their requests in the form set forth in Section 7 of the County Budget Act, page 345, Section 8, same page, provides that the County Court may amend and revise the estimates so made. It provides:

> "* * * The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard, but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein. * * * "

There appears to be no appeal or alternative for the officer if his estimate is not allowed in toto. The allowing of same appears to be purely a discretionary or almost arbitrary power of the County Court.

Conclusion

Section 22 of the County Budget Act, Laws of Mo. 1933, page 351 states: "All laws or parts of laws and expressly sections 9874, 9985 and 9986 in so far as they conflict are hereby repealed." In the first part of this opinion we concluded that you were entitled to purchase supplies as outlined in your letter and could compel the County Court to pay for same, taking for granted that such supplies were necessary and essential to the proper carrying out of your duties as Probate Judge, but by the terms of the Budget Act, the payment for the "necessaries" and supplies is under the power and discretion of the county court; hence, it would be necessary for such supplies to receive the approval of the county court in the manner as set forth in the County Budget Act.

If the County Court could not control the expenditures and retain them within the anticipated revenue, it would be of no force or effect and the whole purpose of the Act would be defeated and it is for this reason that we conclude that the purchase of the supplies in question should receive the approval of the County Court.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

OWN:AW

SCHOOLS: School director may take his oath of office before a notary public. Failure of a director to meet with the other directors within four days after annual meeting for purpose of organization does not create a vacancy on said board.

5-2

April 24, 1935.

FILED 98

Mr. R. B. Wilson
County Superintendent of Schools
Jefferson County
Hillsboro, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "If a man is duly elected a school director, but refuses to meet with the other two members of the board to organize within the four days as prescribed by law, but instead takes his oath of office as director before a Notary Public, is he a qualified director or does a vacancy exist on that particular board.
>
> "Would appreciate your advice in this matter."

Section 9287, R. S. Mo. 1929, provides that the government and control of the district shall be vested in a board of directors composed of three members and specifies their qualifications.

Section 9288, R. S. Mo. 1929, provides that the directors shall within four days after their election take and subscribe an oath or affirmation to faithfully and impartially discharge the duties of their office. Said section reads as follows:

> "The directors shall, within four days after their election or appointment, take and subscribe an oath or affirmation to faithfully and impartially discharge the

> duties of their office, which oath may be administered by each other; and the district clerk shall enter the same, with the date thereof, upon the records of the district, and the oath administered shall be as follows:
>
> "' I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the state of Missouri, and that I will faithfully and impartially discharge the duties of school director in and for district No. _____, county of ____, state of Missouri, to the best of my ability, according to law, so help me God.
>
> _____
>
> " Sworn to and subscribed before me this _____ day of _____, 19____.
>
> _____.'"

The above section provides that the directors may administer to each other the oath required to be taken but said section does not require that the oath shall be so administered. In this connection we call your attention to Section 1721, R. S. Mo. 1929, which provides:

> "Whenever any oath or affirmation is required by law to be taken before a particular court or officer, the same may be done before any other court or officer empowered to administer oaths, unless it is expressly prohibited; and when no court or officer is named by whom an oath may be administered or affidavit taken, the same may be done by any court or officer authorized to administer oaths."

A Notary Public has the power and authority, under the provisions of Section 11739, R. S. Mo. 1929, to administer oaths. It is therefore the opinion of this office that, if a school director takes and subscribes an oath before a notary public within four days after his election, he has complied with the terms of the statute.

II.

Section 9289, R. S. Mo. 1929, provides that the directors shall meet within four days after the annual meeting and organize. Said section reads as follows:

> "The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. A majority of the board shall constitute a quorum for the transaction of business: Provided, each member shall have due notice of the time, place and purpose of such meeting; and, in case of the absence of the clerk, one of the directors may act temporarily in his place. The clerk shall keep a correct record of the proceedings of all the meetings of the board. No member of the board shall receive any compensation for perform - ing the duties of a director."

The above section, while requiring the directors to meet and organize within four days after the annual meeting, does not provide any result that will follow if they or one of their members fail to so meet. Said section does not provide that the failure of a member of the board to meet with the other directors shall work a forfeiture of his office. The statute does provide that a majority of the board shall constitute a quorum for the transaction of business. This clearly indicates that the statute contemplates that a member of said board might be absent from said meeting.

In State v. Consolidated School Dist. No. 1, 238 S. W. loc. cit. 820, 821, the Court said:

> "The laws affecting the organization, functions, and powers of the respondent district are not to be strictly construed. State ex inf. Carnahan v. Jones, 266 Mo. 191,181 S. W. 50. *****

In the case of State v. Bird, 244 S. W. 938, loc. cit.

939, the Court said:

> "(3) Under a more general rule, this construction may be sustained, in that, if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by the law. State v. Cooke, 14 Barb. (N. Y.) 259. By this we mean that if a fair consideration of the statute shows that, unless the Legislature intended compliance with the proviso to be essential to the validity of the proceeding, which nowhere appears, then it is to be regarded as merely directory. People v. Thompson, 67 Cal. 637, 9 Pac. 833; Kenfield v. Irwin, 52 Cal. 164; Westbrookv. Rosborough, 14 Cal. 180; Jones v. State, 1 Kan. 273."

And further at loc. cit. 940, the Court stated:

> "This court has held, however, in construing the intent and purpose of school laws, that they were designed as a workable method to be employed by plain, honest, and worthy citizens, not especially learned in the law; and that no strict and technical construction should be given to them. State ex rel. Carnahan v. Jones, supra; State ex inf. Simrall v. Clardy, 267 Mo. 371, 185 S. W. 184."

In view of the above, it is the opinion of this department that the statute, requiring the directors to meet within four days after the annual meeting and organize, is directory and not mandatory; and since the statutes do not provide that a member who fails to so meet with the other directors for the purpose of organization shall forfeit his office; it is our opinion that such failure to so meet would not work a forfeiture of his office or create a vacancy on the board of directors.

However, we call your attention to Section 9290, R. S. Mo. 1929, which reads as follows:

> "If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy; but should they be unable to agree, or should there be more than one vacancy at any one time, the county superintendent of public schools shall, upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment, and notify said person or persons in writing of such appointment; and the person or persons appointed under the provisions of this section shall comply with the requirements of section 9288, and shall serve until the next annual school meeting."

It is plain from a reading of the above section that if a director refuses to serve or repeatedly neglects the duties of his office, a vacancy would exist which should be filled in the manner provided in Section 9290, supra.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/afj

STATE TAX COMMISSION: Four questions in regard to whether or not State Tax Commission is compelled to grant hearings on complaints.

57

May 3, 1935.

FILED
98

State Tax Commission of Missouri
Jefferson City
Missouri

Gentlemen:

This is to acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "Section 9855, R. S. Statute, 1929, provides among other things that - 'After the various assessment rolls required to be made by law shall have been passed upon by the several boards of equalization and prior to the making and delivery of the tax rolls to the proper officers for collection of the taxes, the several assessment rolls shall be subject to inspection by the commission, or by any member or duly authorized agent or representative thereof, and in case it shall appear to the commission after such investigation, or be made to appear to said commission by written complaint of any taxpayer that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the said commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered.'
>
> "And further on in this same Section the statute says - 'In case said commission or any member or agent thereof

who is acting in said review, shall determine that the assessments so reviewed are not made according to law, he or they shall, in the column provided for that purpose, place opposite said property the lawful valuation of the same for assessment.'

"Under this Section a great many complaints have been filed in the past year or two with the State Tax Commission for reassessment of individuals property. These complaints some times are filed by the owners of property who fail to agree, and in other cases by individual taxpayers of the community.

"There are several legal questions in connection with this procedure on which we would like the advice of your department.

"First - Is the Commission compelled to grant a hearing for reassessment by any citizen who sees proper to file such a complaint?

"Second - Is the Commission required to grant a hearing on reassessment of property if the County Court, the Assessor or any member of the County Board of Equalization files a complaint asking a re-hearing after the Board has passed on the assessment of such property?

"Third - If a complaint is filed and a request for hearing made of the Tax Commission, can the commission require the complainant to give bond and pay the cost of such proceeding, or any part thereof.

"Fourth -Does the person filing complaint have to be a taxpayer in the district in which the complained of property is located, and will such complainant have to make a proof of damage from the assessment complained of?

> "We are asking these questions because in the past the Commission has been put to considerable expense in conducting hearings under this section that were unjustified and resulted in no change in the assessment.
>
> "The commission would like an answer and a ruling on these questions as soon as convenient."

Your request for an opinion contains four separate and distinct questions. As they are closely related to each other, we will first point out the statutes and authorities applicable thereto and then answer said questions in the order in which you ask them.

61 Corpus Juris, Section 1015, page 791, states:-

> "Except for reviewing boards of officers deriving their existence and power from the constitution, the authority of officers or boards for the review or correction of assessments is entirely statutory and must be strictly confined to the limits marked out by the statute and exercised in conformity therewith; and, subject to constitutional limitations, it rests entirely with the legislature to bestow as much or as little power as it sees fit upon a particular board or officer. Thus the character of the corrections or changes which the board is authorized to make depends on, and is to be determined by, the provisions of the prevailing applicable statutes. Likewise, the manner in which the board of review is empowered to exercise the substantive authority conferred upon it is controlled by statutory provisions relating to the manner in which such authority is exercisable. *****"

The State Tax Commission is purely a creature of the statutes and has no powers except those specifically given it by statute. It is likewise true that a taxpayer or other person has no right to appeal to said commission unless that right is expressly granted by statute. The only rights given taxpayers or other persons to file a complaint with the State Tax Commission is conferred by Sections 9854 and 9855, R. S. Mo. 1929. Subdivision 3 of Section 9854 reads:

"(3) To receive all complaints as to property liable to taxation that has not been assessed, or that has been fraudulently or improperly assessed, to investigate the same and to institute such proceedings as will correct the irregularity complained of, if any irregularity be found to exist."

The above section does not give the commission authority, to grant a hearing for reassessment of property on the complaint of third persons. It simply requires the commission to receive all complaints as to property liable to taxation that has not been assessed or that has been fraudulently or improperly assessed, to investigate same and to institute proceedings to correct the irregularities if they find,from their investigation, that any irregularity exists.

Section 9855, R. S. Mo. 1929, provides that after the various assessment rolls, required to be made by law, have been passed upon by the several boards of equalization and prior to the making and delivery of tax rolls to the proper officers for the collection of taxes, the several assessment rolls shall be subject to inspection by the commission or any member or authorized agent or representative thereof; and, if it shall appear to the commission after such investigation, or if it be made to appear to such commission by written complaint of any taxpayer that property subject to taxation has been omitted from said rolls or individual assessments have not been made in compliance with law, the commission may issue an order directing the assessing officer whose assessments are to be reviewed to appear with his assessment rolls and a sworn statement of the person or persons whose assessments are to be considered.

The section above deals only with property subject to taxation that has been omitted from the assessment rolls and to individual assessments that have not been made in compliance with law, that is, those assessments that are void because illegally made. This section does not authorize the commission to grant a hearing on a complaint of third parties for re-assessment of property.

As stated above, the section applies only to omitted property and to illegal assessments and even then it is discretionary with the commission as to whether they will issue an order for a review, as the term "may issue an order" clearly implies discretion on the part of the commission.

In the case of In Re Durant National Bank, 230 Pac. (Okla.) loc. cit. 714, the Court said:

> "**** The tax ferret nor county treasurer have any jurisdiction to reassess property that has been assessed, although grossly undervalued. This court in considering section 9798, supra, relating to tax ferrets, in the case of Wolverton Hardware Co. v. Porter, 61 Okla. 171, 160 P. 906, stated:
>
> "'From an examination of this statute it is clearly apparent that the purpose contemplated is to assess property that has been omitted from assessment and that has escaped taxation, and that it does not confer the power or authority to revalue or reassess for the purpose of taxation any property that may have been overvalued or previously assessed. The object of the statute is to discover omitted property, and this is the entire scope **** contemplated by the act.'"

In view of the above, it is our opinion that the tax commission is not required to and does not have the authority to grant a hearing to reassess property that has already been legally assessed.

The Kentucky statutes provide that any taxpayer feeling himself aggrieved by the action of the Board of Supervisors may appeal. In the case of Cossar v. Klein, 14 S. W. (2d) loc. cit. 161, the Court stated:

> "(1) The first question to be determined is the right of Klein to maintain an action on behalf of the other stockholders. Section 4128, Kentucky Statutes, provides that any taxpayer feeling himself aggrieved by the action of said board of supervisors may appeal to the quarterly court within thirty days after the final adjournment of the said board, by filing with the judge of said court a certified copy under the hand

> of the clerk of said board of the action taken. It further provides that 'he shall have the right to appeal from the decision of the quarterly court to the Circuit Court and then to the Court of Appeals in the same manner that the law now allows appeals in civil cases.' The procedure is purely statutory, affording a remedy for an aggrieved taxpayer, if he thinks his property is not liable to assessment, or that an excessive valuation has been placed upon it. There is nothing in the statute which authorizes one taxpayer to act for another or others, and in the absence of such provision in the statute itself, no such right exists. The statute confines the remedy to the aggrieved taxpayer, and he may not assume to act for others. *****"

61 Corpus Juris, Section 1007, page 783, states the law as follows:

> "It is only those who are prejudicially affected by errors committed in the assessment of property who have a right to a review thereof, and, in the absence of any showing of prejudice resulting from the assessment, a person has no such right and hence cannot complain of a failure to create any proper board for the purpose of reviewing assessments or of the failure of a reviewing board to consider his claim or claims of similar character or to notify him of its meeting."

An individual taxpayer, who complains to the tax commission that his property has been fraudulently or illegally assessed, is entitled to have the commission grant him a hearing and it is their duty to pass upon the complaint.

In Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 19 S. W. (2d) loc. cit. pages 751 and 752, the Court said:

> "(8) Appellant's grievance is, not that its property was overvalued, but that it was discriminated against through the undervaluation and omission in part, of other property subject to taxation. Had it, at any time before the tax books were delivered to the collector, filed

> complaint with the state tax commission, that body, in the proper exercise of its jurisdiction, would have granted a hearing, and would have heard evidence with respect to the valuations complained of, and, if the charges contained in the complaint had been found to be true, the valuations placed on its property would have been lowered, or that on other property raised, the property omitted from the assessment roll would have been placed thereon, and the discrimination complained of thereby removed. The remedy provided by statute is adequate, certain, and complete.
>
> *
>
> "Had appellant made timely complaint to state tax commission, the commission and the state board of equalization, to which it renders an auxiliary service, would, it must be presumed, have at once corrected the alleged discrimination in the assessments, and the state, county, and the road and school districts would have received punctually, and without abatement, the revenue accruing to each of them respectively under the law. It was clearly guilty of laches in not so doing.
>
> "We do not recede from any of the positions taken in the Schlotzhauer Case; we merely supplement its holdings by the further holding that a taxpayer, who is aggrieved by a fraudulent assessment of his property, is not entitled to relief in a court of equity until he has first exhausted the remedies afforded by the statute."

The above case deals solely with a fraudulent assessment and not merely with an assessment which the property owner may, in his opinion, think excessive.

You inquire whether or not the complainant can be required to give bond and pay the cost of a hearing or any part thereof. The only authority for requiring a complainant to pay any costs of a hearing is subdivision 4 of Section 9853, R. S. Mo. 1929, which subsection reads as follows:-

"(4) Whenever a subpoena is issued at the instance of a complainant, respondent, or other party to any proceeding before the commission, the cost of service thereof and the fee of the witness shall be borne by the party at whose instance the witness is summoned. Any witness subpoenaed except one whose fees and mileage may be paid from the funds of the commission, may, at the time of service, demand the fee to which he is entitled for travel to and from the place at which he is required to appear, and one day's attendance. If such witness demands such fees at the time of service, and they are not at that time paid or tendered, he shall not be required to attend before the commission or commissioner, as directed in the subpoena. No witness furnished with free transportation shall receive mileage for the distance he may have traveled on such free transportation."

This section does not give the commission authority to require the complainant to give bond for the costs of a hearing but does provide that whenever a subpoena is issued at the instance of a complainant, the cost of service thereof and the fee of witness shall be borne by said party. It further provides that the witness may, at the time of service of subpoena, demand the fee to which he is entitled for travel to and from the place at which he is required to appear and one day's attendant. If the witness so demands his fees, it would be up to the complainant to furnish them, if he desired said witness to attend the hearing.

We will not answer your questions.

I.

IS THE COMMISSION COMPELLED TO GRANT A HEARING FOR REASSESSMENT BY ANY CITIZEN WHO SEES PROPER TO FILE SUCH A COMPLAINT?

The provisions of the statutes do not authorize the Commission to grant a hearing for reassessment of property on the complaint of any citizen who sees proper to file one. The only instance in which the tax commission is compelled to grant a hearing is when a taxpayer files a complaint that his property has been illegally or fraudulently assessed. It has no power to grant a hearing on complaint of a third party unless such complaint charges that property subject to taxation has been

omitted from the assessment rolls or individual assessments have not been made in compliance with law.

II.

IS THE COMMISSION REQUIRED TO GRANT A HEARING ON REASSESSMENT OF PROPERTY IF THE COUNTY COURT, THE ASSESSOR OR ANY MEMBER OF THE COUNTY BOARD OF EQUALIZATION FILES A COMPLAINT ASKING A RE-HEARING AFTER THE BOARD HAS PASSED ON THE ASSESSMENT OF SUCH PROPERTY?

The statute does not require or authorize the commission to grant a hearing for reassessment of property on the complaint of the county court, assessor, or member of the county board of equalization.

III.

IF A COMPLAINT IS FILED AND A REQUEST FOR HEARING MADE OF THE TAX COMMISSION, CAN THE COMMISSION REQUIRE THE COMPLAINANT TO GIVE BOND AND PAY THE COST OF SUCH PROCEEDING, OR ANY PART THEREOF?

The Tax Commission has no authority to require a complainant to give bond to secure the cost of a hearing, If subpoena is issued at the instance of the complainant, the cost of service thereof and fees of witness shall be borne by said complainant and the witness may, at the time of service of the subpoena, demand the fee to which he is entitled for travel to and from the place at which he is required to appear and for one day's attendant. If said fees are not paid or tendered at that time, he is not required to attend said hearing. Since said fees are to be paid by the complainant,

it would be his duty to pay or tender payment of said fees at the time of service of subpoena if the witness demands them.

IV.

DOES THE PERSON FILING COMPLAINT HAVE TO BE A TAXPAYER IN THE DISTRICT IN WHICH THE COMPLAINED OF PROPERTY IS LOCATED? AND WILL SUCH COMPLAINANT HAVE TO MAKE A PROOF OF DAMAGE FROM THE ASSESSMENT COMPLAINED OF?

Under the terms of the statute, any taxpayer may file a complaint with the commission. The statutes do not require the taxpayer to be a resident of the district in which the complained of property is located or that he make any proof of damage from the assessment complained of. As held above, it would be discretionary with the commission whether or not to grant a hearing on such a complaint.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/afj

VILLAGES: Can impose occupation tax on dealers for privilege of selling gasoline

5-22

May 8, 1935

FILED 98

Honorable Mark W. Wilson
Prosecuting Attorney
Clinton, Missouri

Dear Sir:

We wish to acknowledge receipt of your letter in which you inquire as follows:

> "I would like to have an opinion from you on the following questions;
>
> 'Can a village, incorporated as such, levy a gasoline tax, for instance one cent per gallon on gas sold at stations in said village.' And how high can such a tax be made."

Section 7097 Revised Statutes Missouri 1929, relating to villages, provides, in part, as follows:

> "Such board of trustees shall have power to pass by-laws and ordinances * * * * * * to license, tax and regulate merchants * * * *."

In Viquesney v. Kansas City, et al. 266 S. W. 700, the issue before the court was the power of the city of Kansas City to exact a tax of one cent on merchants and dealers in gasoline. Although it was a special city

charter there under consideration, still it authorized the licensing of "merchants" just as the statute in the instant case does. The court stated, l. c. 703:

> "* * * * Evidently it was the understanding of the framers of the charter that 'merchant' should cover all dealers that might be included in the term, because the specific dealers mentioned in that section do not include retail merchants of many kinds. Appellant is hardly in position in the case to say the term 'merchant' does not cover the case, because he points out that the appellant was otherwise taxed, without objection from him, as a merchant. He paid an ad valorem merchant's general tax on his property, as shown by evidence introduced by the plaintiff. See, also, St. Louis v. Baskowitz, 273 Mo. loc. cit. 565, 201 S. W. 870.
>
> Thus it appears that the city authorities, as well as the plaintiff, interpreted the charter to include callings like that pursued by the appellant, as that of a merchant. * * * * * * * * *"

From the foregoing, we are of the opinion that it would be within the delegated powers of a village incorporated as such to levy an occupation tax upon gasoline sold at stations in said village.

In the Viquesney case, supra, the City of Kansas City was requiring every person engaged in the business of selling, and offering for sale, gasoline, to take out a license and requiring that for the privilege of doing such business the licensee should pay the license collector the sum of one cent on each gallon of gasoline sold, transferred or stored by such person. In discussing the nature of the tax, the court says, on page 702, as follows:

> "The first question for determination is whether the tax of 1¢ a gallon on gasoline sold by the dealer is a property tax, or an excise tax or an occupation tax. Where a tax is imposed and is measured by the amount of business done or the extent to which the privilege is conferred or exercised by the taxpayer irrespective of the value of his assets, it is an excise tax. (Citations omitted.)
>
> Where a tax is measured by the gross receipts of the business, the amount of premiums received by an insurance company, the number of carriages kept by a livery stable, the number of passengers transported by a street railway company, and other taxes of that nature, it is an occupation tax - - one form of excise tax. It has been applied to the volume of gasoline sold, such as the tax we have under consideration here. In re Opinion of the Justices, (Me.) 181 A. 902; State v. Hart, 125 Wash. 520, 217 P. 45; Altitude Oil Co. v. People, 70 Colo. 452, 202 P. 180. In case of Bowman et al. v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139, it was held by the Federal Supreme Court that such a tax was consistent with the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution."

Under the foregoing decision, it is settled in this state that the tax similar to the one in Kansas City is an occupation tax levied upon the dealer for the privilege of doing business. It is not a property tax in any sense of the word, and is not a direct tax against the purchaser. The purchaser under no circumstances can be made to pay the tax.

The question now raised is "how high can such a tax be made?" While it is true that our statutes do not

place any limitation upon the tax that may be exacted, yet it is a well settled rule that municipal authorities can not fix a tax so high as to be virtually confiscatory or prohibitive of a legitimate occupation.

The court in the recent case of City of Washington v. Reed, (Mo.) 70 S. W. (2d) 121, l.c. 123, recognized the above rule and said:

> "While it is the recognized rule that the discretion of the municipal lawmaking body will not be interfered with by the courts unless it is clearly apparent that there has been an abuse of discretion and that the tax fixed by the municipal lawmaking body is arbitrary, unreasonable, oppressive, or prohibitive, it is also the general rule that, if the license tax is fixed so high as to be virtually confiscatory or prohibitive of legitimate occupation or privilege, an ordinance imposing it may be held invalid.
>
> Particularly is this rule recognized as to all businesses and occupations and privileges which are not in their general effect injurious or offensive to the public welfare and are not hurtful to public morals. As to such businesses or occupations, the general trend of authorities is that municipal authorities have not the power or right to fix the license tax at such high figure as to prohibit the pursuit of such businesses or occupations, and, when it appears to the reasonable mind that the license tax has been fixed at such a figure as to result in practical prohibition of such business, the power and authority of the courts to hold such license fee invalid is unquestioned."

The business of dealing in gasoline is a lawful pursuit or occupation and an attempt by a village to fix the tax at such a figure as to result in practical prohibition of such business would be declared invalid by the courts.

From the foregoing, we are of the opinion that it is within the delegated power of the village incorporated to levy an occupation tax of one cent per gallon upon gasoline sold at stations in said village.

Respectfully submitted,

Wm. ORR SAWYERS
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:
MW:LC

COUNTY BUDGET ACT: County Court cannot transfer funds at the close of the fiscal year to any of the classes for use for the current year if valid and outstanding obligations in the nature of warrants exist.

5-15

May 9, 1935

FILED
98

Honorable Joseph V. Willhite
Prosecuting Attorney
Grant City, Missouri

Dear Sir:

This Department is in receipt of your letter of April 11, wherein you make the following request:

> "At the request of the County Court and of the County Treasurer I am writing you for an opinion on two propositions.
>
> 1st. The County Court has ordered the County Treasurer to transfer all surplus funds remaining, after the payment of all warrants issued for current expenditures for 1934, in the general Revenue Fund for 1934, the Bridge Fund for 1934, and the Contingent Fund for 1934, or Classes 1, 2, 3, 4, 5 and 6 under the Budget law, into Class 2 for 1935, while as a matter of fact there are numerous outstanding, unpaid warrants for the prior years of 1930, 1931, 1932 and 1933 drawn upon said funds for those years.
>
> Under those conditions, has the court a legal right to transfer said surplus from 1934 to the funds of 1935, instead of applying said surplus to the payment of the oldest outstanding warrants?

2nd. If the Court has no legal right to order such a transfer, is the treasurer protected in making said transfer by the illegal order of the Court?

I am enclosing herewith a copy of the Court Order."

I.

COUNTY COURT CANNOT TRANSFER A SURPLUS REMAINING AT THE END OF THE FISCAL YEAR TO ANY ONE OF THE FIVE CLASSES, TO BE USED IN THE CURRENT YEAR BY THAT CLASS WHEN THERE ARE VALID OUTSTANDING WARRANTS AGAINST THE COUNTY.

We are grateful to you for inclosing the prepared brief of Honorable Ellis Beavers, in support of the contention that the funds mentioned in your letter can legally be placed in Class 2. Evidently the motivating cause which inaugurated the County Budget Act by the Legislature, was to promote economy and efficiency in county government. The Legislature evidently had in mind a situation as presented in the Statement of Facts attached to your letter. The business oftentimes in various counties has been very loosely conducted. The first step of the Legislature in the correcting of the abuses was the passage of Section 9874, in conformity with Sections 11 and 12 of Article XII of the Constitution, it being the intention of said amendment to abolish credit system and establish the cash system in public business.

A decision discussing the financial history of the counties, which will have a bearing on the final conclusion in this opinion, is that of Kansas City, Fort Smith Railway Co. v. Thornton 152 Mo. l. c. 574:

"It was plainly pointed out that the purpose of the constitutional provision quoted was to put counties and cities upon a cash basis, and to abolish the credit system upon which they had proceeded before the adoption of the Constitution of 1875, by prohibiting a county or city from becoming 'indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose,' etc. It was also expressly held in Payne's case that this was declared to be the purpose of section 12, article X of the Constitution, in Book v. Earl, and that it was held in that case, that: 'Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.' It was also pointed out in Payne's case that it was decided in Schell's case, that: 'County warrants for past indebtedness, though valid, can not be paid from the revenue provided for current expenses, until all warrants, drawn for expenses of the year for which the taxes were levied, have been paid.' It is also a fact that the prior cases and the statutory provisions relied on by the plaintiff, were fully considered in Schell's case. The result reached in the Payne case was not hastily or ill advisedly arrived at, but was the logical effect of a gradually developed understanding and appreciation of the true meaning of the provision of the Constitution quoted. As claimed by counsel section 3205 has been on our statute books since 1835, but prior to the adoption of the Constitution of 1875 there was no organic law which stood in the way of its

enforcement. The result was, overwhelming debts were contracted, which necessarily went unpaid or excessive taxation had to be levied to pay them; the effect of which impaired the credit of the counties and cities, engendered recklessness and extravagance in the management of the public business and constantly oppressed the tax-payers. These were the evils that sections 11 and 12 of article X of the Constitution were intended to remedy, first, by limiting the rate of taxation and, second, by limiting the yearly expenses to the revenue provided for each year. The wisdom of these safeguards has been fully demonstrated by the experience and improved financial status of the counties and cities since those provisions were adopted. It is the duty of the courts to enforce the organic law and to brush aside any statute which conflicts with it whether it was passed before or after the Constitution was adopted. Under these provisions of the Constitution warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued, and the warrants so issued each year must be paid out of the revenues provided and collected for that year. If the revenue collected for any year for any reason does not equal the revenue provided for that year and hence is not sufficient to meet the warrants issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the warrants drawn and debts contracted for such other year have been paid, or in other words, only the surplus of revenue collected for any one year can be applied to the deficit of any other year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year. The intended effect of all which is to abolish the credit system and to establish

> a cash system in public business. If this rule results in any county not having money enough to pay as it goes or to run its governmental affairs, the remedy is not with the courts. Having reached this understanding of the meaning of the Constitution it follows, without the necessity of any analytical examination or comparison of statutes or prior decisions, that all statutes or decisions providing or holding a contrary rule must give way."

Section 9874, referred to above, is expressly repealed by the County Budget Act, and the five classes originally contained in said section are brought forward in the new Budget Act, with minor changes in the substance of the section, but places the mandatory duty upon the county court to sacredly preserve the priorities of the classes over each succeeding class. The learned attorney insists that under Section 12167 relating to transfer of county funds, and Section 12168 being the construction of Section 12167, that the county court has the legal right to transfer any balance to any of the classes to be used by that class for the current year. We would have no difficulty in agreeing with the learned attorney in the applicability of said section to the point in the question if it were not for the fact that there are outstanding warrants against your county. The decision in the case of Decker v. Diemer 229 Mo. l. c. 336, unquestionably bears him out in his contention, but the case of Holloway v. Howell County 240 Mo. l. c. 612,613, also bears out his contention if it were not for the fact the court in its decision said:

> "But if there was, then under certain statutory conditions, the county court had the right to transfer it to other proper funds and use it for county purposes for ensuing years or existing deficits, if any, after all contracts entered into with reference to the current year creating present indebtedness have been complied with and all outstanding current county obligations had been satisfied."

Therefore, we can agree with the learned attorney to the extent that if there is a surplus at the close of the fiscal year the same may be transferred under the sections herein referred to, but we cannot agree with him that the transfer of the funds can be made if there are valid outstanding warrants which have been issued out of said funds. We shall next discuss our reasons for our views to the contrary.

Class 6, page 342, Laws of Missouri 1933, contains the provision that: "if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6." And, again, under Section 5, page 344, Laws of Missouri 1933, "Nor may any warrant be drawn or any obligation be incurred in class 6 until all outstanding lawful warrants for prior years shall have been paid." Under Section 4, page 343, it becomes the duty of the county clerk, among others, to list,"Less outstanding warrants for preceding years as follows: (list total by years) Less all known lawful obligations against the county December 31,last, and for which warrants were not drawn at that date (itemized list of these obligations must be attached to the estimate) Total unpaid obligations of the county on January 1st of current year. (This shall include unpaid warrants and outstanding bills for which warrants may issue)." Thus it will be noted that the county court, in preparing the Budget and carrying out the terms of the county Budget Act should have before them a complete financial picture of the county.

We consider the case of State ex rel. v. Johnson 162 Mo. l. c. 631, to be authority as to how the surplus funds remaining at the end of the current year may be used,

> "This section then had been the law of this State for twenty years before the adoption of the Constitution of 1875. Prior to that, it was not necessary that a county warrant should be drawn upon a special fund or that it should come to the holder during the year in

which the indebtedness was created. What, then, was the effect of the Constitution upon this section? As was ruled in Andrew County v. Schell, 135 Mo. 31, and State ex rel. V. Payne, 151 Mo. 670, that section was modified by the Constitution to the extent that thereafter the warrants drawn by the county court in any year to meet all the necessary and current expenses for that year must first be paid in full in the order of their registration, and if a surplus was left, then the section operated on all other warrants just as it had previous to the adoption of the Constitution of 1875. In a word, that section, in so far only as it conflicted with the provisions of section 12 of article 10 of the Constitution,became inoperative by force of the Constitution as soon as it went into effect, because inconsistent therewith. But with this exception there is no such repugnancy as requires us to hold it was absolutely repealed,the rule of construction being that before it shall be construed as repealed by implication only, the two must be so repugnant that both can not stand, and, we think,with the modification we have mentioned, both can stand. Such has been the opinion of the Legislature, we think, from the fact that this section has been preserved through three revisions since the adoption of the Constitution. We conclude that this surplus, after the current expenses for the years 1895 and 1896 had all been paid, at once became subject to this general statute,section 3166, Revised Statutes 1889, which provides a just and equitable rule for the payment of the debts of the counties. The preferred right of payment according to registration is not taken away further than the changed condition wrought by the Constitution requires, and when the Constitution is read into and with this section, it merely changes the order of payment so that the funds provided for each year's

> expenses is primarily the fund out of which warrants drawn for those expenses are to be paid according to their presentation and registration in that year, and when they are all paid and a surplus, as in this case, remains, then it is applicable to unpaid warrants of former years and section 6771, Revised Statutes 1899, provides the rule of priority, just as it did before its modification by the Constitution of 1875, and the surplus is not to be distributed pro rata."

In the case of Trask v. Livingston County 210 Mo. l. c. 597, wherein the court was considering the question of using funds for expenditures in future years, said;

> "It has been very recently considered, in its application to the subject in hand, by the Court In Banc, and the conclusion was announced that such an obligation to pay an agreed sum, year by year, for the furnishing of certain necessary supplies during a term of twenty years, was not an immediate indebtedness for the entire amount that might ultimately become due by installments during that term. (Saleno v. Neosho, 127 Mo. 627.) It will, we think, be seen upon close examination of Saleno v. Neosho and the Lamar cases that the great question was whether there was an aggregate indebtedness created in the beginning which would exceed the debt-making power of the corporation or whether the indebtedness should be treated only as an obligation which would arise from year to year as the water contracted for was furnished, and in order to ascertain whether the municipal corporation was transgressing the constitutional limit regard was had only to the amount which might fall due within a certain year and if the revenue for that year was sufficient over and above the payment

> of other expenses, then there was no debt incurred within the constitutional prohibition. In other words it was practically decided that although the contract was for twenty years it was considered by the court from the debt-creating point of view as if it had been twenty separate contracts, one covering each year. And the authorities all agree that if the amount to be paid in any year under such a contract exceeds the income and revenues for such year against which it is a charge, it would be invalid, at least to the extent of such excess. There are many considerations which in our opinion sustain the decisions in those cases, but they afford no authority for holding that the county court in this State under the Bridge Act can contract for a supply of bridges covering a period of years, one bridge to be built each designated year and to be paid for out of the revenue for the year in which it shall be built. All the provisions of the Bridge Act are inconsistent with any such power in the county court."

The above decision deals with an entirely separate matter but we believe that the principle involved is the same.

The latest decision of the court in relation to our question is State ex rel. Clark County v. Hackmann 280 Mo. l. c. 696. This decision reviews all of the early cases, as follows:

> "It is suggested that the warrants which furnished the basis of the judgment mentioned were the accumulations of years. Also that many other counties are situated just as is Clark County. We need not blind our eyes to facts which everybody knows. The counties of the State, in

anticipation of their yearly revenue, issue warrants against such revenue. The county authorities know from the assessed values and the tax rates just what revenue should come in for the year. They often issue warrants up to the very limit of the anticipated revenue, and these warrants we have held to be valid obligations of the county. This, on the theory that the warrants represent valid contracts made during the year. By valid contracts we mean contracts within the anticipated revenue of the year. Thus in Trask v. Livingston County, 210 Mo. l. c. 594, it is said:

'It has been uniformly construed that this provision of the Constitution permits the anticipation of the current revenues to the extent of the year's income in which the debt is contracted or created, and prohibits the anticipation of the revenues of any future year.'

So also in State ex rel. v. Johnson,162 Mo. l. c. 629, it is said:

'It was ruled in Book v. Earl, 87 Mo.246, that 'the evident purpose of the framers of the Constitution and the people who adopted it was to abolish in the administration of county and municipal government, the credit system, and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year,' But it was at the same time said: "Under this section the county court might anticipate the revenue collected, and to be collected, for any given year,and contract debts for ordinary current expenses,

which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it."

It was then anticipated that, though the county court might not issue warrants in excess of the levy for a year's current expenses, and that a creditor might rely upon the fact that his contract was within the amount of revenue levied and provided, and trust to the power of the State to enforce its taxes, still it might happen from some unforeseen cause enough of the estimated amount of revenue might not be collected to pay all the warrants drawn against it in anticipation. Under such circumstances it has never been ruled that such a creditor's warrant was absolutely void and extinguished by the non-payment in the year in which it was drawn. On the contrary, this court has often said in no uncertain terms that it was valid and payable out of any surplus revenue in the hands of the county treasurer that might arise in the hands of the county treasurer that might arise in subsequent years. (Randolph v. Knox County, 114 Mo. 142; Andrew County v. Schell, 135 Mo. 1. c. 39; State ex rel. v. Payne,151 Mo. 1. c. 673; Railroad Co. v. Thornton,152 Mo. 570; State ex rel. v. Allison, 155 Mo. 1.c.344; and on this point, Reynolds v. Norman, 114 Mo. 509). '

By failure to collect taxes, and other reasons, there are many valid outstanding county warrants in the several counties of the State - nearly $2,000,000 dollars according to reports. By valid outstanding warrants, we mean warrants issued for the current expenses of the year, and warrants which, when issued, were within the anticipated revenue of the year. By the issuance of the bonds involved here, Clark County is seeking to discharge the judgments upon warrants of this character. This we say because the validity of the warrants is vouched for by court judgments.

> If Clark County is successful, the other counties, to use a homely expression, 'will follow suit'.
>
> As said in State ex rel. W. Johnson, supra, warrants of this character are not invalid because the revenue for the year (as collected) does not meet them, for they may be paid out of the surplus revenues of future years. Of course, there could be no surplus until all debts of the current year have been provided for or met. Up to this time we have not gone further in the protection of such warrants, so that we have a new idea suggested by the instant case. Such indebtedness should be paid, if any legal and constitutional method can be devised. The question is, has Clark County devised such a method?"

CONCLUSION

We are of the opinion that the county court does not have the authority to place the surplus funds at the close of a fiscal year, into one of the five classes, and there be used for the current year when there are valid outstanding obligations in the nature of warrants against the county. It is the duty of the county court to sacredly preserve the priorities of the classes, and this must be done in the manner and in the amount as the anticipated revenue for the current year will permit. If the county court fails to provide adequate funds for class 2 for the current year from the anticipated revenue, it was its duty to so do, as class 2 has a priority over 3, 4 and 5.

II

THE COUNTY TREASURER IS NOT PROTECTED IF FUNDS ARE UNLAWFULLY TRANSFERRED BY THE COUNTY COURT.

The first eight sections of the County Budget Act are applicable to counties of the population of Worth.

Section 8 contains the following paragraph;

> "Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provisions of this act shall be void and of no binding force or effect; and any county clerk, county treasurer,or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

Having come to the conclusion, in the question above, that the county court would not have any legal authority to transfer the surplus funds,at the close of the fiscal year, to Class 2 and there be used for the current expenditures of 1935, we are of the opinion that it would naturally follow that the county treasurer, under the above provision, would be liable on his bond for the funds wrongfully transferred and used.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

OWN:LC

MOTOR VEHICLE MUNICIPAL TAX: Municipal tax for motor vehicles cannot exceed the amount authorized for 1933. Furthermore, the amount authorized for 1933 should not exceed 1/3 of the aggregate amount of state registration fees as prescribed in Sec. 7762, R. S. Mo. 1929.

5-28

May 22, 1935.

FILED
98

Hon. F. D. Wilkins,
City Attorney,
Louisiana, Missouri.

Dear Sir:

We wish to acknowledge receipt of your letter of May 8th, 1935, as follows:

> "There is an apparent conflict in the Statutes of this State with reference to the authority of a Municipality to charge a license tax on motor vehicles within said Municipalities for municipal purposes.
>
> "Section 7762 Revised Statutes of Missouri, 1929 limits the amount of the collection by Municipalities to one-third of the amount collected by the State.
>
> "Section 7780, which, so far as I have been able to find has never been repealed authorizing such Municipalities to collect a license tax for municipal purposes, not exceeding one-half of the amount collected by the State.
>
> "Section 7762 Revised Statutee of Missouri, 1929 was repealed by the Extra Session 1933 and 1934 (see laws 1933-1934, page 99-100). The laws of 1933-1934 with reference to the authorities of Municipalities to license and tax automobiles and motor vehicles provides a license tax may be levied on motor vehicles by Municipalities of this State,

'provided that the fees charged by Municipalities for said license shall not exceed the amount authorized therefor by said Municipalities during the year 1933.'

"What we want to know is, is the City authorized to charge one-third or one-half of the amount charged by the State.

"No doubt you have been asked to pass upon this before and have given an opinion, and we will appreciate a copy of same."

It is the opinion of this office that license taxes shall not exceed the amount authorized therefor by such municipalities during the year of 1933. Furthermore, such authorization for 1933 should not have exceeded one-third of the aggregate amount of the state registration fee, as specified in Section 7762, R. S. Mo. 1929.

The above two sections referred to in your letter, namely, Sections 7762 and 7780, R. S. Mo. 1929, are in conflict only as to the amount such municipality may charge for a license tax.

Section 7780 was originally enacted in the first Extra Session Laws 1921, as shown on page 100, approved July 30, 1921. Section 7762 was approved by a vote of the people in November, 1924, as shown on page 288 in Laws of 1925, thereby superseding the above law. Section 19, page 290, Laws of 1925, contains a provision as follows:

"All laws or parts of laws contrary to, inconsistent with, or in conflict with any of the provisions of this act are hereby repealed."

It is a well settled rule of construction that when such a provision as enacted above is included in an act, all such conflicting provisions in any law are repealed, only insofar as they conflict.

Corpus Juris, Vol. 59, Sec. 514, page 910, provides in part:

> "Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, will, although it contains no repealing clause, govern, control, or prevail, so as to supersede and impliedly repeal the earlier act to the extent of the repugnancy, provided the conflict, inconsistency, or repugnancy is of the character and degree requisite to the application of the rule."

In State of Missouri ex rel. Maguire v. State Auditor, 47 Mo. 32, the court said:

> "The construction has not said that when an act is passed inconsistent with a preceding one, so that both cannot stand, the latter one shall be void and the earlier one shall prevail, but has left the law as it always has been, viz: That when two statutes are inconsistent and repugnant, the one last enacted shall be considered in force. This must be so in the nature of things, for the last enactment is the latest expression of the legislative will, and must prevail, unless it contains some inherent vice that prevents it becoming a statute."

From the above remarks, we are of the opinion that Section 7762, R. S. Mo. 1929, requiring municipalities not to charge a license tax exceeding one-third of the aggregate amount of state registration, automatically repeals that particular provision of Section 7780 allowing the tax to be one-half of the aggregate amount of state registration, as this is in direct conflict, and furthermore supersedes Section 7780.

Section 7761, page 99 of Laws of Missouri Extra Session 1933-34, in part provides:

> "License taxes may be levied on motor vehicles by municipalities of this state provided that the fees charged by municipalities for said license shall not exceed the amount authorized therefor by said municipalities during the year 1933."

Therefore, it is the opinion of this Department that municipalities can only levy a license tax on motor vehicles within said municipalities not to exceed the amount authorized for 1933. Furthermore, the amount authorized by said municipalities during the year 1933 should not have exceeded one-third of the aggregate amount of state registration fees as prescribed in Sections 7761-62, R. S. Mo. 1929.

Yours very truly,

James L. HornBostel,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

ARH:HR

BUS AND TRUCK LAW: (1) A truck domiciled in a foreign State and operating as a contract hauler in interstate commerce over the highways of this State comes within the Act.
(2) Contract hauler domiciled in foreign State and operating in interstate commerce through Missouri must obtain a contract hauler's permit.

5-29

May 28, 1935.

FILED
98

Hon. W. P. Wilkerson
Prosecuting Attorney
Scott County
Benton, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "The above identified defendant has been arrested and brought into our court by a highway weight officer, charged with operating a motor carrier in interstate commerce without a permit from the Public Service Commission so to do, and in another affidavit is charged as operating as a contract hauler in interstate commerce without a permit from the Public Service Commission so to do. This defendant claims that he is operating as a contract hauler, and has been advised by counsel that he does not have to secure a permit from the Public Service Commission so to do.
>
> "This same defendant was recently brought into our court on this same charge, and I dismissed the case, for the reason that Section 5268B declares it unlawful for any motor carrier to operate as above, without a permit, and

Section 5264B describes a motor carrier as a common carrier, in effect. Because I could not prove that he was operating as a common carrier, I dismissed the case. The Public Service Commission men and the highway patrol have criticized me severely for this action, stating that conviction could have been had, and stating that the Public Service Commission instructs them to the effect that any person operating any sort of a vehicle for hire is subject to the provisions of Article 8, Chapter 33, Laws of 1929.

"There has been considerable discussion of these cases here with five or six lawyers in it, and they seem to divide about fifty-fifty in their opinion.

"I wish you would please advise me,

"(1) whether a truck, domiciled in a foreign state, and operating as a contract hauler in interstate commerce, falls within the act, and if so, please give me citations.

"(2) whether you believe that a contract hauler, domiciled in a foreign state, and operating in interstate commerce through Missouri must obtain a certificate of public convenience and necessity, an interstate permit, or must, in fact, recognize the authority of the Missouri Public Service Commission in any way.

"I trust that these matters have already been threshed out by your Department, and I would greatly appreciate you sending me copies of your opinions, together with any other opinions that bear upon this subject, and which you think might be of use to me."

The Act about which you inquire was formerly found in Article 8, Chapter 33 of Revised Statutes of Missouri, 1929. The General Assembly, at its regular session in 1931 (Laws of Mo. 1931, page 304) amended said law by repealing the whole of said article and enacting in lieu thereof seventeen new sections, numbered 5264 to 5280 inclusive; said new

article being designated Article VIII, and was intended "for the supervision, regulation and licensing of transportation of persons and property for hire over the public highways of the State of Missouri by motor vehicles; conferring jurisdiction upon the Public Service Commission to license, regulate and supervise such transportation; providing for the enforcement of the provisions of this Act and for the punishment for violation thereof."

The Act divided the use of such motor vehicles into two classes; the one designated as "motor carrier", which was given a meaning equivalent to that of a common carrier; and the other designated as a "contract hauler".

"Contract hauler" is defined by paragraph "c" of Section 5264, as follows:

> "(c) The term 'contract hauler,' when used in this act, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as herein defined."

Section 5270, Laws of Missouri, 1931, page 309, specifically applies to contract haulers and gives the Public Service Commission the power and authority "to license, supervise and regulate every contract hauler in this State, except as provided in Section 5265 of this Act." Said section gives the Public Service Commission "the power and authority by general order or otherwise to prescribe rules and regulations governing all contract haulers as herein defined."

Section 5271, Laws of Missouri, 1931, page 310, provides in part as follows:

> "It is hereby declared unlawful for any contract hauler except as provided in

> Section 5265 of this Act, to operate or furnish transportation for persons or property, or both, for hire over the highways of this state, without first having obtained from the commission a contract hauler's permit. ******"

The above section makes no distinction between a contract hauler operating in interstate commerce and one operating in intrastate commerce.

Section 5273, R. S. Mo. 1929, (Laws of Mo. 1931, page 314), provides that no certificate of convenience and necessity or contract hauler's permit shall be issued by the Public Service Commission until and after such carrier shall have filed with, and the same has been approved, by the commission of this state a liability insurance policy or bond in some reliable insurance company or association or other insurer's certificate to the commission and authorized to transact insurance business in this State, in such sum and upon such conditions as the commission may deem necessary to adequately protect the interest of the public in the use of the public highways, which liability insurance shall bind the obligors thereunder to make compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such motor carrier or contract hauler. Said section, however, contains the following proviso:

> "Provided, that subsection 'b' of section 5268 of this act, relating to liability insurance policy shall apply to interstate contract haulers."

The above proviso makes it plain that the Legislature intended that the act should apply to contract haulers engaged in interstate commerce as well as those engaged in intrastate commerce.

Judge Reeves in the case of Schwartzman Service v. Stahl, 60 Fed. (2d)loc. cit. 1037, in upholding the constitutionality of the act in question said:

> "(1) 1. At the outset it must be acknowledged that the state has the power to regulate and control the movements of motor vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection

of the highways. **** Provisions of this character have been uniformly sustained. Buck v. Kuykendall, 267 U. S. 307, loc. cit. 314, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286; Stephenson v. Binford et al. (D. C.) 53 Fed. (2d) 509.

"(2) Moreover, while 'a citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle,' yet 'he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process or the equal protection clause.' Packard v. Banton, 264 U. S. 140 loc. cit. 144, 44 S. Ct. 257, 68 L. Ed. 596.

"(3) The highways belong to the state. It may make provisions appropriate for securing the safety and convenience of the public in the use of them. Kane v. State of New Jersey, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222.

"(4) 2. Assuming, therefore, the power and right of the state to regulate and supervise its highways, such right cannot be hampered or restricted within narrow bounds. On the contrary, to the end that such right might be fully enjoyed and exercised, there is a constant recognition of the principle that the state 'has a broad discretion in classification.' Smith v. Cahoon, 283 U. S. 553, loc. cit. 566, 51 S. Ct. 582, 587, 75 L. Ed. 1264. Upon such classification, no person can interpose an objection, save only in those cases where the classification or discrimination is entirely arbitrary.

"(5-7) 3. Every presumption must be indulged in favor of the constitutionality of the law. While validity of a statute cannot stand upon legislative declaration alone, yet the rule is that the legislative declaration

> of purpose and policy is entitled to gravest consideration, and, unless clearly overthrown by facts of record, must prevail.' Foster Packing Co. v. Haydel, 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147; Stephenson v. Binford, (D. C.) 53 F. (2d) 509, loc. cit. 514.
>
> "The rule was well stated in Continental Baking Co., v. Woodring (D. C.) 55 F. (2d) 347, loc. cit. 353, wherein Judge McDermott of the Tenth Circuit said: 'When the Legislature acts within the scope of its legislative power, when no facts are disclosed as to the reasons which actuated the legislation, the presumption of constitutionality stands, unless no fair reason can be ascribed for the legislative action. Hardware Dealers' Ins. Co. v. Glidden (284 U. S. 151), 52 S. Ct. 69, 76 L. Ed. 214; O'Gorman v. Hartford Ins. Co., 282 U. S. 251, 51 S. Ct. 130, 75 L. Ed. 324; Standard Oil Co. v. Marysville, 279 U. S. 582, 49 S. Ct. 430, 73 L. Ed. 856, That a legislative classification should stand, "if any state of facts reasonably can be conceived that would sustain it"; that the burden is on the assailant to show that the classification is "essentially arbitrary."'"

The purpose of the legislation in question is clearly expressed in the message delivered by the Governor to the General Assembly requesting said legislation. In the Schwartzman case, supra, the Court, quoted from the Governor's message as follows:

> "Today the state highways, which are the property of the people and a matter of great pride and concern to them, are being more and more crowded with busses and trucks, which, by reason of their great length, width and weight, bid fair, unless restrained, to crowd off the private vehicles, to accommodate which, primarily, the highways have been constructed. * * *
>
> "The trucks are serving as a convenience

> to farmers and shippers generally, and the busses are an accommodation to the traveling public. Their use of the highways, however, should be restricted and regulated to protect those traveling in private vehicles, and limitations should be placed on their equipment to prevent damage to the highways and to protect citizens using the highways."

The court, after quoting from said message, at loc. cit. 1037, said:

> "'The whole enactment, in view of the foregoing, appears to be designed to accomplish the legislative purpose as declared by it 'of promoting and conserving the interests and convenience of the public.'
>
> "It is obvious, in view of the evidence before the court, that it was needful legislation not only to limit the number of motor vehicles in use on the highways, both as common carriers and contract haulers, but in like manner to supervise and regulate them in the matter of the size of the trucks, the character of business done, and the responsibility of the operators."

It has been held on numerous occasions that a State may, in the exercise of its police power, regulate the use of its highways by vehicles engaged in both interstate and intrastate commerce. In the case of Bradley v. Public Utilities Com. 289 U. S. loc. cit. pages 95 and 96; 77 Law Ed. loc. cit. 1056, the Court said:

> "Protection against accidents, as against crime, presents ordinarily a local problem. Regulation to ensure safety is an exercise of the police power. It is primarily a State function, whether the locus be private property or the public highways. Congress has not dealt with the subject. Hence, even where the motor cars are used exclusively in interstate commerce, a State may freely exact registra-

tion of the vehicle and an operator's license, Hendrick v. Maryland, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 S. Ct. 140; Clark v. Poor, 274 U. S. 554, 557, 71 L. ed. 1199, 1200, 47 S. Ct. 702; Sprout v. South Bend, 277 U. S. 163, 169, 72 L. ed. 833, 836, 48 S. Ct. 502, 62 A.L.R. 45, may require the appointment of an agent upon whom process can be served in an action arising out of operation of the vehicle within the State, Kane v. New Jersey, 242 U. S. 160, 61 L. ed. 222, 37 S. Ct. 30; Hess v. Pawloski, 274 U. S. 352, 356, 71 L. ed. 1091, 1094, 47 S. Ct. 632, and may require carriers to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries resulting from their operations. Continental Baking Co. v. Woodring, 286 U. S. 352, 365, 366, 76 L. ed. 1155, 1163, 1164, 52 S. Ct. 595, 81 A. L. R. 1402. Compare Packard v. Banton, 264 U. S. 140, 68 L. ed. 596, 44 S. Ct. 257; Sprout v. South Bend, 277 U. S. 163, 171, 172, 72 L. ed. 833, 837, 838, 48 S. Ct. 502, 62 A. L. R. 45; Hodge Drive-It-Yourself Co. v. Cincinnati, 284 U. S. 335, 337, 76 L. ed. 323, 326, 52 S. Ct. 144. The State may exclude from the public highways vehicles engaged exclusively in interstate commerce, if of a size deemed dangerous to the public safety, Morris v. Duby, 274 U. S. 135, 144, 71 L. ed. 966, 971, 47 S. Ct. 548; Sproles v. Binford, 286 U. S. 374, 389, 390, 76 L. ed. 1167, 1179, 1180, 52 S. Ct. 581. Safety may require that no additional vehicle be admitted to the highway. The Commerce Clause is not violated by denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety. Compare Hammond v. Schappi Bus Line, 275 U. S. 164, 170, 171, 72 L. ed. 218, 220, 221, 48 S. Ct. 66."

Bearing all of the above in mind, we will now answer

your questions in the order in which you ask them.

I.

It is the opinion of this department that a truck domiciled in a foreign state and operating as a contract hauler in interstate commerce over the highways of this state comes within the Act.

II.

It is the further opinion of this Department that the provisions of Article 8, do not require a contract hauler domiciled in a foreign state and operating in interstate commerce through Missouri to obtain a certificate of public convenience and necessity or an interstate permit, but that Section 5271 of Article 8, does require such a contract hauler to obtain a contract hauler's permit from the Public Service Commission. It is our further opinion that such a contract hauler is subject to the provisions of Article 8, which apply to contract haulers and must recognize the authority conferred by said article upon the Public Service Commission of the State of Missouri.

Yours very truly,

APPROVED:

J. E. TAYLOR
Assistant Attorney-General.

ROY McKITTRICK
Attorney-General.

JET/afj

TAXATION: Real Estate purchased from proceeds of World War compensation etc., is taxable. Money looses government identity on being paid to guardian.

June 10, 1935.

6-12

FILED
98

State Tax Commission
Jefferson City, Missouri

Attention of Mr. Andy W. Wilcox.

Dear Mr. Wilcox:

This will acknowledge receipt of your letter which asks this question:

> "Is real estate in Missouri purchased with money received by a war veteran for compensation from the United States Government, exempt from taxation."

Before getting to the heart of your question it may be appropriate to make some primary observations.

Many and varied efforts have been made under varying conditions by litigants to escape the assessment and payment of State taxes on their property.

In the case of VanBrocklin vs. Anderson, decided by the United States Supreme Court and reported in 117 U. S. 151, that Court speaking on the question of the right of a state to tax states as follows, l. c. 154:

> "In the words of Chief Justice Marshall: 'The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This

great corporation was ordained and established by the American People, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but, while within those limits, it is a perfect government as any other, having all the faculties and properties belonging to a government, with a perfect right to use them freely, in order to accomplish the object of its institution.' U. S. v. Maurice, 2 Brock, 96, 109. The United States, for instance, as incident to the general right of sovereignty, have the capacity, within the sphere of their constitutional powers and through the instrumentality of the proper department, to enter into contracts and take bonds, not prohibited by law, and appropriate to the just exercise of those powers, although not expressly directed or authorized to do so by any legislative act; and likewise to take mortgages of real estate to secure the payment of debts due to them, notwithstanding Congress has enacted that 'no land shall be purchased on account of the United States, except under a law authorizing such purchase.' Act of May 1, 1820, chap. 52, Sec. 7, 3 stat. at p. 568; R. S. Sec. 3736; Neilson v. Lagow, 12 How. 98, 107, 108 (53 U. S. bk, 13 L. ed. 909, 913), and cases there cited. So the United States at the discretion of Congress, may acquire and hold real property in any State, whenever such property is needed for the use of the government in the execution of any of its powers, whether for arsenals, fortifications, light houses, custom houses, court houses, barracks or hospitals, or for any other of the many public purposes for which such property is used, and when the property cannot be acquired by voluntary arrangement with the owners, it may be taken against their will, by the United States, in the exercise of the power of eminent domain, upon making just compensation, with or without a concurrent Act of the State in which the land is situated. Harris v. Elliott, 10 Pet. 25 (35 U. S. bk. 9 L. ed. 333); Kohl v.

U. S. 91 U. S. 367 (Bk. 23, L. ed. 449); U. S. v. Fox, 94 U. S. 315, 320 (Bk. 24, L. ed. 192, 193); U. S. v. Jones, 109 U.S. 513 (Bk. 27 L. ed. 1015); U. S. v. Great Falls Mfg. Co. 112 U. S. 645 (Bk. 28 L. Ed. 846); Fort Leavenworth R. R. Co. vs. Lowe, 114 U. S. 525, 531, 532 (ante, 264, 266).

While the power of taxation is one of vital importance, retained by the States, not abridged by the grant of a similar power to the government of the Union, but to be concurrently exercised by the two governments, yet even this power of a State is subordinate to andmay be controlled by the Constitution of the United States. That Constitution and the laws made in pursuance thereof are supreme; they control the Constitutions and laws of the respective States and cannot be controlled by them. The people of a State give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the Union are not given by the people of a particular State, but by the people of all the States; and, being given by all for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself

an abuse, because it is the usurpation of a power which the people of a single State cannot give. The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over ~~thic~~ which exerts the control. The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.* * * *"

And then continuing says, l. c. 158:

"Chief Justice Marshall, in delivering judgment, covered the whole ground by saying: 'If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail, they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

'Gentlemen say, they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it.' 4 Wheat 432 (608).

So in Weston v. City Council of Charleston, the exemption of the public lands, while owned by the United States, from state taxation was assumed, both in the argument of counsel that a state tax on stock issued by the United States

to individuals was equally valid with a tax on lands after they had been sold by the United States to private persons; and in the answer made by Chief Justice Marshall; 'The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country, with no exemption from common burthens.' 2 Pet. 459, 468 (27 U. S. Bk. 7 L. ed. 485, 488).

The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States, must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, 'to pay the debts and provide for the common defense and general welfare of the United States.' Constitution, art. 1, Sec. 8, Cl. 1. Dobbins v. Erie County Comrs. 16 Pet. 435, 448 (41 U. S. bk. 10 L. ed. 1022, 1027). The principal reason assigned in Buchanan vs. Alexander, 4 How. 20 (45 U. S. bk. 11, L. ed. 857) for holding that money in the hands of a purser, due to seamen in the navy for wages, could not be attached by their creditors in a state court was: 'The funds of the government are specifically appropriated to certain national objects; and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended.'

The more thoroughly the proceedings by which the States became members of the Union--either by joining in establishing the Federal Constitution, or by admission under subsequent Acts of Congress are examined, the more strongly they confirm the same view.

In the Articles of Confederation of 1778, it had been expressly stipulated that 'No imposition, duties or restriction shall be laid by any State on the property of the United States.' And in the articles which the Ordinance of 1787 for the government of the Northwest Territory declared should 'be considered as articles of compact between the original States and the people and States in said Territory, and forever remain unalterable, unless by common consent,' it had been provided that 'no tax shall be imposed on lands the property of the United States.' Constitutions and Charters, 8, 432.

The Articles of Confederation ceased to exist upon the adoption of the Federal Constitution; and the Ordinance of 1787, like all Acts of Congress for the government of the Territories, had no force in any State after its admission into the Union under that Constitution. Permoli v. First Municipality of New Orleans, 3 How, 589, 610 (44 U.S. bk. 11, L. ed. 739). Strader vs. Graham, 10 How. 82 (51 U. S. bk. 13, l. ed. 337).

The Constitution, creating a more perfect union and increasing the powers of the National Government, expressly authorized the Congress of the United States 'to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States;' 'To exercise exclusive legislation over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings;' and to 'dispose of and make needful rules and regulations respecting the territory or other property belonging to the United States;' and declared, 'This Constitution and the laws of the United States which shall be made in

> pursuance thereof shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.' No further provision was necessary to secure the lands or other property of the United States from taxation by the States."

In the case of Central Pacific Railroad Company vs. State of California, where the Plaintiff sought to escape the payment of a state tax, reported in 162 U. S. 91, that Court at page 118, speaks the following:

> "Even in respect of railway corporations created by act of Congress the claim of an exemption of their property from state taxation has been repeatedly denied. This was so ruled in Union P. R. Co. v. Peniston, 85 U. S. 18 Wall. 5, 30, 36 (21:787, 791, 793), and Mr. Justice Strong said:
>
> 'It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the National government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise. . . . . .It is therefore manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents or upon the mode of their constitution or upon the fact that they are agents, but upon the effect of the tax;* that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power.

A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers. In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in Thomason v. Union P. R. Co. 76 U. S. Wall. 579, (19:792) It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of despatches, nor the transportation of United States mails or troops or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the state, of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general government, and if it is not, it is prohibited by no constitutional implication.'

In Thomson v. Union P. R. Co. 76 U. S. 9 Wall. 579 (19:792), the Union Pacific Railway Company, eastern division, a corporation created by the legislature of Kansas, received government aid in bonds and land, and, thus aided, constructed its road to become one link in the transcontinental line known as the Union Pacific system, in accordance with the same acts of Congress relating to plaintiff in error, and conferring the same functions and privileges. The state of Kansas having subsdquently taxed the roadbed, rolling stock, and certain personal property of the corporation, its stockholders sought to enjoin the collection of the tax on the ground that the property was mortgaged to the United States and that it was bound under the congressional grant to perform certain duties and ultimately pay 5 per cent of its net earnings to the United States, and that state taxation would retard the burden to it in the discharge of its obligations to the general government.

But the contention was overruled, and Mr. Chief Justice Chase said: "'But we are not aware of any case in which the real estate or other property of a corporation not organized under an act of Congress has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government. It is true that some of the reasoning in the case of McCulloch vs. Maryland, 17 U. S. 4 Wheat 316 (4:579), seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the government of the United States. And even in respect to corporations organized under the legislation of Congress, we have already held, at this term, that the implied limitation upon state taxation, derived from the express permission to tax shares in the national banking association, is to be so construed as not to embarrass the imposition or collection of state taxes to the extent of the permission fairly and liberally interpreted. . . . .We do not think ourselves warranted, therefore, in extending the exemption established by the case of McCulloch v. Maryland beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection. . . . .No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the states and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National government, but it will be safe to conclude, in general, in reference to persons and state corporations employed in government

> services, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection. Lane County v. Oregon, 74 U. S. 7 Wall. 77 (19:105); First Nat. Bank v. Kentucky, 76 U. S. 9 Wall. 353 (19;701)."

Likewise, in the case of Coe v. Errol, 116 U. S. 517, where the plaintiff sought to escape payment of taxes on personal property, the Court speaks as follows:

> "We have no difficulty in disposing of the last condition of the question, namely: the fact, if it be a fact, that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it cannot be exempt by reason of being owned by nonresidents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the Government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary. The fact, therefore, that the owners of the logs in question were taxed for their value in Maine, as a part of their general stock in trade, if such fact were proved, could have no influence in the decision of the case and may be laid out of view.
>
> We recur, then, to a consideration of the question freed from this limitation: Are the products of a State, although intended for exportation to another State and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?

Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution.

This question does not present the predicament of goods in course of transportation through a state although detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State for their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State;* * *"

59 Corpus Juris at page 23, Paragraph 4, states:

> "* * *Insofar as jurisdiction means sovereignty, the jurisdiction is continued in the state within whose borders the tract is included, and for purposes of jurisdiction, used in the governmental, as distinguished from the juridical, sense, the tract forming the subject matter of the agreement remains under the control of the State within whose boundaries it lies."

In the case of Leary vs. Jersey City, 208 Fed. 854, the Court lays down the rule that the State within whose boundaries a tract of land lies rather than the State to whom exclusive and extra territorial jurisdiction under it is secured by an agreement, has jurisdiction for the governmental purposes of taxation.

It will be seen that the Federal Courts in construing the right of taxation have due regard for the sovereignty of the States as to matters of taxation for state purposes and do not rule that the sovereignty of the State for such purposes is limited in any way except insofar as the delegation of exclusive power of taxation has been granted not by one State but by the several states composing the National Union and acting in concert has been granted to the Federal Government.

Section 6 of Article X of the Constitution of the State of Missouri provides as follows:

> "The property, real and personal, of the State counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law.

Section 7 of Article X of the Constitution provides:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

We do not understand your inquiry to be with reference to the properties named as exempt in Section 6 of the above Constitution of Missouri. It will be noticed that said Section does not of its own force exempt even the classifications therein enumerated, but requires that before any of those classes are exempt there must not only be a legislative enactment so providing but it further requires that such exemption shall be only by a general law. No property in Missouri is exempt from taxation except as defined by the above provisions and the herein referred to Federal Constitution and Statutes.

Section 3 of Article IV of the Constitution of the United States provides in part as follows:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

Article VI of the Federal Constitution in part is as follows:

> "This Constitution and the Laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

By the World War Veterans Act is is provided, Vol. 38, No. 454, U.S.C.A:

> "The compensation, insurance, maintenance and support allowance* * *shall be exempt from taxation."

This provision of the World War Veterans Act has been ruled on in this State in the case of Butler vs. Cantley, 226 Mo. App. 1047, 47 S. W. (2d) 258. In that case the Springfield Court of Appeals on March 7, 1932, handed down an opinion in which they held that money whic h had been paid to the Administrator of an Estate of a deceased Soldier of the World War by virtue of the terms of the War Risk Insurance Act, and had been deposited by him thethe bank which later failed, was entitled to preference.

We conceive this ruling to be based on the only possible theory, that is, that the title to said money had not at that time been divested out of the Federal Government.

A like ruling as that made in the Springfield Court of Appeals case has also been made by the Courts of Connecticut, West Virginia, Nebraska and Iowa.

Decisions to the contrary have been handed down by the State Courts of Nebraska and Minnesota. See Note 3, Vol. 53, No. 11 (April 1, 1933) Supreme Court Reporter, p. 416.

The State Courts in construing a federal statute have the right to reach their own conclusion as to the construction of a federal statute where no federal cases in point are cited. This principle is announced in the case of Hayland Flour Mills Company vs. Missouri Pacific Railroad Company, 5 S. W. (2d) 125, Certiorari denied; Erie Railroad Company vs. Hayland Flour Mills Company, 48 S. Ct. 433, 277 U. S. 586, 72 L. Ed. 1001.

On account of the diverse and opposite rulings by the Courts of different states in construing this identical question the Supreme Court of the United States assumed jurisdiction of the question in the case of Spicer vs. Smith which is herein after referred to.

This of course being a federal statute the decisions of the federal Courts are controlling on State Courts in cases decided by the Federal Courts construing a Federal Statute. See case of Illinois State Trust Company vs. Missouri Pacific Railroad Company, 5 S. W. (2d) 368, Certiorari denied; 48 S. Ct. 25, 278 U. S. 623.

The determinative question is, when does money paid by the Government cease to be government money and assume the status of privately owned money, i. e. when does the title pass?

In the case of Pagel vs. Pagel as Administrator, decided March 5, 1934, by the Supreme Court of the United States, reported in Vol. 78, No. 9, page 627, United States Supreme Court Law Edition, Advanced Opinions, that Court held that war risk money paid to the estate of an insured soldier upon the death of the designated beneficiary before receiving all the installments, is not exempted from the claims of his creditors. At page 629 the Court says:

> "The purpose of the exemption, Par. 454, is to safeguard the insured soldier and the beneficiary payments made under the policy to them or for their benefit* * *Upon the death of the insured the father whom he had designated as beneficiary was by the Bureau awarded monthly payments to continue until death. The language of the statute limits the exemption to 'any person to whom an award is made'. It is clear that the statute does not extend the exemption upon the insured and beneficiary."

In the case of Spicer vs. Smith, 53 S.Ct. 415, the United States Supreme Court in defining when money paid by the Federal Government under the War Risk Insurance and Disability Compensation Act loses its identity as government money and takes on the status of privately owned money says, speaking of the contention of the guardian that the latter was entitled to a preferred claim for a bank deposit paid by the government to the guardian which he deposited in the bank:

> "He asserts that under acts of Congress later to be considered, the war risk insurance and disability compensation paid to a guardian of an incompetent veteran remains the money of the UnitedStates so long as it is subject to his control and suggests that the guardian is a mere instrumentality of the United States for the disbursement of such money for the benefit of the veteran."

In holding against this contention that Court said l. c. 416:

> "* * *Unquestionably payment to the guardian vested title in the ward and operated to discharge the obligation of the United States in respect to such installments* * *It results that the

> deposit in question does not belong to the United States and, as indebtedness to it, is essential to priority, the guardian's claim under that Section is without merit."

The Supreme Court of North Carolina in the case of Martin vs. Guilford County, reported in 158 S. E. 847, in construing this principle said:

> "In the instant case, the sum of money which was payable to plaintiff as a veteran of the World War, under the act of Congress, as compensation, insurance and maintenance and support allowance, has been paid to him, he has acquired full and unrestricted title to the money, free from any control over the same by the government of the United States; he has invested it, as he had a right to do, in the purchase of a lot of land and an automobile, which are subject to taxation by Guilford County, under the laws of this state. We think it clear that by the enactment of sections 454 and 618 of Title 38, U.S.C.A. Congress has not undertaken to exercise any control over the property, real or personal, now owned by the plaintiff, and that said property is not exempt from taxation by Guilford County, under the laws of this State, applicable to said property as well as to all other property in said county."

In the case of Duzan vs. Cantley, Commissioner of Finance, 55 S. W. (2d) p. 711, l. c. 712, our Kansas City Court of Appeals said, speaking of the same subject:

"It is argued that the money shall not be subject to the claims of creditors, and since there can be no assignment or garnishment or other proceeding against the beneficiary, therefore the relationship of debtor and creditor cannot exist, especially where the bank takes the fund with knowledge of the source thereof.

This contention is on the theory that the purpose and intent of the legislation in behalf of veterans is to protect the money from all claims, except the United States Government, not only until it comes into the hands of the beneficiary, but also until the latter has himself spent it. We think this is not the correct construction or interpretation to be placed thereon. In our view, funds thus arising are not thus protected after they have once come into the hands of the beneficiary. They have then become his absolute property, and having once come into his hands are no longer an object of solicitude or care on the part of the Government. The latter is careful to protect the fund until the beneficiary receives it, but no further. This seems to be clear from the use and subsequent reiteration of the word 'payable.' So long as a fund is 'payable' to a person it has not yet reached his hands, but when it has, it cannot longer be said to be payable to him. This is borne out by the plain intent of section 54, p. 81, of the above-mentioned USCA, where in protecting money due pensioners, attachment, levy, or seizure of such funds is prohibited, it speaks of money 'due, or to become due' to any pensioner, 'whether the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner.' It is not exempt after it is paid to the pensioner."

For a like expression of the Courts we also cite the case of State vs. Wright, 140 So. 584, by the Supreme Court of Alabama. State ex rel. Smith vs. Board of Commissioners, 294 Pac. 915, where the Court says, l. c. 921:

> "We conclude that the intervention of a guardian does not leave the pension funds still in the hands of the government so that they are still 'payable' or 'due' the ward as expressed by 38 USCA Sec. 454, so as to exempt them from assignment, execution, and taxes, but, when paid to the guardian, the title and possession have both passed from the government, and they are no longer 'payable', and consequently not entitled to any exemption from taxes under Section 454."

In the case of Trotter, Guardian, vs. State of Tennessee, United States Supreme Court Law Edition, Advanced Opinions, Vol. 78, No. 3, the Supreme Court of the United States had under consideration the question of exemption from taxation of compensation and war risk disability benefits to a mentally incompetent veteran, and the question as to the right of exemption of land purchased by the guardian of such incompetent, the same being paid for in cash out of the moneys theretofore received from the government in payment of compensation and war risk insurance.

The Court in holding there was no exemption from taxation states, l. c. 129:

> "Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced.* * *on the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers. The moneys payable to this soldier were unquestionably exempt till they came into his hands or the hands of his guardian.* * *we think it very

> clear that there was an end to the exemption when they lost the quality of moneys and were converted into land and buildings. The statute speaks of 'compensation, insurance, and maintenance and support allowance payable' to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises. Veterans who choose to trade in land or in merchandise, in bonds or in shares of stock, must pay their tribute to the state." * * * *

The Courts have generally refused to enlarge on the statute on exemptions under consideration. They in holding that the guardian, of a minor, of funds that have been paid by the Government to the guardian of the ward, who has them on deposit in the bank, is not entitled to a preferred claim for the same, as was held in the Spicer case, supra, have gone much further in ruling that the Government identity or protection has ended, than is necessary to go in holding that the real estate purchased with money received by the War Veteran as compensation from the United States Government is subject to taxation.

The trend of the courts, and we think the holding, is to the view that when the Government money has actually been received, either by the party so entitled thereto or received by his guardian, that thereupon it loses its identity as public or government money and then has no other protection than that of the usual private individual. The title thereupon passes from the government.

CONCLUSION.

It is the opinion of this Department that real estate in the State of Missouri, purchased with money received by a war

veteran as compensation from the United States Government under the World War Veterans Act, i s not exempt from taxation.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

John W. Hoffman, Jr.,
Acting Attorney General.

DW:MM

COUNTY BUDGET ACT: County Treasurer should approtion funds turned over to him monthly by the collector according to the six classes and in such a manner that the priority of payment of each class over each succeeding class may be sacredly preserved.

June 14, 1935. 6-15

FILED 98

Hon. Carl E. Williamson,
Prosecuting Attorney,
Ripley County,
Doniphan, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following matter:

> "Under the present budget law, how should a county treasurer apportion the funds which he receives each month from the county collector?"

By the terms of Section 22 of the County Budget Act (Laws of Mo. 1933, p. 351) certain sections, insofar as they conflict with the Budget Act, are repealed.

Section 9927, R.S. Mo. 1929 relates to the duty of the county collector in compiling monthly statements of collections and the payment thereof to the county treasurer, and provides as follows:

> "Every county collector and ex officio county collector, except in the city of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively. It shall be the duty of the county clerk, and he is hereby required, to forward immediately a certified copy of such detailed statement to the state auditor,

> who shall keep an account of the state taxes with the collector."

We cannot discern any conflict between Sec. 9927, supra, and the terms of the County Budget Act insofar as they relate to counties of a population of less than 50,000, under which Ripley County would be classified.

Section 9874, R.S. Mo. 1929 relates to the appropriation, apportionment and subdivision of all the revenues collected or to be collected, and places the same in five separate classes. It is our opinion that this section is repealed in its entirety by Section 2 of the County Budget Act (Laws of Mo. 1933, page 341), which classifies the expenditures of the county into six classes and imposes on the county court the duty of sacredly preserving the priority of payment of the classes.

Section 9985, R.S. Mo. 1929 deals with the apportionment of the various funds and the duties of the treasurer with respect to warrants, and is as follows:

> "The county courts of the various counties in this state are hereby authorized and empowered, at the first regular term of said court after taking effect of this chapter, and at the May term every year thereafter, to make an order and cause the same to be spread upon the records of such court, setting apart, appropriating, apportioning and subdividing the revenues of any county for county purposes, as the same is set forth and specified in sections 9874 and 9875, and when the order shall thus be made and spread upon the records of any county in this state, the moneys so set apart, appropriated, apportioned and subdivided shall be held to be a sacred fund for the purpose for which it has been designated; and the county court thus making the order shall have no power to divert the same, or to permit the funds thus set apart to be drawn from the treasury of such county, except by warrants issued by order of such court on the respective

> funds so set apart, and for the purposes in sections 9874 and 9875 specified and set forth: Provided, that nothing in this chapter shall be so construed as to authorize any county court in this state to make a levy for county purposes greater than that prescribed in section 11 of article X of the Constitution."

Section 9986, R.S. Mo. 1929 makes it the duty of the treasurer to separate and subdivide the revenue of the county as ordered in Section 9985, and is as follows:

> "It shall be the duty of the county treasurer to separate and subdivide the revenues of such county in his hands, and as they come into his hands, in compliance with such order of court and the provisions of this chapter; and it shall be his duty to pay out the revenues thus subdivided, on warrants issued by order of the court, on the respective funds so set apart and subdivided, and not otherwise; and for this purpose the treasurer shall keep a separate account with the county court of each fund, which several funds shall be known and designated respectively as the pauper fund, road and bridge fund, fund for the payment of the salary of county officers, fund for the payment of fees of grand and petit jurors, judges and clerks of elections, and witnesses for the grand jury, and contingent fund; and no warrant shall be paid out of any other fund other than that upon which it has been drawn by order of the court as aforesaid. Any county treasurer or other county officer, who shall fail or refuse to perform the duties required of him or them under the provisions of this chapter, and in the express manner provided and directed, shall be guilty of a misdemeanor, and, upon conviction

> thereof, shall be punished by a fine of not less than one hundred dollars, and not more than five hundred dollars, and in addition to such punishment, his office shall become vacant."

Bearing in mind that Section 22 of the County Budget Act repeals Sections 9985 and 9986, supra, insofar as they conflict with the terms thereof, it is the opinion of this department that the county funds, as they come into the hands of the county treasurer, should be apportioned according to the estimate as made by the county court under the terms of the Budget Act.

As stated above, Section 2 of the County Budget Act contains six separate classes and the estimate as contained in the budget should follow those classes and the amounts as set forth in the budget in each class should be sacredly preserved. It is the duty of the county treasurer to assist in the preservation of the priorities of the classes; Section 8 of the County Budget Act (Laws of Mo. 1933, p. 346) contains the following provision:

> "Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

CONCLUSION

It will be noted that the Legislature did not make a radical departure in providing for the six classes and the different types of funds as contained in Secs. 9985 and 9986, and it is the opinion of this department that there is no direct conflict therein. The county treasurer may continue to follow the procedure as set forth in said sections except insofar as a fund contained in the old section is in direct conflict with the six classes of funds as contained in the County Budget Act.

The most striking change in the financial structure of the county brought about by the new Budget Act is the fact that the priority of payment of each class over each succeeding class as contained in Section 2 is mandatory on the county court, and likewise, the county treasurer; hence, it becomes the duty of the

county treasurer to keep funds in the various classes, or to so apportion the funds in the various classes, so that the priority of payment may be sacredly preserved.

If this be borne in mind by the county treasurer, he can classify the funds when delivered to him by the collector in such a manner that he will incur no official liability and at the same time prevent a large number of warrants from being protested in the succeeding classes while preserving the priorities of the preceding classes.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

CITIES:

INTOXICATING LIQUOR:

Municipalities shall not increase occupation tax of merchants and dealers engaged in the sale of non-intoxicating beer.

June 22, 1935.

FILED
98

Hon. W. P. Wilkerson,
Prosecuting Attorney
Scott County
Benton, Missouri

Dear Sir:

This will acknowledge your letter requesting an opinion from this department which reads as follows:

"Please refer to Senate Bill #54, Section 13,139-e, paragraph "D", wherein it is provided,

" 'No Municipal Corporation shall increase any occupation tax which it now levies upon any holder of any permit required by this article, in excess of the amount of such tax imposed upon merchants and dealers in the same or similar lines of business, and not holding any such permit.'

"I am being bombarded with requests to tell the cities and towns in my county what this sentence means, and I have told my people that it means that the city shall not levy a greater occupation tax on a 3.2 beer dealer than is levied on dealers in malt liquors of a higher alcohol content. Please advise me what interpretation your office is placing on this sentence."

Section 13139-e of the Non-intoxicating Beer

Act provides in part, in subsection "d" as follows:

> "**** No municipal corporation shall increase any occupation tax which it now levies upon any holder of any permit required by this article in excess of the amount of such tax imposed upon merchants and dealers in the same or similar lines of business and not holding any such permit."

In construing the above section of the statute, we rule that the intent of the Legislature was that no municipality should be discriminatory in the levying of an occupation tax on merchants or dealers engaged in the sale of non-intoxicating beer over what said municipalities now levy upon merchants or dealers engaged in the same or similar lines of business.

If a merchant or dealer is engaged in a particular business and also sells, under proper license, non-intoxicating beer, the occupation tax upon the business other than selling non-intoxicating beer cannot be increased over that which is levied as an occupational tax on other merchants or dealers engaged in the same or similar lines of business only.

We conclude that, in our opinion, the occupation tax upon a business other than the sale of non-intoxicating beer shall not be increased because such merchants or dealers engage in the sale of non-intoxicating beer, and that Section 13139-e has no reference to the relative charges that may be charged for 3.2 and 5% beer licenses by municipalities.

Respectfully submitted,

APPROVED:

RUSSELL C. STONE
Assistant Attorney-General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

COUNTY BUDGET ACT: County Court cannot permit Probate Judge to exceed amount provided in original budget estimate but if any funds are left in class 6, same may be used for purchasing additional books - clerical error may be corrected after estimate goes to State Auditor.

8-71

August 26, 1935.

FILED
98

Honorable Mark W. Wilson,
Prosecuting Attorney,
Henry County,
Clinton, Missouri.

Dear Sir:

This department is in receipt of your letter of August 17 requesting an opinion as to the following:

> " * * * Last January, when the Probate Court made its budget, it sent in a budget for $578.88, which the County Court saw fit to reduce to $380.12, but did not call the Probate Court when they made the cut. Probate Judge later discussed this with the County Court and convinced them that it would be impossible to run his office on this amount. The Court then said they would take care of any expenses over the amount allowed. The budget was not raised before it was sent into the Auditor's Office and in fact the County Clerk made an error and sent the amount in as $330.12.
>
> "The Probate Judge has already spent the amount allowed by the court on the reduced budget and has a book ordered which will cost $80.00. There will be other expenses in his office which will be expenses that should be allowed.
>
> "If the County Court had allowed the amount the Probate Judge asked for, he would have had sufficient to pay his expenses.
>
> "It is clear that the Probate Judge has

> not been at fault as he asked for a sufficient amount to pay his expenses and was not given an opportunity to be heard after the Court reduced his budget. Can the amount be raised now that it is in the Auditor's Office with the County Court's consent? Will the Probate Judge be safe in ordering his necessary supplies? * * * * "

We assume that the County Court of Henry County carried out its duties according to the terms of the County Budget Act (Laws of Mo. 1933, pp. 340-351 inclusive), and in compiling the budget took into consideration the estimate of the Probate Judge under Class 4, which provides:

> "The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

Section 8 of the County Budget Act (Laws of Mo. 1933, p. 345) contains the following provision:

> " * * * The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard, but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein."

You state in your letter that the Probate Judge "was not given an opportunity to be heard after the Court reduced his budget", but it appears that the County Court orally promised to take care of the expenses of the Probate Judge over the amount allowed in the budget. We note that the County Court made no changes regarding the request of the Probate Judge and filed the estimate in accordance with Section 8 of the Act and forwarded a certified copy to the State Auditor.

We are of the opinion that any oral agreements made by the Court Court and the Probate Judge affecting the estimate of the Office of Probate Judge would not be binding for the reason that once the estimate is compiled and filed according to the statute, the County Court would have no power to change or amend the same to conform to any oral or extraneous agreements. The County Budget Act contains no provision for amending or changing the estimate after it is filed.

As to the clerical error wherein the County Court reduced the amount of the estimate for the office of the Probate Judge from $380.12 to $330.12, we are of the opinion that this error may be corrected by the County Court, as this would not constitute a change or a correction in the budget, but an error in entering the figures. This error may be corrected so that the figures as contained in the budget will conform to the original estimate as made by the County Court. A copy of the corrected budget should be sent to the State Auditor.

CONCLUSION

It is the opinion of this department that the County Court cannot permit the Probate Judge to exceed the amount of the budget as originally estimated and filed, except for the clerical error as heretofore discussed, for the reason that it might subject the County Court and its officers to the liability contained in Section 8, i.e., "any order of the county court * * * directing the issuance of any warrant contrary to any provision of this act shall be void * * * and any county clerk * * * or other officer participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

We would suggest, however, that if there are any funds in Class 6 available after the five prior classes have been provided for, the same may be used for purchasing the record book and any other expenses of the office of Probate Judge.

We are of the opinion that at the close of the fiscal year, if there be a balance in any one of the classes which is

no longer needed for the class, said funds may be used for the payment of the record book in question in the manner as provided in the Act.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

RECORDER OF DEEDS: Is entitled to compensation as provided by statute. No compensation for a receipt that a certain chattel has been filed in his office.

10-2

September 30, 1935

FILED 98

Honorable Jeff R. Wilson
Recorder of Deeds
Lexington, Missouri

Dear Sir:

We acknowledge receipt of your letter of September 20, as follows:

> "Will you please tell me if the Recorder of Deeds is not entitled to an extra ten cents when he issues a receipt that a certain chattel has been filed in his office, giving the date, time, instrument number and signing the same in his official capacity as recorder of deeds.
>
> There is some question as to this and I would appreciate an early reply."

As stated by the Court in Gammon v. Lafayette County 76 Mo. 676, which is a well established rule of law in this state,

> "The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for service he is required to perform as a public officer, he has no claim upon the State for compensation for such service."

Section 3099, page 209, Laws 1935, provides for a fee to the recorder for filing chattel mortgages and also for discharging same,

> "Such recorder shall enter in a book, to be provided by him for such purpose, the names of all the parties to such instrument, arranging the names of such mortgagors or grantors alphabetically, and shall note thereon the time of filing such instrument or copy, for which said recorder shall receive a fee of twenty cents. Said fee shall also include and cover all costs for discharging said mortgage or deed of trust according to the methods hereinafter provided. Such mortgage or deed of trust, when satisfied, shall be discharged by any of the following methods:
>
> 1. By the mortgagee, cestui que trust, his agent or assigns, on the margin of such index, which shall be attested by the recorder.
>
> 2. Upon the presentation by the mortgagor or grantor of the original mortgage or deed of trust, and upon such mortgagor or grantor making affidavit before such recorder that the instrument presented by him is the original of the copy on file, and that such mortgage or deed of trust has been fully paid and satisfied.
>
> 3. Upon presentation or receipt of an order in writing, signed by the mortgagee or cestui que trust thereof, attested by a justice of the peace, or any notary public, stating that such instrument has been paid and satisfied.
>
> When any of these provisions have been complied with, it shall be the duty of the recorder to enter in a column for that purpose the word 'satisfied' giving date. When a chattel mortgage shall be satisfied as above provided, the recorder may deliver

> said mortgage to the holder of the note secured thereby, or, if the holder of said note refuse to receive the same the recorder may destroy said mortgage: Provided, that the recorder may deliver to the parties entitled thereto, or destroy all such mortgages now remaining on file in his office and which have been entered satisfied on the chattel mortgage register."

Section 11804 Revised Statutes Missouri 1929 is the statute providing for various fees a recorder of deeds is entitled to receive,

> "Recorders shall be allowed fees for their services as follows:
>
> For recording every deed of instrument, for every hundred words . . . . . $.10
>
> In addition to the above fee for recording deeds, they shall be allowed for recording every such instrument relating to real estate, a fee of ten cents, as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate.
>
> For every certificate and seal. 50
>
> For recording a plat of survey, if not more than six courses. 40
>
> For every course above six of the same 02
>
> For copies of plats, if not more than six courses 40
>
> For every course above six . . . . . .02."

Section 3101 Revised Statutes Missouri 1929, in part, provides:

> "Every such recorder of deeds shall be entitled to receive for certified copy of such instruments so filed as aforesaid, when requested to furnish the same, for every one hundred words ten cents."

The above provision would entitle the recorder to a fee if such provision would apply to the question. However, by virtue of the definitions that follow as to what constitutes a certified copy, we are prone to be of the opinion that what you refer to in your letter is not the same as a certified copy, and, therefore, you would be entitled to no fee for such services rendered.

Webster's New International Dictionary defines 'certified copy' as follows:

> "A copy made or attested by officers having charge of the original and authorized to give copy originally."

The following definition is given for 'copy,'

> "An imitation, transcript or reproduction of an original record."

In Ehrlick v. Mulligan 57 A. L. R. 598, 140 Atl. 463, the Court said, in reference to a United States statute,

> "This statute makes a certified copy of a record of the United States District Court admissible in evidence in the courts of this state. The question presented to us is whether a 'true copy' is a 'certified copy.' We think these terms are not interchangeable and that a 'certified copy' implies more than a 'true copy' and that a 'true copy' is not a 'certified copy.' In marking a copy under the appellation of a 'true copy' and affixing the seal of the court the name of the clerk and his deputy, if marked by deputy, there is no certifi-

> cation under the seal of the court and signature of the clerk that the document so marked is on file in the office of the clerk, and is a copy of the document as the same remains of record."

Therefore, from the above definition, a receipt merely giving out the information that a chattel is filed, with date, time, instrument number, etc., would not constitute a certified copy of such instrument.

We are unable to find any statute authorizing the recorder to receive or be entitled to a fee for the receipt you refer to, and in the absence of such statutory provision, as stated in Gammon v. Lafayette County, supra, an officer is entitled to no fee for such service.

Yours very truly,

DRAKE WATSON
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, JR.
(Acting) Attorney General

DW
ARH:LC

TOWNSHIPS: Townships may issue warrants, which warrants shall bear interest.

10-5

October 3, 1935

FILED
98

Honorable Mark Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

This will acknowledge your letter of recent date requesting an opinion from this office, which reads as follows:

> "Under Township Organization, can the Township Treasurer give protested warrants for township expenses, for instances road repair, where the amount in the treasure is not sufficient to pay such necessary expenses?
>
> I could find no law giving the Township Board or Treasurer power or authority to do this. I told them my opinion was that it could give warrants to be payable in the future but not to be protested so as to bear interest."

We direct your attention to Section 12256 R. S. Mo. 1929, relating to the powers of townships, which reads as follows:

> "Each township, as a body corporate shall have power and capacity: First, to sue and be sued, in the manner provided by the laws of this state; second,

> to purchase and hold real estate within its own limits for the use of its inhabitants, subject to the power of the general assembly; third, to make such contracts, purchase and hold personal property, and so much thereof as may be necessary to the exercise of its corporate or administrative powers; fourth, to make such orders for the disposition, regulation or use of its corporate property as may be conducive to the interest of the inhabitants thereof; fifth, to purchase at any public sale, for the use of said township, any real estate which may be necessary to secure any debt to said township, or the inhabitants thereof, in their corporate capacity, and to dispose of the same."

Your attention is further directed to Section 12306 R. S. Mo. 1929, relating to claims, when allowed by the township board of directors and reads as follows:

> "When any claim or account, or any part thereof, shall be allowed by the township board of directors, they shall draw an order upon the township trustee in favor of the claimant for the amount so allowed - - said order to be signed by the president of said board, and attested by the township clerk and delivered to said claimant."

It is evident from a careful reading of the above mentioned sections that it would be within the province of the township organization to issue warrants for township expenses relating to the repairs of roads. Under the provisions of Section 12257 R. S. Mo. 1929, no township shall possess any corporate power except such as are

enumerated or granted by the chapter respecting township organization or shall be specifically given by law or shall be necessary to the exercise of the powers so enumerated or granted. In construing Sections 12256 and 12306, supra, in light of Section 12257, supra, it is our opinion that the township organization or board could issue warrants.

The general proposition of law respecting interest payable on warrants thus issued is found in Corpus Juris, Vol. 63, page 185, and reads as follows:

> "Warrants constitute prima facie acknowledgments of town indebtedness, but do not bear interest unless by special provision under statutory authority."

Under the provisions of Section 2839 R. S. Mo. 1929, relating to interest payable upon moneys after they become due and payable on written contracts, creditors are entitled to receive six per cent interest per annum. In the instant case if the township organization proposes to issue these warrants for road repairs, such warrants would draw interest at the rate of six per cent per annum should no interest be specified on the warrant.

Your attention is directed to the case of Skinner v. Platte County 22 Mo. 436, wherein the Supreme Court said:

> "In order to draw interest the warrant for allowance must be made out and presented for payment to the treasurer; if he has funds to pay with, he pays the warrant without interest; if he has no funds to pay with, &he shall so certify on the back of the warrant, date and subscribe the same.' (R. C. 1845,page 311 Sec.6) From this date the warrant will bear interest."

If the expenditures contemplated for road expenses involve a very large amount of money, you are directed to

Section 7961 R. S. Mo. 1929, which provides a method whereby the people of the township can accept or reject at the polls a proposed bond issue for contemplated road expenses.

In light of the foregoing, it is our opinion that township organizations may issue warrants for expenses covering road repairs and other such necessary expenses where the amount of funds in the treasury of such organization is not sufficient to pay the expenses. It is our further opinion the warrants so issued would bear interest under the general interest statutes.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

RCS:LC

DRAINAGE DISTRICTS--COUNTY COURT--BONDS: Treasurer of Drainage Districts should promptly disburse funds in retirement of outstanding bonds which are due and payable, in spite of the County Court's order to the contrary.

October 8, 1935

10-9

FILED
98

Honorable W. P. Wilkerson
Prosecuting Attorney
Scott County
Benton, Missouri

Dear Sir:

We acknowledge your request for an opinion dated September 10, 1935, which reads as follows:

> "It seems that before the term of office of the present Treasurer of this county, and also before my term began, the County Court of this County entered an order of record, directing the Treasurer to impound all the funds then on hand and thereafter collected, belonging to certain drainage districts organized and existing under the law regulating districts organized by the County Court, said impounding of funds to continue until lifted by said County Court.
>
> "Upon assuming the moluments and responsibility of office, the present Treasurer asked by opinion as to whether he is required to honor the aforementioned order of the County Court, or whether he should pay any bonds and coupons that were presented for payment, according to law, against the districts which have funds in his hands in the absence of mandamus proceedings and the adjudication of the question in the Circuit Court.
>
> "The County Court has employed counsel for these districts, who, I understand is attempting to refinance the said districts with funds proposed

> to be borrowed from the Reconstruction Finance Corporation, presumably under the authority of Sec. 11022, page 3660, M. S. A. and Sec. 10829a, page 3551, M. S. A., and I understand that it was in connection with this proposed refinancing of these districts that the order was made.
>
> "Will you please advise me whether, in your opinion, the order impounding the funds is legal and valid and binding upon the Treasurer, stating whether the solvency or insolvency of the district would make any difference, if, in your opinion, it does make a difference? None of the districts have been adjudicated insolvent. One probably is, in fact, insolvent, and would be so adjudicated if the matter were handled properly.

You indicated in your letter that the drainage districts in question were originally organized under Article II, Chapter 64, R. S. Mo. 1929. This we assume to be a fact. It is by virtue of this Article that a County Court can incorporate drainage districts. Section 10814 R. S. Mo. 1929 provides in part as follows:

> "* * * * If the court finds in favor of making the improvement, it shall, by order of record, incorporate the land and other property described in the report of the viewers and engineer or any part thereof into a drainage district for the purpose of this article, and shall designate the same by number. Such district shall be a body corporate and a political subdivision of the state, shall possess the usual powers of a corporation for public purposes, shall be capable of suing and being sued in its corporate name and shall be capable of holding such real and personal prop-

> erty as may be at any time either donated to or acquired by it in accordance with the provisions of this article or of which it may be rightfully possessed at the time of the passage of this article. If the court shall find against the improvement, it shall dismiss the petition and proceedings at the cost of the petitioners, and shall issue an itemized bill of all costs and expenses, in like manner and with like effect as fee bills are issued by the clerk of the circuit court."

You indicated by your letter, and we assume it to be a fact, that the duly incorporated drainage districts issued funding bonds pursuant to the provisions of Section 10829, which provides in part as follows:

> "The county court may issue bonds for and on behalf of any drainage district created under this article, for the purpose of paying the cost of the completion of improvement as located, described and set forth in the report of the viewers and engineer, as confirmed by the county court and the payment of all duly authorized expenses incident thereto. * * * *
>
> "Bonds issued hereunder shall be signed and delivered to the county treasurer and shall be sold by him, with the consent and approval of the court, at not less than 95 per cent. of the par value plus accrued interest. Said bonds may be prepared, dated and executed at one time and when delivered for value in accordance with the terms of the contract of purchase shall be held to be the obligations of the district though executed by officials other than those in office at the time of delivery for value: Provided, the officials signing them were such officials at the time the bonds were signed. Said bonds shall

show upon their face the purpose for which they are issued and the principal and interest thereof shall be payable from the proceeds of the taxes levied upon the land and other property in the drainage district as hereinbefore provided. At the times any bonds are issued, a sufficient amount of the said drainage taxes shall be set aside and appropriated to pay the principal and interest of said bonds and it shall be the duty of the county court to arrange and determine the annual installments of said taxes so as to provide funds in due time for the payment at maturity of the principal and interest of any bond authorized and issued hereunder. The proceeds of any taxes so appropriated shall be used for the purpose of paying the principal and interest of said bonds and no other. If necessary to promptly pay said bonds and the interest thereon the county court shall rearrange the schedule of annual installments made at the time the taxes were levied and shall also make such additional tax levies as are necessary and shall provide for the collection of the same at such times as will produce the required amounts. Under no circumstances shall the county court make any tax levies which will in any manner, or to any extent, impair the security of the bonds issued hereunder or the fund available for the payment of the principal and interest of the same. Bonds and coupons not paid at maturity shall bear interest at the rate of 6 per cent. per annum until paid. * * * *"

Section 10832 R. S. Mo. 1929, provides in part as follows:

"The treasurer of the county in which a drainage district is located shall

act as treasurer of the district and shall be the custodian of the funds of the district, except as otherwise provided in this article. He shall receive and receipt for all such funds and shall enter into a separate bond for each district in the county in a sum to be fixed by the court, not less than the probable amount of funds of said district to be in his possession at any one time. Such bond shall be payable to the district, shall be approved by the court, shall be signed by two or more resident freeholders in the county or by a surety company authorized to transact business in the state and shall be conditioned for the faithful and prompt disbursement according to law of all such funds as shall from time to time be in his possession. * * * *"

Section 10827 R. S. Mo. 1929, provides how your County Treasurer became possessed of this money belonging to the drainage districts which the County Court has attempted to impound and provides in part as follows:

" * * * * The 'drainage tax book' shall be the warrant and authority of the collector for making such demand and collection. The said collector shall pay over and account for all moneys collected thereon each year to the county treasurer at the time he pays over state and county taxes.* * * *"

Section 10842 R. S. Mo. 1929 provides as follows:

"When the improvements of a district have been completed and paid for, and all costs and expenses of the district paid, if there remains on hands to the credit of such district any funds not needed, the county court may prorate back to the taxpayers all or any part of such funds not needed or may use the same for maintenance in lieu of maintenance taxes."

In the case of Little River Drainage District v. Lassater, 29 S. W. (2d) 716 l. c. 719, the Supreme Court said:

> "It would seem that, in collecting taxes for drainage districts, even though such drainage district might include the entire territory of the county, county collectors would be performing no duties or functions of their offices as county collectors. In performing these duties they are agents and officers of and perform them for such districts."

Article X, Section 20 of the Missouri Constitution provides:

> "The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town or other municipal corporation, shall be applied to the purposes for which they were obtained, or to the repayment of such debt or liability, and not otherwise."

In the case of Houck v. Little River Drainage District, 248 Mo. 373, l. c. 382; 154 S. W. 739, the Supreme Court of Missouri said:

> "That the State, by the Legislature, has the power to create corporations for the purpose of reclaiming or improving swamp and overflowed land by ditches and drains and levies, in districts prescribed by it, or to be ascertained and fixed by such appropriate instrumentalities as it may provide, is no longer a question in this State. Nor is it an open question that the instrumentality so created may be invested with all the necessary power and authority to construct and maintain whatever works may be necessary to accomplish such object, and to raise the funds to pay for the same by assessment on the lands to be benefited thereby. * * * * These

> corporations, as is said in the most of the cases cited, are, when formed, public subdivisions of the State, exercising the powers granted them for the purposes of their creation, within their territorial jurisdiction, as fully, and by the same authority, as the municipal corporations of the State exercise the powers vested by their charters."

In the case of People v. Wylie, 283 Illinois 515; 119 N. E. 585, l. c. 587, under an Illinois Statute making the Treasurer of the drainage district the dispenser of drainage funds, the Court said:

> "The acts of a treasurer are ministerial in the sense that if an order is drawn in accordance with the statute from a fund from which it is payable, if there is money in the fund, he has no discretion as to payment unless he has notice that the order is not legally chargeable to the fund, but he may, and should, refuse to pay orders known by him to be drawn for claims not authorized by law or for expenditures not within the power of the board. In this case the appellant participated in the illegal act and knew that the orders were illegally drawn."

Again in Dewey v. Niagara County, 62 New York, 294, a case decided upon identical statutes as the Missouri Statutes in issue, that Court said at l. c. 297:

> "The county of Niagara, or its board of supervisors, had no direction of the work contemplated by the act or discretion in respect thereto, or the levy and collection of the assessment for the expenses. It exercised an agency under the act at the instance of the commissioners in the assessment upon individuals, the owners of lands, and the collection of the sums estimated and assessed upon the lands by the commissioners. The responsible actors were the commissioners; and the duty

> performed by the board of supervisors was in their aid, and to give effect to their work. The county treasurer, in the receipt and disbursement of the moneys collected upon that special assessment, acted not as the agent and treasurer of the county but as the fiscal agent and treasurer of the commissioners. The moneys were not county moneys or applicable to county purposes. They were not, in fact, applied or paid out for the use of the county, but upon the vouchers of the commissioners and pursuant to the statutes. The defendant, or its governing body or financial officers, had no control over or possession of the funds thus raised, or any use of or benefit from it. They money paid by the plaintiff upon the assessment by the commissioners did not go into the treasury of the county and was never, in any sense, received or appropriated by, or in the possession of the defendant. There would be evident injustice in compellin the body of the county to indemnify the plaintiff against the irregularities of the statutory commissioners appointed for a local and not for a county purpose, and in no way representing the county or acting in its behalf."

In the case of State v. Hortsman, 50 S. W. 811; 149 Mo. 290, the Supreme Court of Missouri said at l. c. 296:

> "The respondents correctly interpret the law that when they made the assessment and caused it to be levied and made the order appropriating it for the purposes for which it was levied, their duty was ended, and the duty and responsibility of disbursement was on the county treasurer."

In the case of Bayless v. Gibbs, 251 Mo. 492, l. c. 506; 158 S. W. 590, our Supreme Court said:

> "This court, in numerous cases, has repeatedly held that the county courts of the respective counties of the State are not the general agents of the counties of the State. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void."

CONCLUSION.

We find nothing in the Statutes specifically authorizing the County Court of Scott County with power to impound drainage funds in the custody of the County Treasurer acting as ex officio treasurer of the drainage district. We are of the opinion that the County Court had no actual or implied power to make such an order. The fact that these public corporations have become insolvent since incorporation, and the Reconstruction Finance Corporation is being petitioned for financial aid, does not legally justify a void order of any County Court, nor does that reason give validity to an order made beyond the power of the County Court, under the Constitution and Statutes.

These drainage districts were incorporated under the law allowing County Courts to so incorporate. They were incorporated for a definite purpose and bonds were sold to expedite the purpose. Money was assessed, levied and collected, which under our Constitution and drainage Statutes is earmarked as money to be used for retiring said funding bonds. The Legislature has provided that the County Treasurer be custodian and dispenser of this money marked with this trust and has made him the ministerial officer to perform the statutory duty prescribed, and this is true, even though his duties have no connection

with his official duties as County Treasurer, but are merely incidental to that office. The Courts have already held that the County Collector in collecting drainage tax is performing no duty of County Collector. In handling drainage money the Treasurer is bonded to the drainage corporation and not to the County. The bonds are not County bonds. When the Legislature gave him statutory power to "disburse", it is not reasonable to imply that other county officers can make legal orders controlling this disbursement directing the Treasurer to disobey the law and violate contractual obligations evidenced by outstanding drainage bonds. He is the agent for the drainage district and not the County Court.

In the absence of adjudication of the question presented, we are of the opinion that the Treasurer should disburse this money on outstanding bonds when legally presented to him for payment. He is bonded for "the faithful and prompt disbursement of all such funds as shall from time to time be in his possession." The County Court by the drainage act itself is given power to expedite prompt payment on said bonds, and after payment in full is authorized to prorate back all surplus, but by no word or implication did the Legislature authorize them to hinder payment as per their order outlined in your request.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN Jr.
(Acting) Attorney General.

SCHOOL BUSES:)
SALES TAX:) School employed bus drivers do not have to pay a 1% sales tax if such are not licensed by the Public Service Commission.

10-21

October 17, 1935.

FILED
98

Mr. D. C. Wilson,
Superintendent,
Consolidated School District No. 5,
Stoddard County,
Bell City, Missouri.

Dear Sir:

This is to acknowledge your letter as follows:

> "In our school we have employed four bus drivers at a certain salary per month regardless of the number of children they haul, and they furnish their own buses.
>
> "Are these men subject to the recent one cent sales tax on their work?"

The Sales Tax law passed by the 1935 Legislature makes provision for charging a tax of one per cent. on amounts paid for tickets, fares and services to persons operating buses licensed by the Public Service Commission of Missouri. Section 2, subdivision "(h)", Laws of Missouri, 1935, pages 415-416, provides in part as follows:

> "From and after the effective date of this Act and up to and including December 31, 1937, there shall be and is hereby levied and imposed and there shall be collected and paid:
>
> * * * * *
>
> "(h) A tax equivalent to one (1) per cent. of the amount paid or

charged for tickets, fares and services by every person operating a railroad, sleeping car, dining car, express car, and such buses and trucks as are licensed by the Public Service Commission of Missouri, engaged in the transportation of persons or freight for hire."

It is to be noted that a bus licensed by the Public Service Commission of Missouri, engaged in the transportation of persons or freight for hire must pay one per cent. sales tax. However, if a person was engaged in transportation of persons or freight for hire and not licensed by the Public Service Commission, then there would be no authority for exacting the one per cent. tax.

From the foregoing it is our opinion that your school employed bus drivers do not have to pay a one per cent. sales tax if such are not licensed by the Public Service Commission of Missouri. However, if such are licensed by the Public Service Commission, then the tax would have to be paid.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

JLH:EG

APPROVED:

ROY McKITTRICK
Attorney-General

ROAD DISTRICTS: (1) May purchase right-of-way and deed to state.

(2) Those organized under Article X of Chapter 42, R.S. Mo. 1929, may not borrow money for such purpose except after petition or election.

10-31

October 29, 1935.

FILED
98

Wilkins & Wilkins
Attorneys At Law
305½ Wilkins Building
Louisiana, Missouri

Attention of Mr. F.D. Wilkins

Gentlemen:

Your recent communication requesting an opinion of this office has been received. Your request is as follows:

> "There is in Pike County, Missouri, what is known as the Clarksville Eight-mile Road District of Pike County, Missouri. Its officers are attempting to borrow money for the purpose of paying for the right-of-way of Highway No. 79, which goes through their district. What I want to know is, have these officers of this road district any right to buy this right-of-way and give it to the state. Secondly, have they any right to borrow money and pledge the faith and credit of the district with which to purchase this right-of-way for this road which is to be deeded to the State?"

It would appear from the name of the Road District that it is organized and existing by virtue of Article X of Chapter 42, Revised Statutes of Missouri 1929, and shall base the statements herein made upon such a premise. In considering your problems we shall not pass on the constitutionality of the statutes referred to.

I.

ROAD DISTRICT MAY BUY RIGHT-OF-WAY AND CONVEY TO STATE FOR CONSTRUCTION OF STATE HIGHWAYS.

Section 8131 R. S. Missouri 1929 is a part and portion of the State Highway Act and reads in part as follows:

> "Any civil subdivision as defined in this article shall have the power, right and authority, through its proper officers, to contribute out of funds available for road purposes all or a part of the funds necessary for the purchase of rights-of-way for state highways, and convey such rights-of-way, or any other land, to the state of Missouri to be placed under the supervision, management and control of the state highway commission for the construction and maintenance thereupon of state highways and bridges. * * * *"

The term "civil subdivision" referred to in the foregoing section is defined in the following section to mean

> "a county, township, road district, or other political subdivision of the state or quasi public corporation having legal jurisdiction of the construction and maintenance of public roads."

It therefore appears that the Clarksville Eight-mile Road District of Pike County is included within these sections and is thereby authorized to purchase rights-of-way for state highways and convey the same to the state.

CONCLUSION.

It is therefore the opinion of this office that the Clarksville Eight-mile Road District of Pike County, by and through its proper officers, may purchase rights-of-way for state highways and bridges and convey the same to the State, in the same manner as they would expend other funds of the District available for road purposes.

II.

OFFICERS OF ROAD DISTRICT MAY NOT BORROW MONEY TO PURCHASE RIGHTS-OF-WAY.

We have heretofore referred to Section 8131 R. S. Missouri 1929, as authorizing road districts to acquire rights-of-way and deed the same to the state for use as a state highway. This Section further provides as follows:

> "Funds may be raised for the purpose of this article in such manner and such amounts as may be provided by law for other road purposes in such civil subdivision;* * * **

The use of the word "article" is confusing as to a proper interpretation of this clause, as the entire article applies to the State Highway System rather than to the purchase of rights-of-way by civil subdivisions. This Section was passed by the 58th General Assembly as House Bill 610 and is found at page 226 Laws of Missouri 1929. By referring to the original enactment we find that the word "article" does not appear in the original enactment, but it reads

> "funds may be raised for the purpose of this act in such manner and such amounts as may be provided by law for other road purposes in such civil subdivision;* * **

It therefore appears that it was the intent to authorize the civil subdivisions to raise funds for the purpose of acquiring rights-of-way for state highways to be deeded to the State in the same manner that the civil subdivisions raise other funds for road purposes.

By referring to Article X of Chapter 42 Revised Statutes of Missouri 1929, it will be found that the commissioners of the road district are authorized to issue road and bridge bonds after an election is held at which two-thirds of the voters voting at the election favor the issuance of the bonds. Section 8068 R. S. Missouri 1929. It will also be found that upon petition of certain owners a public road or part of a public road within the district may be permanently improved and the cost of the improvement assessed against the lands in the district. Section 8069. In the event that the special tax bills issued under this plan are unpaid at the expiration of thirty days

> "the commissioners may borrow money not exceeding the aggregate amount of such special tax bills as are then unpaid, and at a rate of interest not exceeding eight per cent per annum and as such unpaid special tax bills are paid shall draw warrants on the county treasurer for the amount of such payment and pay whatever may be so borrowed with interest thereon."

Section 8072. It is provided by Section 8073 that special assessment bonds may be issued covering the cost of making the improvement on the road or part of the road in the district under certain circumstances.

The foregoing provisions are the only ones authorizing the borrowing of money and the pledging of the credit of the district to secure the payment of the same. No authority appears to have been granted to the commissioners of the road district to borrow money for any purpose. At least there is no specific grant of such authority.

We are cognizant of the general rule that an officerhas by implication such powers as are necessary for the due and efficient exercise of those powers expressly granted or such powers as may be fairly implied therefrom. 46 Corpus Juris 1032, Section 287. Without going into the question and without determining whether or not an officer has implied authority to borrow money on the credit of the corporation he serves, so as to enable him to fulfill the duties imposed upon him by law, we believe it certain that no such implied power resides in the commissioners of road districts established under the provisions of Article II of Chapter 42. Section 8065 sets forth the general powers and duties of such commissioner and provides in part as follows:

> "Said commissioner shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all power, right and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition <u>as the means at their command will permit</u>" * * * *

By the inclusion of the underlined phrase it is certain that the legislature contemplated that the commissioners should only expend such funds as were subject to disbursement. The commissioners are not to extend their activity so as to incur debts which can not be paid but are to keep the road system of the county in the best condition possible with the funds which are available for that purpose. So in the instant case, by reading Section 8131 into Section 8067, the Board of Commissioners may levy a direct property tax for the purpose of acquiring rights-of-way to be conveyed to the State for state highway purposes, yet there is no authority, expressed or implied, for the commissioners to pledge the credit of the district to secure funds borrowed for such a purpose.

CONCLUSION.

It is therefore the opinion of this office that the officers of the Clarksville Eight-Mile Road District of Pike County, have no authority to borrow money and pledge the faith and credit of the district for the purchase of rights of way to be conveyed to the State for use of the state highway without complying with the provisions of Sections 8068, 8072 or 8073 R. S. Missouri 1929.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM

TAXATION; Tangible personal property owned by building loan association is taxable to said associat

November 5, 1935.

11-6

FILED
98

Honorable Andy W. Wilcox
Chairman
State Tax Commission
Jefferson City, Missouri

Dear Mr. Wilcox:

This is to acknowledge your letter dated October 30, 1935, as follows:

> "The Farmers Home Loan Building and Loan Association of Nevada, Missouri, several years ago foreclosed on the real estate and furniture and fixtures of the Prince Edwards Apartment in Jefferson City, and since that time the property has been assessed to this corporation. Recently the Collector of Cole County received payment for the real estate only, the Association stating that under the law they were exempt from the personal property in this Apartment, eventho the title is held in this Association.
>
> "This Department would like to have an opinion "As to whether or not this personal property is taxable to the Association."

In answer to your specific question "As to whether or not this personal property is taxable to the Association," it is our opinion that said personal property is not exempt from taxation and is taxable to the Association.

The Constitution of Missouri, Article X, Section 6, relates to "Property exempt from taxation," and Section 9743, R. S. Mo. 1929, enacted in pursuance to said constitutional provision, provides as follows:

> "The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; third, lands and other property belonging to this state; fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; fifth, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

It is to be noted that nothing is found therein that exempts from taxation tangible personal property owned by a building and loan association. Thus, as stated above, in our opinion, tangible personal property owned by a building and loan association is taxable to that association.

It might be that the Farmers Home Loan Building and Loan Association objects to paying taxes on the personal property in Cole County in view of Section 9745, R. S. Mo., 1929, contending that said taxes should be paid at their domicile, which is Nevada, Vernon County, Missouri. However, in view of your question, we do not assume to write on a subject not inquired about.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

CIRCUIT CLERK: Circuit Clerk is not entitled to retain fees earned under the provisions of Section 916, R. S. Mo. 1929, in addition to the maximum amount of fees allowed him under Section 11786, Laws of Mo. 1933.

January 24, 1935.

FILED

Hon. O. O. Wyrick
Clerk of the Circuit Court
and
Ex-Officio Recorder
Miller County
Tuscumbia, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of January 10th, 1935, requesting an opinion which reads as follows:

> "Under Section 916 of the Revised Statutes of Missouri the party applying for a change of venue must pay all costs and expenses attending the change of venue and the said expense shall not be taxed as costs. The Clerk in making up the transcript would collect his fee for this service. Since the fee is not to be taxed as costs would the Clerk have to account for such fee or would he be allowed to retain this fee in addition to the maximum amount of fees allowed to be retained by law?
>
> "I would appreciate an early opinion on this matter."

Section 916, R. S. Mo., 1929, provides:

> "All the costs and expenses attending any such change of venue, made on the application of either party, shall be taxed against and paid by the petitioner, and shall not be

> taxed in the costs of the suit; Provided, however, that when the change of venue is sought on the grounds of the prejudice of the inhabitants of the county, and the application is controverted by the opposing party, the costs incurred by the opposing party in hearing and determining said application shall be taxed against and paid by the losing party to said application."

Section 11786, Laws of Missouri, 1933, page 369, reads in part as follows:

> "The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. ****; provided further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

Section 11814, Laws of Missouri, 1933, page 372, provides in part:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices under the provisions of sections 11785, 11787, and 11788, or of any other statute, except such fees as are chargeable to the county, and if such fees be not paid when due by the party liable for the payment, it shall be the duty of the clerk to forthwith issue a fee bill for same

> and place such fee bill in the hands of the sheriff of the proper county who shall forthwith levy same on the persons liable therefor, or their sureties, as authorized and provided by section 11776. **** And quarterly such clerk shall pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law. It shall be the duty of the county court to examine such quarterly report and to require of the prosecuting attorney to enforce payment of all fees therein shown to be unpaid in any manner now or hereafter provided by law, and, to that end, such prosecuting attorney shall have authority, at any time, to direct the issuance of any execution or fee bill for costs in any case in which any costs accruing to the county are unpaid."

Under the provisions of Section 11786, supra, Circuit Clerks are allowed to retain fees not to exceed the amount specified therein and in addition thereto all fees earned by them in cases of change of venue from other counties. Under the provisions of Section 11814, supra, it is made the duty of the Clerks of Courts of Record to charge and collect in all cases every fee allowed to their offices under the provisions of Sections 11785, 11786 and 11788, or of any other statute, except such fees as are chargeable to the county, and it is made the further duty of said clerks to pay into the county treasury the amount of any fees allowed in excess of the sums permitted to be retained.

In our opinion, the fees of the Circuit Clerk for making a transcript of record and proceedings in a case where a change of venue had been awarded are fees accruing to his office. The fact that fees are taxed against the petitioner and not as costs of the suit, is immaterial. We

are therefore of the opinion that a Clerk of the Circuit Court is not allowed to retain fees earned by him under the provisions of Section 916, supra, in addition to the maximum amount of fees allowed to be retained under the provisions of Section 11786, Laws of Missouri, 1933, page 369.

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

JET/JLH:j

LOTTERIES: Specifically prohibited in the State of Missouri by Section 10, Article XIV of the Constitution.

8-16

August 15, 1935

FILED
99

Paul C. Wolman, Chairman
Veterans of Foreign Wars of
the United States
Mercantile Trust Building
Baltimore, Maryland

Dear Sir:

This Department is in receipt of your letter of August 13, requesting an opinion as to the following state of facts:

> "Will you please advise me whether the laws of your State permit the sale of lottery tickets of the sweepstake variety? If they do not would you kindly inform me as to the section of the law prohibiting their sale?
>
> Assuring you of my appreciation for your prompt reply, at the above address, I am"

Section 10 of Article XIV of the Constitution of the State of Missouri, provides:

> "The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof

or supplemental thereto, are hereby avoided."

In the case of State v. Becker 248 Mo. 555, the Supreme Court of this State said:

"It is not denied that the term 'lottery' is, as interpreted by the courts of other States, broad enough to include every punishable plan,scheme or device whereby anything of value is disposed of by lot or chance, and it is not contended there yet has been devised nor that there could be devised any scheme in the nature of a lottery that the term lottery is not, as thus interpreted, broad enough to cover. It is said, however, the framers of the Constitution and the statute must have had a less comprehensive meaning in mind, otherwise they are convicted of employing useless words, a conclusion not favored. It is to be observed, however, that at the time the Constitution was framed the meaning of the term 'lottery' was not so well settled as now and there was even then a contention being made in our courts that there was a distinction between a 'regular' lottery and other devices similar in respect to the elements which rendered them culpable, but not conducted with the same formalities. State v. Hindman, 4 Mo. App. l. c. 582.) Doubtless to meet such a conception the framers of the Constitution (Sec. 10, art. 14) used the phrase 'scheme in the nature of a lottery.' The courts of this State had not then given to the word 'lottery' the broad definition (State v. Mumford,73 Mo. 647) subsequently approved and it seems caution rather than necessity dictated the employment of the additional words,'scheme in the nature of a lottery.' "

In the case of State v. Emerson 318 Mo. 633, Judge Walker said:

"The people in framing the State Constitution (Sec.10,Art.XIV) declared their disapproval of the establishing of lotteries or schemes of chance in the nature of lotteries, by inhibiting the General Assembly from giving legislative recognition to such schemes. In the discussion and interpretation of this constitutional provision we have held that a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. (State ex rel. v.Hughes, supra, l. c. 534.) In State v. Becker, supra, l. c. 560, in line with our former rulings and those of courts of last resort elsewhere, a more comprehensive definition is given to the word and a lottery or a scheme in the nature of a lottery is held to include every punishable plan, scheme or device whereby anything of value is disposed of by lot or chance.

The crime having been properly charged,the proof of the existence of the elements necessary to establish it are held to be consideration, chance and a prize."

CONCLUSION

In view of the foregoing, it is the opinion of this Department that by reason of Section 10, Article XIV, of the Constitution of the State of Missouri, the establishing of lotteries or schemes of chance in the nature of lotteries, is specifically prohibited in this State.

Respectfully submitted,

JOHN W. HOFFMAN,Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

CIRCUIT COURT REPORTERS - Salary determined by population as ascertained by Sec. 11808, R. S. Mo. 1929 as amended;

November 8, 1935.

11-18

FILED
99

Honorable Edgar B. Woolfolk
Circuit Judge
Troy, Missouri

Dear Judge Woolfolk:

This department is in receipt of your request for an opinion relative to the salary payable to the court reporter of your circuit for the years 1932, 1933 and 1934, and which request in part is as follows:

> "There is a matter of controversy arising by reason of auditors' report recently made for Lincoln County, Missouri, as affecting the office of Court Reporter for Lincoln County, Missouri. The audit shows according to the opinion of the gentlemen auditing the account of Court Reporter for Lincoln County, that she has been overpaid (in his opinion) the sum of $52.46 per year for the years 1932, 1933 and 1934.
>
> "This audit comes as a matter of surprise, in view of the fact that within the last few years all the various counties in this Circuit have been audited; St. Charles in 1935.
>
> "The law respecting the compensation of court reporters has been on our statute books for many years. I have been allowing court re-

porters compensation for this circuit on $2,500.00 basis, to be apportioned among the several counties, and a careful examination of the law seems to force the conclusion that the compensation of Court Reporters of the class of the 35th Circuit should be $3,000.00. It seems a clear proportion to me that their salary is based on five times the vote cast at the last general election of 1930, which would place the Circuit in the Class of $60,000.00, rather than the last decennial census. In this event the Court reporters for this Circuit are underpaid. The appointment of the Reporters in this Circuit was made Jan. 1, 1931, for the six year period.

" I much prefer, if this be a plain proposition, not to have any litigation respecting this matter. My Court Reporter for Lincoln County, through kindness of certain members of the bar, and with their aid, prepared a collation of authorities and history of the laws enacted concerning the subject matter involved, which she hands me, and which I enclose herewith for your convenience in reaching a conclusion of this matter."

The compensation of the court reporter for the years involved is fixed by the provisions of Section 11720, R. S. Mo. 1929, which, in part, provides as follows:

"Court reporter shall receive salary as follows: In cities, or counties which now have and such as may hereafter have a

> population of sixty thousand or more, an annual salary of three thousand dollars, * * In counties having a population of forty-five thousand and less than sixty thousand inhabitants, an annual salary of two thousand five hundred dollars, * * * Provided further, that where a judicial circuit is composed of more than one county, such salary shall be divided among the counties and be paid by them proportional as the population of such counties bear to the entire population of the circuit; * "

It is apparent that the term "counties," used in connection with the population figures, in the above statute, actually means circuits. This appears to have been the interpretation placed upon the above statute in State ex rel. Geaslin v. Walker (1924), 257 S. W. 470, and followed in Graves v. Walker, 23 S. W. (2d) 1107.

Therefore, from the above and foregoing, it is apparent that the salary of a court reporter is determined by the total population of the circuit, and when a circuit is composed of two or more counties, the total population of all the counties in the circuit determines the salary of the court reporter under Section 11720, R. S. Mo. 1929.

Section 11720, R. S. Mo. 1929 refers to the compensation of a court reporter as being "an annual salary." The term "annual salary" means nothing more than compensation for a full twelve months year; neither a monthly salary nor a calendar year's salary, but a salary based upon a full year immediately following the beginning of a particular term of office. Such is the holding in the Linville case (State ex rel. v. Linville, 300 S. W. 1066,) and followed by Sims v. Clinton County, 8 S. W. (2d) 69.

The term "annual salary" does not mean that the salary of a reporter is fixed at the time

of the appointment for a period of six years. A county, during a term of office, may pass from one population class to another, thereby changing the amount of compensation. State v. Hamilton, 260 S. W. 466. Since under the express terms of Section 11720, R. S. Mo. 1929, the salary of a court reporter is paid in proportion to the county's population, every county in the circuit contributing toward the total salary according to its population, any change in the population of one county in a circuit would affect the amount of compensation the court reporter would receive from that county. Likewise, the population of a circuit may increase or decrease during the court reporter's term of six years.

Section 11808, R. S. Mo. 1929 fixes the method for determining the population of counties for the purpose of paying county officers at five times the highest number of votes cast at the last previous general election. This act was amended Laws Mo. 1933, p. 369 by fixing the population of counties by the last decennial census.

In State ex rel. v. Walker, 257 S.W. 470, the question of what method was to be used in determining the population of a circuit was not directly passed upon, but the court assumed that the proper method for determining the population of a circuit was the total actual population of the counties comprising that circuit. The Walker case was decided by the Supreme Court en banc.

In State ex rel. v. Hoffman, decided by the Kansas City Court of Appeals (1927), 294 S. W. 429, it was held that the official court reporter in a circuit consisting of one county, was a county officer for the purpose of fixing his salary.

#5 - Honorable Edgar B. Woolfolk

There is no conflict between the Geaslin and the Rucker cases. The sole question in the Geaslin case was: Is the amount of salary of court reporter governed by the total population of the circuit, or by the most populus county in the circuit? The court held it was governed by the total population of the entire circuit. What is now Section 11808, R. S. Mo. 1929 was not mentioned in said opinion, and therefore could not have been construed. The court, in support of its decision, concretely applied the ruling therein to the various circuits to reflect the results of their work, and in so doing merely took judicial notice of the census figures of the various counties.

There is no intimation in the opinion of how the population of a circuit is to be determined. The court's holding is limited to saying that the population of the circuit governs the amount of salary, that, "and nothing more." Such was the construction placed upon the court's opinion by the Kansas City Court of Appeals in the Rucker case. State ex rel. Rucker v. Hoffman, 249 S. W. 429. The Rucker case decided only one question, namely, the basis for calculating the population. The question centered around whether or not the census was to be used as the population, or whether the population was to be determined by multiplying the vote by five, as was provided in Section 11016, R. S. Mo. 1919 (Section 11808, R. S. Mo. 1929). The court said, l.c. 431:

> "The prosecuting attorney, however, contends that this case is controlled by State ex rel. Geaslin v. Walker, 302 Mo. 116, 257 S. W. 470, and that there the Supreme Court held the federal census the proper basis upon which to claculate population. The question here was not before the court in that case. All the Supreme Court held was that:

> 'Where a judicial circuit is composed of more than one county the salary of a reporter shall be divided among the counties and be paid by them proportional as the population of such counties bear to the entire population of the circuit. And that in a judicial circuit composed of more than one county the salary of the court reporter is governed by the population of the circuit and not by the population of the most populous county therein.'

No other question was before the court, and no other question was decided. The basis of calculation was not involved, although both sides apparently submitted the question on the theory that the federal census controlled. This case is not in any sense an authority for the appellant in this case."

In the Rucker case, the court pointed out that a probation officer appointed by the circuit judge, and paid by the county, was a county officer.

In Hasting v. Jasper County, 232 S. W. 700, l.c. 701, the court said:

> "Our conclusion, from the foregoing, is that probation officers are public officers whose duties are created by law, are to be wholly performed within the limits of a county and for the benefit of the people of that county, and whose salaries are

> paid by the county court from the funds of such counties, and appellant is therefore a county officer (citing cases), as these words are used in section 11016, R. S. Mo. 1919, * * "

Section 11016, R. S. Mo. 1919 provided for the determination of the population for paying "county officers" upon a basis determined by five times the vote.

We may easily distinguish the cases, State ex rel. v. Imel, 242 Mo. 293, Greene County v. Lydy, 263 Mo. 77, wherein the courts have decided that the Probate Judge is not a county officer, from the present controversy, for the reason that the Probate Judge is a part and parcel of the judiciary, so created by Article VI of the Missouri Constitution, while county officers generally are created under the provisions of Article IX of the Constitution relating to counties, cities and towns.

The court reporter performs duties in the county, is paid from the county treasury, and the amount of such compensation is determined by the ratio the population of the county bears to the entire population of the circuit. The circuit court reporter is compensated as other county officers, and for the purpose of determining the population of the county, is a "county officer" within the meaning of Section 11808, R. S. Mo. 1929 and as amended.

The only provision made in the county budget act, designed to pay the full operating costs of the county, for the payment of salaries is in Class 4 (Laws Mo. 1933, p. 341), wherein the county court is required to set aside an amount sufficient to pay the salaries of "all county officers." The court reporter comes within this class and is paid from this class on the theory

he is a county officer. The fact that a court reporter may perform similar duties in other counties of the circuit does not destroy his classification of being a "county officer."

While the prosecuting attorney is a county officer, some duties are imposed upon him which are to be performed in other counties. On changes of venue, the prosecuting attorney of one county prosecutes for the state in the county to which the case is sent; the reason being that the Legislature so decreed it. The performance of this decreed law in other counties does not destroy his classification of being a county officer. The same holds true of the circuit court reporter.

The Rucker case, supra, having specifically decided the question that a court reporter is a county officer, the duty of this office is to follow the law as written.

Having thus far decided that a court reporter is a "county officer" within the meaning of Section 11808, R. S. Mo. 1929 and as amended, we next pass to the question: What effect did the repeal of Section 11808, R. S. Mo. 1929 and the enactment of a new statute by the 1933 Legislature, have upon the salaries of the court reporter? It may be urged that under the awkward wording of the Linville case, supra, that the salary of the court reporter herein, at the time of his appointment in 1931, was fixed for the full six year agreement. Such is not the holding of the Linville case. Such a decision would lay down in this State a rule of law that a public officer, at the beginning of his term of office, acquires a vested right in the amount of compensation paid by that office which the Legislature would be without authority to change during his term.

In State ex rel. McKittrick v. Bair, 63 S. W. (2d) 64, it was held that a public officer acquires no vested right to compensation fees for his office, but that such compensation is subject to legislative control. Therefore, when the Legislature repealed Section 11808, R. S. Mo. 1929, Laws

Mo. 1933, p. 370, and substituted the decennial census in lieu of the five times the vote basis for determining the population of a county, the Legislature decreed a new basis for determining the population of counties for the purpose of paying salaries to county officers.

The Legislature of 1935, Laws Mo. 1935, p. 223, passed Section 11720-A relating to additional salaries for court reporters in circuits having a population of less than 45,000. Since a construction of that section is not involved herein, we pass the same without comment.

CONCLUSION.

It is, therefore, the opinion of this office that a court reporter is a "county officer," within the meaning of Section 11808, R. S. Mo. 1929, as amended; that the population of a circuit for the purpose of determining the amount of compensation a court reporter is entitled to receive, is determined by Section 11808, R. S. Mo. 1929 before and after the 1933 amendment; that the population of the county for the purpose of paying the court reporter prior to July 24, 1933 was determined by multiplying the vote by five; that since said date, the population of the county for the purpose of determining the salary of the court reporter is determined by the last decennial census.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

ALL APPLICANTS FOR OLD AGE ASSISTANCE MUST HAVE RESIDED WITHIN THIS STATE FOR FIVE YEARS OR MORE, WITHIN THE NINE YEARS IMMEDIATELY PRECEDING THE FILING OF THE APPLICATION FOR ASSISTANCE. ALSO MUST HAVE BEEN A RESIDENT OF THE STATE FOR ONE YEAR NEXT PRECEDING THE FILING OF SAID APPLICATION FOR ASSISTANCE.

n-21

November 21, 1935

FILED

Mrs. Fannie Wooldridge, Secretary
Old Age Assistance Board
Wentzville, Missouri

Dear Madam:

We acknowledge receipt of your letter of November 12, as follows:

> "The Statute providing for Old Age Assistance provides that as a condition of eligibility the applicant must have resided in the State of Missouri, one whole year next before the filing of the application; it further provides that applicant must have lived in the State at least five years, during the nine years immediately preceding the date of application. In view of the fact that the purpose of the law is to aid bonafide residents of the state.
>
> The question has arisen in our mind as to whether or not the proviso that applicant shall live in the state five years out of the nine years immediately preceding the date of the application is for the purpose of preventing an influx of eligibility, in the first instance.

> We are of the opinion that this question is going to be raised, by appeal to the Circuit Court in our County, provided the board rules that persons who have been bonafide residents of the State for one year next before the date of the application are also required to have lived in the state five years out of the next preceding the date of application; in other words, it is the contention of some that the five years proviso only applies to persons coming into the state after the Statute was enacted. If it is possible for us to have your opinion on this point, we shall appreciate it very much."

The Act in question is entitled, "PENSIONS AND RETIREMENT FUNDS: Providing for Assistance for Residents of the State over the age of 70 years under certain conditions and requirements."

The purpose of this Act, as stated under the above title, on page 308 Laws of Missouri 1935, is as follows:

> "AN ACT to provide for, regulate and fix the conditions and requirements for assistance for residents of the State over the age of 70 years; etc."

As stated by the Court in Betz v. Kansas City Southern Railway Co. 287 S.W. 445, 314 Mo. 390, Judge Ragland, speaking for this court in banc, in Grier v. Railway Co. 286 Mo. l.c. 534, said,

> "The primary rule for the interpretation of statutes is that the legislative intention is to be

> ascertained by means of the words it has used. All other rules are incidental and mere aids to be invoked when the meaning is clouded. When the language is not only plain, but admits of but one meaning, these auxiliary rules have no office to fill."

Section 4 of the Act provides:

> "Subject to the provisions and under the restrictions contained in this Act, every aged person who has no income or an income inadequate to provide a reasonable subsistence compatible with decency and health, but in any event not exceeding $30.00 per month, shall, while residing in the State, be entitled to assistance in old age. Provided, that where a husband and wife, who are living together, are both entitled to assistance under the provisions of this act, the maximum amount to be received by both shall not be more than $45.00 per month."

From reading the above provision it is clearly stated that every aged person subject to the provisions of this Act, while residing in this State, shall be entitled to assistance. This provision does not exclude aged persons from the provisions of this Act who have, for any reason, come into this State having a good intention to become residents of the State of Missouri who later qualify for the old age pension. This would work a great injury or hardship upon such people and be against public policy; furthermore, it would, in many instances, prevent them from migrating to this State. No doubt the requirements as to the time the applicant must be a resident of the State and reside herein prior to the filing of the application, is so included in this Act for the purpose of preventing many persons from other

states moving here for the sole purpose of obtaining the old age pension. However, there is no distinction made in the whole of the Act as to people now residents of Missouri, and to anyone who may later become a resident of this State. It is a fundamental rule of construction as held in State ex rel. Gass v. Gordon 266 Mo. 394, that the statute should receive a sensible construction such as will effect the legislative intention, and, if possible, so as to avoid an unjust and absurd conclusion.

Section 6 of the Act provides,

> "Old age assistance may be granted only to an applicant who, has attained the age of 70 years or upwards, is incapacitated from earning a livelihood and is without adequate means of support, is a citizen of the United States, has resided in the State for 5 years or more within the 9 years immediately preceding application for assistance and for the one year next preceding the date of application for assistance (absence in the service of the State or of the United States shall not be deemed to interrupt residence in the state if domicile be not acquired outside of the state), is not at the date of making application or of receiving aid an inmate of any prison, jail, insane asylum, or any other public reform or correctional institution, and has no child or other person responsible under the law of this state and found by the state board or by the county board able to support him."

The above section provides that an applicant to qualify must have resided in this State for five years or more within the nine years immediately preceding application for assistance, and one year next preceding the date of application for assistance.

This section does not require the applicant to have resided in this State prior to the enactment of this law. If this were true then it would follow that no one later becoming a resident of Missouri could thereby qualify. However, the law refers to the time applicant has resided in the State prior to the filing of his application in every instance.

Section 9 of the Act provides,

> "An applicant for assistance shall deliver his claim, in writing, to the county board, in the manner and form prescribed by the State Board. All statements in the application shall be sworn to or affirmed by the applicant, setting forth that all facts are true in every material point."

This section of the Act provides the manner and form in which applicant is to deliver the application.

Section 14 of the Act provides,

> "The assistance, if allowed, shall commence on the first day of the calendar month, following that on which the petition was received by the county board."

The above section merely states when such assistance shall commence, if same shall be allowed. Nowhere embodied in this Act is there any stipulation as to what time these applications shall be filed. We conclude that same may be filed any time after the effective date of the act.

CONCLUSION

Therefore, from the foregoing, we are of the opinion that the old age assistance law clearly and expressly provides all applicants for such pension must have resided within this State for five years or more, within the nine years immediately preceding the filing of application for assistance, and must have been residents of this State for one year next preceding the filing of applications for assistance.

Respectfully submitted,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

JET/ ARH: LC

COUNTY COURTS: County Court cannot relieve itself of the duties imposed by statute, relative to the poor, by delegating its duties to a board established by it.

12/23

December 23, 1935.

FILED
99

Honorable John J. Wolfe
Associate Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Mr. Wolfe:

This is to acknowledge your letter as follows:

"The League of Women Voters and other civic organizations in St. Louis County prevailed upon the Children's Bureau of the U. S. Department of Labor, Washington, D. C., to conduct a survey of child welfare services in St. Louis County, and in August of this year the Bureau of the Department of Labor made its report.

"One of the parts of the report contained the following findings:

"'Poor relief.

The statutes make the county court responsible for the administration of relief to the poor and in St. Louis County the court itself dispensed such relief. The court did not employ a staff to assist it in this work hence the investigation of such cases consisted only of the inquiry in open court and subsequent supervision was not given.'

"The inaccuracy and room for error in procedure administering monetary aid in

the above manner is, of course, obvious to any one familiar with the pauper situation of a county of this size and in the summary of recommendations, the Children's Bureau makes the following recommendation respecting public welfare:

"'1. If legal authority for the establishment of a county department of public welfare can be obtained such a department should be set up with an advisory board of citizens appointed by the county court and containing one or more members of the county court. (An attorney general's ruling might make this possible if such a ruling could authorize the county court to delegate certain of its functions to properly appointed agents.)

" 'A qualified director and assistants in sufficient number to carry on the work of the department should be appointed by the county court on the recommendation of the advisory board on the basis of training and experience.'

"I should like very much to have an opinion from you as to whether or not the court could legally set up a department of Public Welfare in accordance with the above recommendation, and if you can give the matter of this opinion some preference I should like to be able to take the matter up shortly backed by your opinion, so that some intelligent handling of the welfare situation of the county can be obtained."

The narrow question presented in your inquiry for determination relates to the right of the county court to delegate its duties to a Department of Public Welfare, to be established by the county court.

It is our opinion that the county court cannot establish a Department of Public Welfare for the following

reasons: (1) There is no statutory authority for the establishment of such; (2) that if established there would be no provision for the paying of expenses of said department; (3) that the county court must perform the duties prescribed by statute, in person, and not delegate same to other persons.

Article 4, Chapter 90, R. S. Mo. 1929, relates to "County Poor, Support Of"; and Section 12950 provides as follows:

> "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 12953, R. S. Mo., 1929, provides as follows:

> "The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any justice of the peace of the county in which any person entitled to the benefit of the provisions of this article resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

Section 12954, R. S. Mo. 1929, provides as follows:

> "The county court shall at all times use its discretion and grant relief to all persons, without regard to residence, who may require its assistance."

A reading of the above sections pertaining to the support of the county poor, shows that the duty rests upon

the county court to provide relief and maintenance and support of poor persons when it is a direct relief. The county court has the right, however, when it establishes and maintains a poorhouse for the relief of poor persons to make rules and orders for the governing of said poorhouse thus established. Nowhere in said article is it provided that the county court may set up a department or office for the purpose of paying direct relief or the giving of assistance to poor persons. Absent such statutory authority it is our opinion that the county court cannot do so. If the county court establishes a board of Public Welfare, then it is our further opinion that there is no statutory authority for the paying of expenses or salary of said board.

The paramount reason we are of the opinion that the county court cannot establish a department of public welfare is because the duties and powers imposed upon the county court for the direct relief of the poor involve a trust and confidence, judgment and discretion, and thus cannot be delegated.

In the Board of Commissioners of Excise of Delaware County v. Sackrider, 35 N. Y. Reports, p. 154, l. c. 156 et seq., the court said:

> "* * * It is not a case where the commissioners employ an attorney to bring particular suits, they themselves having first considered the question as to the propriety of the suits; but the attorney is left to act in the place of the board of commissioners and determine for them what suits shall be brought. The commissioners substitute the attorney in their place and stead, and undertake to depute to him all their authority, so far as they have authority, to determine any question as to the propriety of bringing suits against individuals for violation of the excise laws.
>
> "In my opinion, the commissioners of excise are clothed with something more than a mere

> naked authority; they are intrusted with an office which requires discretion, and are clothed with a trust which is to be exercised for the public good. Etc.
>
> * * * * * *
>
> "The duties of the office involve a trust and confidence which they cannot assign to a stranger. (Cases cited)
>
> * * * * * *
>
> "The law having cast the duty upon the board of commissioners of excise in such a case, I do not think it can be or should be deputed to third persons. Etc.
>
> * * * * * * "

In Perry and Finehout, Overseers of the Poor of the Town of Saratoga Springs v. Tynen, 22 Barbour's Sup. Ct. Reports (N. Y.) 137, l. c. 140, the court said:

> "* * * In cases of the delegation of a public authority to three or more persons, the authority conferred may be exercised and performed by a majority of the whole number. If the act to be done by virtue of such public authority requires the exercise of discretion and judgment--in other words, if it is a judicial act--the persons to whom the authority is delegated must meet and confer together, and be present when the act is performed; or at least a majority must meet, confer, and be present, after

all have been notified to attend. * *"

See also, Commonwealth v. Armstrong, 4 Pa. County, 5 and 6; Ruggles et al. v. Collier et al., 43 Mo. 353 l. c. 365.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

JLH:EG

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General

I. INTOXICATING LIQUOR: (1) Information. (2) Sell intoxicating liquor without a license. (3) Proof that a retailer has no license. (4) Principal's liability to act of agent.

II. LEGAL ETHICS.

February 19, 1935.

FILED
100

Hon. H. Parker York
Prosecuting Attorney
Schuyler County
Lancaster, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date, requesting an opinion from this office, which reads as follows:

> "In as much as there seem to be few, if any, decisions by appellate courts under the new liquor control act (since repeal) I would appreciate it if your office would send me approved forms or citations where they may be found, of informations that could be used in prosecuting persons for selling at retail liquor without a license and for possessing liquor not stamped or manufactured as provided by law. Will you also tell me the customary manner of proving that a retailer does not possess a State license for selling liquor (whisky, etc.) by the package. I have a witness who will testify that he purchased alcohol from an employee in a road house. The owner was present but not in the room at the time. Under the new act could I stick the owner for the sale, he had no license to sell anything but 3.2 beer. If I could not stick him for the sale could any other charge be brought? Any information you can give me along this line will be deeply appreciated as I would like to stop bootlegging around here if there is any way to do it.

"I would also like your opinion on a matter of legal ethics. Before taking office as Prosecuting Attorney I was appointed by the court to defend a man charged with stealing sheep. There was also another attorney appointed to assist me. The Def. was found guilty and we appealed. Now that I am Prosecuting Attorney would it be wrong for me to follow up this appeal on behalf of the defendant, or should I withdraw from the case?"

I.

Information for selling intoxicating liquor without a license.

The appellate courts of this State have not passed on any information drawn under the provisions of the new "Liquor Control Act" found at page 77, Laws of Missouri, Extra Session, 1933-1934. For that reason there is no approved forms for Informations drawn under the new act. We are of the opinion, however, that an Information which substantially follows the language of the statutes would be sufficient, and we are enclosing a copy of an Information charging the sale of intoxicating liquor without a license which we believe would be sufficient.

II.

Law applicable to the sale of intoxicating liquor without a license.

Under the old dramshop law, a license was required to sell intoxicating liquor in any quantity less than three gallons. In Kelley's Criminal Law and Procedure, (4th ed.), page 985, the Note thereon has the following to say in regard to the sale of intoxicating liquor without a license:

"No person shall, directly or indirectly, sell intoxicating liquors in any quantity less than three gallons either at retail or in the original package, without taking out a license as a dramshop keeper.

"This law remains on the statute books unrepealed, and there would seem to be

no reason why prosecutions may not still be brought under it, notwithstanding the greater strictness of the prohibition law, with which it is not otherwise inconsistent.

"The indictment must charge that the defendant sold intoxicating liquor in less quantity than three gallons; it is not sufficient to allege that he sold one pint, nor that he sold a less quantity than three gallons. But it is not necessary to state the name of the person to whom the sale was made, nor the price of the liquor, nor the kind of liquor, except 'intoxicating liquor'; nor that it was made to some person or persons to the jurors unknown. But it must be charged that the sale was made without a license. If the indictment gives a specific description of the offense by setting out the price, kind and quantity of liquor, and to whom sold, the proof must correspond with the indictment, so far at least as regards the kind of liquor and person to whom sold. Thus, where the charge was for selling intoxicating liquors, to wit, whisky, brandy, rum, gin, proof that the liquor sold was alcohol was insufficient to sustain the charge. Proof of the sale of a half pint or any quantity less than three gallons will sustain the charge, although the indictment allege the sale of one pint. Nor is time material, further than to show that the offense was committed within one year previous to the finding of the indictment; therefore a sale may be alleged on one day, and the proof may be of a sale on another. But if the evidence is specific as to the date alleged, and no other proof is shown, it is error to instruct as to other dates. Every distinct sale, whether to the same person or to several persons separately, constitutes a distinct and separate offense, for which there may be distinct counts or indictments, and separate punishments assessed. In general the date on which an offense is alleged to have been committed is immaterial, but when there are two or more indictments against the same person for similar offenses, and the feature distinguishing them is the difference in the dates, the date is immaterial to prevent the defendant from being twice convicted, for the same offense. It has been suggested by

the court that, when one is to be indicted at the same term for several or successive violations of the statute, the better practice would be to present one indictment, with a separate count for each offense, and distinguish them from each other by date or name of the person to whom the liquor was sold, or in some other intelligent manner. When the indictment charges the selling in a general way, without specifying the person or price or kind of liquor involved in the sale, the state may call any witness or witnesses and prove an illegal sale, and, if the court permits witnesses to testify as to separate and distinct acts or sales, the prosecutor will not be required to elect upon which one he will rely. The prosecutor may be allowed to call witnesses and prove or attempt to prove several distinct sales or violations of the law, when the indictment contains but one count and charges but one offense. If evidence of sales on more than one day is introduced, a conviction or acquittal is a bar to further prosecution of any of such sale.

"In a prosecution for selling intoxicating liquors, there must be proof of a sale, or of facts from which a sale may be inferred; it is not sufficient to prove merely that liquor was drunk on defendant's premises. But where the defendant said to another that if he would furnish the money defendant would supply the whisky, and, upon receiving the money, he returned after a short absence with a pint of whisky and the change, held to be a sale by defendant. It must be shown that the sale was made in the county in which the indictment was found. The court will not permit the law to be circumvented or evaded by any artifice or device resorted to for that purpose, such as selling on credit, or in payment of services rendered, or selling some other article and delivering the liquor also, or adding something else with it, or selling a gallon to be taken away at different times, or by any other contrivance to evade the law; every such transaction amounts to a sale of the liquor in violation of the

law, as much as if the party should openly hand it to a customer at the counter or bar, and receive the money for it.

"It is a question for the jury, in every such case, whether the act was a sale under a mere device to evade the law, or was a lawful disposition of the liquor.

"It is not necessary that the defendant should own the liquor, or have authority from the owner to sell it. Yet, if he acts as clerk, or servant, or agent of another in selling, he is not excused, unless his principal is protected by a license or by the law, because no man can authorize another to violate the law. If the sale is made under the direction of the principal, both will be liable. But, in general, if the person sought to be charged did not give authority, or in any way favor or assent to the act, or suffer his will to concur therein, he cannot be held liable. And it was held that a dramshop keeper is not responsible for the act of his agent in selling to a drunkard against his express direction not to do so. But the statute declares that any sale, gift or other disposition of intoxicating liquors to any minor without the permission or consent required or to any habitual drunkard, by any clerk, agent or other person acting for any dramshop keeper or other person, shall be deemed and taken to be, for all the purposes of the law as the act of such dramshop keeper or other person. And the Court of Appeals has held that, under this statute, it is no defense to an indictment for selling to a minor, etc., that the sale was made by the bartender, without the knowledge or desire of the defendant, and in his absence and against his positive instructions. If a wife sells in the presence of her husband, he is guilty and she is excused; if he is absent and she sells by his direction, both are liable; if without his consent, she alone is guilty.

"The indictment must negative the provisos and exceptions in the statute creating the offense. Thus, it must be charged that the defendant had no license. But this negative

> averment need not be proved by the state. It devolves upon the defendant to show that he had a license, and if he fails to show that he has a license it will be presumed that he had none, and the averment will be taken as proved. This rule is not universal; on the contrary, some of the authorities hold that the state must produce some presumptive evidence, at least, that the defendant had no license, before he is required to prove the contrary."

Many cases are cited in support of the above statements of law and we believe that they are applicable to selling intoxicating liquor without a license under the new "Liquor Control Act" insofar as the statutes are similar.

III.

Method of proving a retailer does not possess a license to sell intoxicating liquor.

In the case of State v. Wilson, 39 Mo. App. l.c. 115, the Court said:

> "The court instructed the jury that, if the defendant had a dramshop license, it was his duty to produce or prove it. This, the defendant claims, was error.
>
> "The instruction was proper, and announced the correct rule. State v. Edwards, 60 Mo. 490; Schmidt v. State, 14 Mo. 137; Wheat v. State 6 Mo. 455. If the defendant had a license it was a matter peculiarly within his knowledge, and, if he relied on it as a defense, he should have produced it. The general rule is, that, when 'the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party.' 1 Greenleaf on Evidence (14 ed.) sec. 79."

See also State v. Geise, 39 Mo. App. l.c. 190 and cases cited.

We are therefore of the opinion that the averment in an information that the defendant had no license to sell intoxicating liquor would be taken as true unless disproved by the defendant.

IV.

Act of Agent done with the knowledge and consent of principal would be the act of the principal.

In the case of State v. Brown, 151 Mo. App. l.c. 351, the Court stated:

> "The trial court properly overruled the motion for a new trial despite this affidavit. Putting aside other considerations the 'mistake' which appears to weigh so heavily on the tardily quickened conscience of the witness involved only an immaterial fact. It was the defendant's drug store and the defendant's whiskey and the defendant was present at the sale. It cannot make the slightest difference in the criminal liability of defendant whether he handed out the liquor and took in the money or his agent, the doctor, did that service for him. Where a person acts as the clerk or agent of another in selling intoxicating liquors in violation of law, either may be indicted. (Schmidt v. State, 14 Mo. 137; Hays v. State, 13 Mo. 246; State v. Quinn, 40 Mo. App. 627; State v. Morton, 43 Mo. App. 64; State v. Heintz, 45 Mo. App. 403; State v. Dugan, 110 Mo. 138.) The judgment is affirmed."***

See also State v. Crawford, 151 Mo. App. l.c. 404.

It is therefore the opinion of this office that the sale of intoxicating liquor without a license by an agent with the consent and knowledge of the principal would make both agent and principal guilty of selling intoxicating liquor without a license.

V.

Legal Ethics.

The canons of ethics of the American Bar Association is silent in regard to a Prosecuting Attorney appealing a case for a client whom he represented before being elected Prosecuting Attorney. We know of no law or rule of ethics that would prevent you from representing your client in an appeal to Appellate Court; and we are unable to see how it would conflict with your duties as Prosecuting Attorney, especially since under Section 11333, R. S. Mo. 1929, it would be impossible for you to represent the State against your former client. However this may be, it is our opinion that since you are now Prosecuting Attorney of your county, it would be a better policy, and certainly within the spirit of the ethics of the legal profession, for you to withdraw from this case if you can do so without harm to the interests of your client.

Respectfully submitted,

JOHN W. HOFFMAN, JR.,
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JWT/JWH:afj

TAXATION AND REVENUE : Collectors - commission of county and township collectors for collecting drainage taxes and media for payment thereof.

COUNTY COLLECTORS:

5-22

May 21, 1935.

FILED
100

Hon. Charles Young,
Treasurer, Livingston County
Chillicothe, Missouri

Dear Sir:

A request for an opinion has been received from you under date of January 24, 1935, such request being in the following terms:

> "We are anticipating a large collection of drainage taxes in this county the next twelve months and would appreciate your opinion relative to rate of commission allowed collectors for collecting such taxes. Another matter we would like included in your opinion is; In the event we accept drainage bonds and coupons in payment of taxes, are we allowed to add a cash commission of 2% for collection of such taxes paid with bonds and coupons."

I.

FEES OF EX OFFICIO COLLECTORS.

The usual fee of county and township collectors for collecting drainage taxes is fixed by R. S. Missouri, 1929, Section 10880, which provides as follows:

> "The county and township collectors for collecting current taxes for drainage and levee districts shall receive one per cent. of all such taxes collected, and for the collection of delinquent taxes for such they shall receive two per cent. of all sums collected."

and by Section 10763, which provides in part as follows:

> "The said collector shall retain for his services one per centum of the amount he collects on current taxes and two per centum of the amount he collects on delinquent taxes."

In a county the size of Livingston County which is under township organization and in which the county treasurer is ex officio collector, the township collectors collect and get one per cent commission on current drainage taxes and the county treasurer ex officio collector gets nothing, whereas on delinquent drainage taxes the county treasurer ex officio collector collects the same and gets two per cent commission therefor and the township collectors get nothing. This is covered by R. S. Missouri, 1929, Section 10796, which provides in so far as relevant as follows:

> "Drainage taxes* * *shall be collected by such township collectors* * *and each township collector shall* * * receive the same compensation therefor * * *as provided for county collectors under this article,* * *. The delinquent drainage taxes shall be certified by the secretary of the board of supervisors to the county treasurer as ex officio collector of delinquent taxes, who shall collect such delinquent drainage taxes* * *. The said treasurer as ex officio collector of delinquent taxes shall* * *receive the same compensation therefor and pay over the said taxes to the treasurer of the drainage district as is provided for county collectors, under this article, * * * **

CONCLUSION.

It is therefore the opinion of this office that the township collectors are entitled to one per cent for the collection of current drainage district taxes and that the county treasurer ex officio collector is entitled to two per cent for the collection of delinquent drainage district taxes.

II.

EX OFFICIO COLLECTOR NOT REQUIRED TO ACCEPT BONDS OR COUPONS IN PAYMENT OF FEES AND COSTS.

Your second inquiry is whether or not the collector is required to accept past due bonds and coupons in payment of his costs and fees which are due him for services rendered in the collection of the delinquent taxes. This issue is presented because of the provisions of Section 9911 R. S. Mo. 1929, which provides in part as follows:

> "Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose." * * * * *

By reason of the foregoing authorization past due bonds and coupons of any drainage or levee district have been received in payment of taxes levied for the payments of bonds or coupons of the same issue of such district. It is to be noted that the bonds or coupons are to be accepted inppayment of "any tax levied". It is not provided that they shall be received in payment of all taxes, debts or dues as did the interest coupons considered in the case of Ellett vs. Virginia, 135 U. S. 696. By the terms of this statute the bonds or coupons are to be accepted in payment of "taxes". If the word "taxes" covers the collector's commission then the answer to your question is that you are required to accept the bonds and coupons in full payment of the amount of tax and commission due, if that term is not to be so construed then a contrary result is reached.

Taxes in their ordinary and accepted sense are construed to be the contribution of the citizen to his government. As stated in the case of Taylor vs. Gehner, et al. 45 S. W. (2d) 59, 60:

> "Taxes are proportional contributions imposed by the State upon individuals for the support of government and for all public needs."

The collector's commission, of course, could not under any circumstances be considered as a uniform contribution for the support of the government. That fee is to go directly to the County Collector for his extra services required in the collection of the delinquent taxes. As was said by the Supreme Court in the case of State ex rel. Shannon County vs. Hawkins, 169 Mo. 615, 620, construing the four per cent commission then allowed collectors for the collection of delinquent state and county taxes:

> "Reading the two sections together, we must arrive at the intention of the legislature, it seems to us that Section 9280 deals alone with the commissions to be retained by the collectors out of the revenue collected. Section 9309 deals with the costs <u>allowed him for his extra services</u> in addition to his commission, and these are to be paid by the delinquent and the collector is allowed only four per cent."

We must presume that the Legislature used the word "taxes" here in its ordinary and usual sense, for there is nothing to indicate a contrary intention. However, there is additional authority for our holding that this word does not include the collector's commission. That is the case of State ex rel. Crutcher vs. Koeln, 61 S. W. (2d) 750. In this case the Court considered the effect to be given Senate Bill 80, page 423, Laws of Missouri 1933, the purport of which was to remit all taxes, penalties and interests which had accrued on taxes providing that the fact amount of the tax bill was paid before certain dates. The Court in passing upon whether or not the penalties, costs and interests were a part of the tax stated, l. c. 753:

> "* * *the compensation (collector's commission) now under consideration is included in the phrase, 'penalties, interests and costs' as is also the compensation of all other persons whose services are as already stated incidental to delinquent taxes and their collection.
>
> * * * * * * * * *
>
> Also, by statutory classification the respondent's 'commission' of two per cent on delinquent taxes collected is 'penalty' as against the relator, required to be added to the tax bill and collected from the party paying such tax as a 'penalty' in the same manner as other penalties are collected and enforced.
>
> * * * * * * * * *
>
> It follows as used in the chapter on taxation in the Revised Statutes, the expressions 'commissions,' 'interest,' 'fees,' and 'costs' are included in the generic term 'penalty.' "

And on page 754:

> "Penalties are a mere adjunct, of a nature quite different from taxes as already shown, and are provided merely as an aid in enforcing the collection of the latter."

It should be recalled that Section 9911 is a part and parcel of Chapter 59 of the Revised Statutes of Missouri 1929, that chapter which deals with the subject of taxation.

Not only does the collector's commission allowed on delinquent drainage district taxes fail to meet the recognized requirements for a "tax", but it should be noted that the word is used in this section in connection with the word "levied", and the use of the phrase "taxes levied" indicates a definite intention to limit the subject matter of the law. The term "levied" as used in the above phrase has very recently been before the Supreme Court for construction. In the case of State vs. Davis, Collector, 73 S. W. (2d) 406, this case turned entirely upon the construction of this word in Section 9935 R. S. Missouri 1929. In this case the Court stated, l. c. 407:

> "The word 'levy' as applied to taxes has a well defined and understood meaning. It means the formal order, by the proper authority, declaring property at its assessed valuation, subject to taxation at a fixed rate. State ex rel. Hamilton v. Hannibal & St. J. Ry. Co., 113 Mo. 297, loc. cit. 307, 21 S. W. 14. The clause under consideration is not ambiguous, and the Legislature must have used the word 'levied' advisedly. * * *"

Most certainly the additional collector's commission allowed for collection of delinquent drainage taxes does not depend upon any formal order by the proper authority declaring property at its assessed valuation subject to taxation at a fixed rate. This additional commission is allowed by reason of the delinquent condition of the taxes. It is definitely fixed by the statutes applicable and is due regardless of the acts of any "proper authority". The ruling in the Davis case supra seems equally applicable to the instant situation.

While it may be said that these authorities are not conclusive as to the interpretation of the term as used in Section 9911, the application of such construction to the instant statute is logical in viewof the purpose sought to be obtained by that enactment. It is apparent that the Legislature was attempting to enumerate those things which were legal tender in the payment of taxes due the state and the various governmental subdivisions. By this law it was sought to lay down the rule to govern the County Collectors in the collection of the taxes due these various agencies. The legislature undoubtedly realized that the county collector was in a good position to determine for himself in what manner he would accept payment for his own services. However, when the rights of the state were involved and of the various governmental subdivisions, it was logical and necessary that some guide be provided for the collector to follow in receiving payment of taxes assessed and levied.

Requiring of County Collectors to accept past due bonds and coupons in payment of taxes can only be applied to "taxes" in its proper sense. It can only be justified on the theory that by the acceptanceof such past due bonds and coupons the districts are in truth and fact paying the bonds and coupons. Contractural relationship exists between the holders of the bonds and coupons and the district. However, that relationship does not attach to the collecting officer. He is under no obligation whatsoever to pay the bonds or coupons, and was never intended to be required to accept them in payment of his compensation for additional services rendered in the collection of delinquent levee or drainage district taxes.

CONCLUSION.

It is therefore the opinion of this office that the county collector is not required to accept past due bonds or coupons of any drainage or levee district in payment of the two per cent commission allowed him under the law for the collection of delinquent taxes of such districts.

Respectfully submitted,

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HGW:MM